

Staff Comments on the Proposed Penal Law 1964 (1 of 5)

1964

PROPOSED NEW YORK PENAL LAW

Introduced as a Study Bill
(Senate Int. 3918, Assembly Int. 5376)
at the 1964 Legislative Session

Prepared by the New York State Commission on Revision
of the
Penal Law and Criminal Code

The Study Bill of the Proposed New York Penal Law
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Suggestions, comments and criticisms concerning this
proposed New York Penal Law should be sent

to

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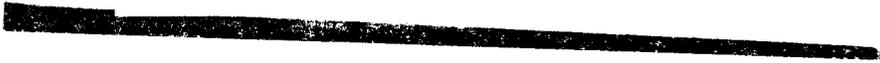


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COMMISSION FOREWORD

In 1881 New York adopted the "Penal Code" and the "Code of Criminal Procedure," the first codification of this State's criminal laws which, for the most part, were derived from the then existing Revised Statutes. In 1909 a formal rearrangement of the material in the Penal Code was enacted as the "Penal Law". Thus, neither the Penal Law nor its companion body, the Code of Criminal Procedure, has undergone overall revision in the past eighty-three years and, in a real sense, for a much longer period than that.

In 1961 the State Commission on Revision of the Penal Law and Criminal Code was created for the purpose of studying "existing provisions of the penal law, the code of criminal procedure, the correction law and other related statutes," and of preparing "for submission to the legislature, a revised, simplified body of substantive laws relating to crimes and offenses in the state, as well as a revised, simplified code of rules and procedures relating to criminal and quasi-criminal actions and proceedings" (Laws 1961, ch. 346, as amended by Laws 1962, ch. 548). In short, the Commission's two major assignments are to revise in thoroughgoing fashion both the Penal Law and the Code of Criminal Procedure.

In carrying out these assignments, it was determined to concentrate first on the Penal Law. This task was conceived by the Commission to be more than one of reorganization, clarification and minor substantive change, but as one calling for re-examination of many fundamental principles and concepts of the criminal law. Particular stress was therefore placed upon the study of such major areas as classification of offenses and the sentencing structure, the law of homicide and its punitive features, the defense of insanity, and the development of "general provisions" which would crystallize important criminal law doctrines of general application. In its endeavor to find modern and enlightened approaches in these and other fields, the Commission and its staff examined the penal codes of other jurisdictions; studied available literature; consulted with public officials and others who have specialized knowledge and experience; held numerous meetings for discussion of controversial problems; and conducted five public hearings in a number of cities in the state.

It should be noted that the recently published American Law Institute's Model Penal Code, of which Commissioner Wechsler

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was the chief reporter, has been an invaluable source of stimulation and guidance throughout the course of the Commission's work. The revisions, in recent years, of the penal codes of Illinois, Minnesota and Wisconsin have also been important aids.

While the Commission's primary efforts were aimed at the production of the new Penal Law "package" presented here, it decided to propose certain important and controversial changes separately. Accordingly, it submitted at the 1963 legislative session bills dealing with (1) new procedures for determining sentences in capital cases, and (2) the defense of insanity. The first of these was enacted into law at the 1963 session. These matters are discussed at length in the 1963 and 1964 Interim Reports of the Commission.

From the standpoint of fundamental importance and need for revision, the single most important area was considered to be that relating to classification of offenses and sentencing. As a result, Associate Counsel Preiser devoted his efforts for approximately two years to an exhaustive study of the current sentencing, parole and probation laws of New York and other jurisdictions; to consultations with specialists in these fields, both within and without the state; to periodic discussions with the Commission concerning the directions which the ultimate proposals should take; and finally, to the drafting of an entirely new structure, which is contained in the proposed Penal Law as Title B. As a matter of interest, Mr. Preiser's thorough analysis of New York's present sentencing laws is included in this volume as Appendix A.

The aforementioned areas are by no means the only ones wherein significant changes of substance were considered and ultimately proposed. Examination of this revision will disclose basic changes in the laws relating to homicide, assault, burglary, arson, larceny, forgery and many other offenses.

In considering the organization of the revised Penal Law, the Commission decided that logical and orderly arrangement of the specific offenses to be defined called for a "category" arrangement to replace the existing "alphabetical" format. It soon became apparent, however, that logical grouping was not possible because the present Penal Law contains a multitude of provisions that do not truly belong there. It is burdened with statutes which are obsolete, unconstitutional or duplicative of other provisions of law; statutes which are procedural, administrative, regulatory or civil in nature; and, above all, with many statutes of an extremely narrow or highly specialized character.

Much of this material was amenable to outright repeal. The administrative and civil sections could be and have been placed in a separate "Part" of the proposed Penal Law. However, a greater problem was presented by the mass of regulatory provisions which consist of many sections of limited scope, containing criminal sanctions which are merely incidental. Among these are such subjects as impure foods, banking, insurance, and the like, which belong with provisions dealing with the same subject matter in other specialized bodies of law. In the main, the Legislature, over the years, has adopted that policy and there are now some two thousand misdemeanors, mostly of the indicated character, defined outside the Penal Law. Within the Penal Law, however, are still to be found several hundred of these primarily regulatory sections, which dilute the traditional penal provisions and hamper effective revisional effort. The Commission determined, therefore, to provide for the relocation of these statutes in other chapters of the Consolidated Laws more appropriate than the Penal Law.

This project, undertaken by Chief Assistant Counsel McQuilgan has resulted in a second study bill accompanying the main Penal Law revision bill, which proposes the relocation of some 365 Penal Law sections (approximately 30% of the total). Combined with the outright omission of about 325 other sections, the excision and relocation process accounts for nearly 60% of the existing Penal Law statutes.

Thus stripped to its basic material, the Penal Law was considerably more amenable to the kind of revision contemplated. The staff then gathered together and examined categories of homogeneous offenses, now frequently scattered throughout the Penal Law. When offenses constituting an area of crime were thus assembled and viewed in perspective, they appeared repetitions in some instances and conflicting in others. Despite their multiplicity, uncovered territory was often disclosed. Each area was then re-drafted in a relatively few basic statutes covering all of the ground of the existing provisions, and often more.

The staff submitted its completed proposal to the Commission in September of 1963. During the next five months the Commission members met many times to discuss the proposal, section by section. Votes were taken upon every point of controversy or disagreement, and the staff continued to revise and alter its original draft to conform to the Commission's decisions. The final proposal was introduced as a study bill at the 1964 legislative session.

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The instant publication presents that proposal, augmented by explanatory notes prepared by the staff. Limitations of time, however, have not permitted review or consideration of the notes by the Commissioners themselves.

In the coming months the Commission intends to hold public hearings in various parts of the state to elicit the comments and criticism of the bench, bar, other interested groups, and the public at large. Those caring to do so are also invited to communicate their views by writing to the Commission at 155 Leonard Street, New York City.

The Commission is now giving its attention to revision of the Code of Criminal Procedure. The staff has already completed a preliminary survey of the provisions thereof and is undertaking an analysis and drafting program of the kind adopted in the proposed Penal Law. No precise time table can be set but work on the remaining portions of the Commission's assignment is being carried forward as expeditiously as possible.

Acknowledgments

The Commission is indebted to many individuals, organizations and governmental agencies for their cooperation and assistance in the preparation of the proposed revision. At the risk of omitting some who deserve mention, special note should be made of the invaluable assistance rendered by Hon. Russell G. Oswald, Chairman of the New York State Board of Parole, and other members and personnel of the Board in the study of sentencing. We are also indebted to Hon. Paul D. McGinnis, Commissioner of Correction, and the personnel of his department, and to the New York City Department of Correction for their assistance in this connection.

We appreciate the complete cooperation provided by the ex-officio members of the Commission and by the Judicial Conference, and the contributions made by their representatives at the meetings of the Commission.

The Commission gratefully acknowledges the most significant role played by its excellent staff in this endeavor. Mr. Denzer, Counsel, in addition to providing overall direction for the project, produced a major portion of the drafting. Messrs. McQuillan, Torcia and Hechtman are responsible for much of the research and drafting as well. Mr. Preiser merits special commendation as the principal architect of that portion of the revision dealing with the classification of offenses and sentencing. To Miss Chapman, our Administrative Assistant, go our thanks for her highly efficient services.

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The Commission is most grateful to the Edward Thompson Company of Brooklyn, New York, for generously undertaking to print and distribute our proposed Penal Law and commentary as a public service and without cost to the Commission.

Temporary Commission on Revision of
the Penal Law and Criminal Code.

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MEMBERSHIP OF THE COMMISSION AND ITS STAFF

The Commission originally consisted of nine members, three appointed by the Governor, three by the Temporary President of the Senate and three by the Speaker of the Assembly. Subsequent legislation increased its membership to twelve, all of whom serve without compensation. The Commission includes as ex-officio members the leaders of the Legislature. The membership is as follows:

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SENATOR ELISHA T. BARRETT, Chairman of the Senate Finance Committee
ASSEMBLYMAN FRED W. PRELLER, Chairman of the Assembly Ways and Means Committee

* Died August 25, 1963.

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TEXT OF PROPOSED LAW

AN ACT providing for the punishment of offenses, constituting chapter forty of the consolidated laws.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

CHAPTER 40 OF THE CONSOLIDATED LAWS

PENAL LAW

PART ONE

GENERAL PROVISIONS

TITLE A. TITLE, GENERAL PURPOSES, GENERAL RULES OF CONSTRUCTION, AND DEFINITIONS

ARTICLE 1: SHORT TITLE AND PURPOSE

Section

1.00 Short title.

1.05 General purposes.

§ 1.00 Short title

This chapter shall be known as the "Penal Law."

§ 1.05 General purposes

The general purposes of the provisions of this chapter are:

1. To proscribe conduct which unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests;
2. To give fair warning of the nature of the conduct proscribed and of the sentences authorized upon conviction;
3. To define the act or omission and the accompanying mental state which constitute each offense;

4. To differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties therefor; and

5. To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interests of public protection.

ARTICLE 5: GENERAL RULES OF CONSTRUCTION AND APPLICATION

Section

5.00 Penal Law not strictly construed.

5.05 Application of chapter to offenses committed before and after enactment.

5.10 Other limitations of scope, application and function of this chapter.

§ 5.00 Penal Law not strictly construed

The general rule that a penal statute is to be strictly construed does not apply to this chapter, but the provisions herein must be construed according to the fair import of their terms to promote justice and effect the objects of the law.

§ 5.05 Application of chapter to offenses committed before and after enactment

1. The provisions of this chapter shall govern the construction and punishment of any offense defined in this chapter and committed after the effective date thereof, as well as the construction and application of any defense to a prosecution for such an offense.

2. Unless expressly stated otherwise, or unless the context otherwise requires, the provisions of this chapter shall govern the construction and punishment of any offense defined outside of this chapter and committed after the effective date of this chapter as well as the construction and application of any defense to a prosecution for such offense.

3. The provisions of this chapter do not apply to or govern the construction or punishment of any offense committed prior to the effective date of this chapter, or the construction or application of any defense to a prosecution for such an offense. Such an offense must be construed and punished according to

the provisions of law existing at the time of the commission thereof in the same manner as if this chapter had not been enacted.

§ 5.10 Other limitations of scope, application and function of this chapter

1. Except as otherwise provided, the procedure governing the accusation, prosecution, conviction and punishment of offenders and offenses is not regulated by this chapter but by the code of criminal procedure.

2. This chapter does not affect any power conferred by law upon any court-martial or other military authority or officer to prosecute and punish conduct and offenders violating military codes or laws.

3. This chapter does not bar, suspend, or otherwise affect any right of liability to damages, penalty, forfeiture or other remedy authorized by law to be recovered or enforced in a civil action, regardless of whether the conduct involved in such civil action or matter constitutes an offense defined in this chapter.

ARTICLE 10: DEFINITIONS

§ 10.00 Definitions of terms of general use in this chapter

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

1. "Person" means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a government agency.

2. "Possess" means to have physical possession or otherwise to exercise dominion or control over tangible, movable property.

3. "Physical injury" means pain of a substantial nature, or any illness or impairment of physical condition.

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

5. "Deadly physical force" means physical force capable of producing death or serious physical injury.

6. "Deadly weapon" means an instrument, article or substance readily capable of inflicting death or serious physical injury, and so made, designed or constructed that such is its primary function.

7. "Dangerous weapon" means an instrument, article or substance which, regardless of its primary function, is readily capable of being used to produce death or serious physical injury.

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

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

TITLE B. OFFENSES AND SENTENCES

ARTICLE 15: DEFINITIONS AND CLASSIFICATION OF OFFENSES

Section

15.00 Classification of offenses.

15.05 Felony; definition, classification and designation.

15.10 Misdemeanor; definition, classification and designation.

15.15 Violation; definition and designation.

§ 15.00 Classification of offenses

1. Offense. The term "offense" means a breach of any law of this state or of any law, local law or ordinance of a political subdivision of this state, other than one that defines a "traffic infraction," for which a sentence to a term of imprisonment or to a fine is authorized upon conviction thereof. An offense is either a crime or a violation.

2. Crime. The term "crime" comprises felonies and misdemeanors.

3. Violation. Every offense which is not a crime is a "violation."

§ 15.05 Felony; definition, classifications and designation

1. Definition. An offense is a felony if a person convicted thereof may be sentenced to a term of imprisonment which is in excess of one year.

2. Classifications. Felonies are classified, for the purpose of sentence, into five categories as follows:

- (a) Class A felonies;
- (b) Class B felonies;
- (c) Class C felonies;
- (d) Class D felonies; and
- (e) Class E felonies.

3. Designation. The particular classification of each felony defined in this chapter is expressly designated in the section or article defining it. Any offense defined outside this chapter which is declared by law to be a felony without specification of the classification thereof or which, by virtue of an expressly specified sentence, is within the definition set forth in subdivision one of this section shall be deemed a class E felony.

§ 15.10 Misdemeanor; definition, classifications and designation

1. Definition. An offense is a misdemeanor if a person convicted thereof may be sentenced to a term of imprisonment which is in excess of fifteen days but which cannot exceed one year.

2. Classifications. Misdemeanors are classified, for the purpose of sentence, into three categories as follows:

- (a) Class A misdemeanors;
- (b) Class B misdemeanors; and
- (c) Unclassified misdemeanors.

3. Designation.

(a) Each misdemeanor defined in this chapter is either a class A or a class B misdemeanor, as expressly designated in the section or article defining it.

(b) Any offense defined outside this chapter which is declared by law to be a misdemeanor without specification of the classification thereof or the sentence authorized upon conviction shall be deemed a class A misdemeanor.

(c) Any offense defined outside this chapter which, by virtue of an expressly specified sentence, is within the definition set forth in subdivision one of this section shall be deemed an unclassified misdemeanor.

4. Exception. The provisions of this section do not apply to any offense for which the sentence is expressly specified in a provision enacted prior to the effective date of this chapter, if such offense was not a crime prior to that date.

§ 15.15 Violation; definition and designation

1. Definition. An offense is a violation if:

(a) A person convicted thereof may be sentenced to a term of imprisonment which cannot exceed fifteen days;

or

(b) The only sentence authorized is a fine.

2. Designation. Every violation defined in this chapter is expressly designated as such. Any offense defined outside this chapter which is not expressly designated a violation shall be deemed a violation if:

(a) Notwithstanding any other express designation, it is within the definition set forth in subdivision one of this section; or

(b) The sentence is expressly specified in a provision enacted prior to the effective date of this chapter and the offense was not a crime prior to that date.

ARTICLE 20: AUTHORIZED DISPOSITION OF OFFENDERS

§ 20.00 Authorized dispositions

1. In general. Every person convicted of an offense shall be sentenced in accordance with this title.

2. Class A felony. Every person convicted of a class A felony shall be sentenced to imprisonment in accordance with section 30.00 unless such person is sentenced to death in accordance with section 130.35 or section 140.25.

3. Revocable dispositions; probation and conditional discharge. When a person is convicted of an offense, the court, where authorized by article twenty-five, may sentence such person to a period of probation or to a period of conditional discharge as provided in that article. Such sentence shall be deemed a tentative one to the extent that it may be altered or revoked in accordance with article twenty-five, but for all other purposes shall be deemed to be a final judgment of conviction.

In any case where the court imposes a sentence of probation, it may also impose a fine authorized by article forty.

4. Other dispositions. When a person is convicted of an offense, other than a class A felony, and not sentenced to a period of probation or to a period of conditional discharge, or when a sentence of probation or of conditional discharge is revoked, the sentence of the court shall be as follows:

(a) A term of imprisonment authorized by article thirty; or

(b) Where authorized by article thirty-five, a reformatory period of imprisonment as provided in that article; or

(c) A fine authorized by article forty, provided, however, that when the conviction is of a class B felony or of any felony defined in article two hundred twenty-five, the sentence shall not consist solely of a fine; or

(d) Both imprisonment and a fine; or

(e) Where authorized by section 25.20, absolute discharge as provided in that section.

In any case where a person has been sentenced to a period of probation and a fine, if the part of the sentence that provides for probation is revoked, the court shall sentence such person to imprisonment.

5. Corporations. When a corporation is convicted of an offense, the sentence of the court shall be as follows:

(a) A fine authorized by section 40.10; or

(b) Where authorized by section 25.05, a period of conditional discharge as provided in that section; or

(c) Where authorized by section 25.20, absolute discharge as provided in that section.

In any case where a corporation has been sentenced to a period of conditional discharge and such sentence is revoked, the court shall sentence the corporation to pay a fine.

6. Civil penalties. This section does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty and any appropriate order exercising such authority may be included as part of the judgment of conviction.

**ARTICLE 25: SENTENCES OF PROBATION,
CONDITIONAL DISCHARGE AND
ABSOLUTE DISCHARGE**

Section

- 25.00 Sentence of probation.
25.05 Sentence of conditional discharge.
25.10 Conditions of probation and of conditional discharge.
25.15 Calculation of periods of probation and of conditional discharge.
25.20 Sentence of absolute discharge.

§ 25.00 Sentence of probation

1. Criteria. The court may sentence a person to a period of probation upon conviction of any crime other than a class A felony if the court, having regard to the nature and circumstances of the crime and to the history, character and condition of the defendant, is of the opinion that:

(a) Institutional confinement of the defendant is not necessary for the protection of the public;

(b) The defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through probation supervision; and

(c) Such disposition is not inconsistent with the ends of justice.

Provided, however, that the court shall not impose a sentence of probation in any case where it sentences a defendant for more than one crime and imposes a sentence of imprisonment for any one of the crimes, or where the defendant is subject to any undischarged indeterminate or reformatory sentence of imprisonment imposed at a previous time by a court of this state.

2. Sentence. When a person is sentenced to a period of probation the court shall impose the period authorized by subdivision three of this section and shall specify, in accordance with section 25.10, the conditions to be complied with. The court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of probation.

3. Periods of probation. Unless terminated sooner in accordance with the code of criminal procedure, the period of probation shall be as follows:

(a) For a felony, the period of probation shall be five years;

(b) For a class A misdemeanor, the period of probation shall be three years;

(c) For a class B misdemeanor, the period of probation shall be one year; and

(d) For an unclassified misdemeanor, the period of probation shall be three years if the authorized sentence of imprisonment is in excess of three months, otherwise the period of probation shall be one year.

§ 25.05 Sentence of conditional discharge

1. Criteria. The court may impose a sentence of conditional discharge for an offense if the court, having regard to the nature and circumstances of the offense and to the history, character and condition of the defendant, is of the opinion that neither the public interest nor the ends of justice would be served by a sentence of imprisonment or a fine and that probation supervision is not appropriate; provided, however, that the court shall not impose a sentence of conditional discharge for a class A or class B felony or for any felony defined in article two hundred twenty-five.

When a sentence of conditional discharge is imposed for a felony, the court shall set forth in the record the reasons for its action.

2. Sentence. When the court imposes a sentence of conditional discharge the defendant shall be released with respect to the conviction for which the sentence is imposed without imprisonment, fine or probation supervision but subject, during the period of conditional discharge, to such conditions as the court may determine. The court shall impose the period of conditional discharge authorized by subdivision three of this section and shall specify, in accordance with section 25.10, the conditions to be complied with. The court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of conditional discharge.

3. Periods of conditional discharge. Unless terminated sooner in accordance with the code of criminal procedure, the periods of conditional discharge shall be as follows:

- (a) Three years in the case of a felony; and
- (b) One year in the case of a misdemeanor or a violation.

§ 25.10 Conditions of probation and of conditional discharge

1. In general. The conditions of probation and of conditional discharge shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.

2. Conditions relating to conduct and rehabilitation. When imposing a sentence of probation or of conditional discharge, the court may, as a condition of the sentence, require that the defendant:

- (a) Avoid injurious or vicious habits;
- (b) Refrain from frequenting unlawful or disreputable places or consorting with disreputable persons;
- (c) Work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment;
- (d) Undergo available medical or psychiatric treatment and remain in a specified institution, when required for that purpose;
- (e) Support his dependents and meet other family responsibilities;
- (f) Make restitution of the fruits of his offense or make reparation, in an amount he can afford to pay, for the loss or damage caused thereby;
- (g) If a minor, (i) reside with his parents or in a suitable foster home or hostel as referred to in section six-f of the correction law, (ii) attend school, (iii) spend such part of the period of the sentence as the court may direct, but not exceeding two years, in a facility made available by the division for youth pursuant to subdivision two of section five hundred two of the executive law, provided that admission to such facility may be made only with the prior consent of the division for youth, (iv) attend a non-residential program for such hours and pursuant to a schedule prescribed by the court as suitable for a program of rehabilita-

tion of youth, (v) contribute to his own support in any home, foster home or hostel;

(h) Post a bond or other security for the performance of any or all conditions imposed;

(i) Satisfy any other conditions reasonably related to his rehabilitation.

3. Conditions relating to supervision. When imposing a sentence of probation the court, in addition to any conditions imposed pursuant to subdivision two of this section, shall require as conditions of the sentence, that the defendant:

(a) Report to a probation officer as directed by the court or the probation officer and permit the probation officer to visit him at his place of abode or elsewhere;

(b) Remain within the jurisdiction of the court unless granted permission to leave by the court or the probation officer; and

(c) Answer all reasonable inquiries by the probation officer and promptly notify the probation officer of any change in address or employment.

§ 25.15 Calculation of periods of probation and of conditional discharge

1. A period of probation or of conditional discharge commences on the day it is imposed and multiple periods, whether imposed at the same or at different times, shall run concurrently.

2. When a person has violated the conditions of his probation or conditional discharge and is declared delinquent by the court, the declaration of delinquency shall interrupt the period of the sentence as of the date of the delinquency and such interruption shall continue until a final determination as to the delinquency has been made by the court pursuant to a hearing held in accordance with the provisions of the code of criminal procedure.

3. In any case where a person who is under a sentence of probation or of conditional discharge is also under an indeterminate or a reformatory sentence of imprisonment imposed for some other offense by a court of this state, the service of the sentence of imprisonment shall satisfy the sentence of probation or of conditional discharge unless the sentence of probation or of conditional discharge is revoked prior to the next to occur of parole or conditional release under, or satisfaction of, the sentence of imprisonment.

§ 25.20 Sentence of absolute discharge

1. **Criteria.** The court may impose a sentence of absolute discharge in any case where it is authorized to impose a sentence of conditional discharge under section 25.05 if the court is of the opinion that no proper purpose would be served by imposing any condition upon the defendant's release.

When a sentence of absolute discharge is imposed for a felony, the court shall set forth in the record the reasons for its action.

2. **Sentence.** When the court imposes a sentence of absolute discharge, the defendant shall be released with respect to the conviction for which the sentence is imposed without imprisonment, fine or probation supervision. A sentence of absolute discharge is for all purposes a final judgment of conviction.

ARTICLE 30: SENTENCES OF IMPRISONMENT**Section**

- 30.00 Indeterminate sentence of imprisonment for felony.
- 30.05 Alternative definite sentence for class D or class E felony.
- 30.10 Sentence of imprisonment for persistent felony offender.
- 30.15 Sentences of imprisonment for misdemeanors and violation.
- 30.20 Place of imprisonment.
- 30.25 Concurrent and consecutive terms of imprisonment.
- 30.30 Calculation of terms of imprisonment.
- 30.35 Merger of certain definite and indeterminate sentences.
- 30.40 Release on parole; conditional release.

§ 30.00 Indeterminate sentence of imprisonment for felony

1. **Indeterminate sentence.** A sentence of imprisonment for a felony shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.

2. **Maximum term of sentence.** The maximum term of an indeterminate sentence shall be at least three years and the term shall be fixed as follows:

- (a) For a class A felony, the term shall be life imprisonment;
- (b) For a class B felony, the term shall be fixed by the court, and shall not exceed twenty-five years;

(c) For a class C felony, the term shall be fixed by the court, and shall not exceed fifteen years;

(d) For a class D felony, the term shall be fixed by the court, and shall not exceed seven years; and

(e) For a class E felony, the term shall be fixed by the court, and shall not exceed four years.

3. Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence shall be at least one year and shall be fixed as follows:

(a) In the case of a class A felony, the minimum period shall be fixed by the court and specified in the sentence. Such minimum period shall not be less than fifteen years nor more than twenty-five years;

(b) Where the sentence is for a class B, class C or class D felony and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that the ends of justice and best interests of the public require that the court fix a minimum period of imprisonment, the court may fix the minimum period. In such event, the minimum period shall be specified in the sentence and shall not be more than one-third of the maximum term imposed. When the minimum period of imprisonment is fixed pursuant to this paragraph, the court shall set forth in the record the reasons for its action; and

(c) In any other case, the minimum period of imprisonment shall be fixed by the state board of parole in accordance with the provisions of the correction law.

§ 30.05 Alternative definite sentence for class D or E felony

Notwithstanding the provisions of section 30.00 of this article, when a person is sentenced for a class D or class E felony and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less.

§ 30.10 Sentence of imprisonment for persistent felony offender

1. Definition of persistent felony offender.

(a) A persistent felony offender is a person who stands convicted of a felony after having previously been convicted of two or more felonies, as provided in paragraphs (b) and (c) of this subdivision.

(b) A previous felony conviction within the meaning of paragraph (a) of this subdivision is a conviction of a felony in this state, or of a crime in any other jurisdiction, provided:

(i) that a sentence to a term of imprisonment in excess of one year, or a sentence to death, was imposed therefor; and

(ii) that the defendant was imprisoned under sentence for such conviction prior to the commission of the present felony; and

(iii) that the defendant was not pardoned on the ground of innocence.

(c) For the purpose of determining whether a person has two or more previous felony convictions, two or more convictions of crimes that were committed prior to the time the defendant was imprisoned under sentence for any of such convictions shall be deemed to be only one conviction.

2. Authorized sentence. When the court has found, pursuant to the provisions of the code of criminal procedure, that a person is a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized by section 30.00 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by that section for a class A felony. In such event the reasons for the court's opinion shall be set forth in the record.

§ 30.15 Sentences of imprisonment for misdemeanors and violation

1. Class A misdemeanor. A sentence of imprisonment for a class A misdemeanor shall be a definite sentence. When such a

sentence is imposed the term shall be fixed by the court, and shall not exceed one year.

2. Class B misdemeanor. A sentence of imprisonment for a class B misdemeanor shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed three months.

3. Unclassified misdemeanor. A sentence of imprisonment for an unclassified misdemeanor shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall be in accordance with the sentence specified in the law or ordinance that defines the crime.

4. Violation. A sentence of imprisonment for a violation shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed fifteen days.

In the case of a violation defined outside this chapter, if the sentence is expressly specified in the law or ordinance that defines the offense and consists solely of a fine, no term of imprisonment shall be imposed.

§ 30.20 Place of imprisonment

1. Indeterminate sentence. When an indeterminate sentence of imprisonment is imposed, the court shall commit the defendant to the custody of the state department of correction for the term of his sentence and until released in accordance with the law.

2. Definite sentence. When a definite sentence of imprisonment is imposed, the court shall commit the defendant to the county or regional correctional institution for the term of his sentence and until released in accordance with the law.

§ 30.25 Concurrent and consecutive terms of imprisonment

1. Except as provided in subdivision two of this section, when multiple sentences of imprisonment are imposed on a person at the same time, or when a person who is subject to any undischarged term of imprisonment imposed at a previous time by a court of this state is sentenced to an additional term of imprisonment, the sentence or sentences imposed by the court shall run either concurrently or consecutively with respect to each other and the undischarged term or terms in such manner as the court directs at the time of sentence. If the court does

not specify the manner in which a sentence imposed by it is to run, the sentence shall run as follows:

(a) An indeterminate sentence shall run concurrently with all other terms; and

(b) A definite sentence shall run concurrently with any sentence imposed at the same time and shall be consecutive to any other term.

2. When more than one sentence of imprisonment is imposed on a person for offenses which are such that, had they been prosecuted separately, a prosecution for one would have barred a subsequent prosecution for the other pursuant to section 75.10, the terms of those sentences must run concurrently.

3. Where consecutive definite sentences of imprisonment are not prohibited by subdivision two of this section and are imposed on a person for offenses which were committed as parts of a single incident or transaction, the aggregate of the terms of such sentences shall not exceed one year.

§ 30.30 Calculation of terms of imprisonment

1. Indeterminate sentences. An indeterminate sentence of imprisonment commences when the prisoner is received in an institution under the jurisdiction of the state department of correction. Where a person is under more than one indeterminate sentence, the sentences shall be calculated as follows:

(a) If the sentences run concurrently, the time served under imprisonment on any of the sentences shall be credited against the minimum periods of all the concurrent sentences, and the maximum terms merge in and are satisfied by discharge of the term which has the longest unexpired time to run;

(b) If the sentences run consecutively, the minimum periods of imprisonment merge in and are satisfied by service of the period which has the longest unexpired time to run, and, except as provided in paragraph (c) of this subdivision, the maximum terms are added to arrive at an aggregate maximum term equal to the sum of all the maximum terms;

(c) The aggregate maximum term of consecutive sentences imposed for two or more crimes committed prior to the time the person was imprisoned under any of such sentences shall, if it exceeds twenty years, be deemed to be twenty years, unless one of the sentences was imposed for

a class B felony, in which case the aggregate maximum term shall, if it exceeds thirty years, be deemed to be thirty years.

2. Definite sentences. A definite sentence of imprisonment commences when the prisoner is received in the institution named in the commitment. Where a person is under more than one definite sentence, the sentences shall be calculated as follows:

(a) If the sentences run concurrently and are to be served in a single institution, the terms merge in and are satisfied by discharge of the term which has the longest unexpired time to run;

(b) If the sentences run consecutively and are to be served in a single institution, the terms are added to arrive at an aggregate term and are satisfied by discharge of such aggregate term, or by service of two years imprisonment plus any term imposed for an offense committed while the person is under the sentences, whichever is less;

(c) If the sentences run concurrently and are to be served in more than one institution, the term of each such sentence shall be credited with the portion of any concurrent term served after that sentence was imposed;

(d) If the sentences run consecutively and are to be served in more than one institution, the aggregate of the time served in all of the institutions shall not exceed two years plus any term imposed for an offense committed while the person is under the sentences.

3. Jail time. The term of a definite sentence or the maximum term of an indeterminate sentence imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence. In the case of an indeterminate sentence, if the minimum period of imprisonment has been fixed by the court, the credit shall also be applied against such portion of the minimum period as exceeds one year. The credit herein provided shall be calculated from the date custody under the charge commenced to the date the sentence commences and shall not include any time that is credited against the term or maximum term of any previously imposed sentence to which the person is subject. Where the charge or charges culminate in more than one sentence, the credit shall be applied as follows:

(a) If the sentences run concurrently, the credit shall be applied against each such sentence;

(b) If the sentences run consecutively, the credit shall be applied against the aggregate term or aggregate maximum term of the sentences and against each minimum period of imprisonment fixed by the court.

In any case where a person has been in custody due to a charge that culminated in a dismissal or an acquittal, the amount of time that would have been credited against a sentence for such charge, had one been imposed, shall be credited against any sentence that is based on a charge for which a warrant or commitment was lodged during the pendency of such custody.

4. Good behavior time. Time allowances earned for good behavior, pursuant to the provisions of the correction law, shall be computed and applied as follows:

(a) In the case of a person serving an indeterminate sentence, the total of such allowances shall not exceed one-third of his maximum or aggregate maximum term and the allowances shall be applied as provided in subdivision one (b) of section 30.40;

(b) In the case of a person serving a definite sentence, the total of such allowances shall not exceed one-sixth of his term or aggregate term and the allowances shall be applied as a credit against such term.

5. Time served under vacated sentence. When a sentence of imprisonment that has been imposed on a person is vacated and a new sentence is imposed on such person for the same offense, or for an offense based upon the same act, the new sentence shall be calculated as if it had commenced at the time the vacated sentence commenced, and all time credited against the vacated sentence shall be credited against the new sentence.

6. Escape. When a person who is serving a sentence of imprisonment escapes from custody, the escape shall interrupt the sentence and such interruption shall continue until the return of the person to the institution in which the sentence was being served or, if the sentence was being served in an institution under the jurisdiction of the state department of correction, to an institution under the jurisdiction of that department. Any time spent by such person in custody from the date of escape to the date the sentence resumes shall be credited against the term or maximum term of the interrupted sentence, provided:

(a) That such custody was due to an arrest or surrender based upon the escape; or

(b) That such custody arose from an arrest on another charge which culminated in a dismissal or an acquittal, and the person was denied admission to bail pending disposition of such charge due to a warrant lodged against him because of the escape.

§ 30.35 Merger of certain definite and indeterminate sentences

The service of an indeterminate sentence of imprisonment shall satisfy any definite sentence of imprisonment imposed on a person for an offense committed prior to the time the indeterminate sentence was imposed. A person who is serving a definite sentence at the time an indeterminate sentence is imposed shall be delivered to the custody of the state department of correction to commence service of the indeterminate sentence immediately.

§ 30.40 Release on parole; conditional release.

1. Indeterminate sentence.

(a) A person who is serving one or more than one indeterminate sentence of imprisonment may be paroled from the institution in which he is confined at any time after the expiration of the minimum period or periods of imprisonment that have been fixed. Such person shall continue service of his sentence or sentences while on parole, in accordance with and subject to the provisions of the correction law.

(b) A person who is serving one or more than one indeterminate sentence of imprisonment and who is not on parole shall, if he so requests, be conditionally released from the institution in which he is confined when the total good behavior time allowed to him, pursuant to the provisions of the correction law, is equal to the unserved portion of his maximum or aggregate maximum term. Such release shall interrupt service of the sentence or sentences. The conditional release shall be subject to such conditions as may be imposed by the state board of parole, and every person so released shall be under the supervision of the state board of parole, in accordance with the provisions of the correction law for a period of three years from the date of release, or a period equal to the unserved portion of the maximum or aggregate maximum term, whichever is longer. Compliance with the conditions of release during the aforesaid period shall satisfy the remaining portion of the maximum or aggregate maximum term.

2. Definite sentence. A person who is serving one or more than one definite sentence of imprisonment with a term or aggregate term of sixty days or more may be conditionally released from the institution in which he is confined at any time after service of thirty days of that term. Such release shall interrupt service of the sentence or sentences. The conditional release shall be subject to such conditions as may be imposed by the institution's conditional release board, and every person so released shall be under the supervision of the institution's conditional release board, in accordance with the provisions of the correction law for a period of two years from the date of release. Compliance with the conditions of release during the two year period shall satisfy the remaining portion of the term or aggregate term.

3. Delinquency.

(a) When a person has violated the terms of his parole and the state board of parole has declared such person to be delinquent, the declaration of delinquency shall interrupt the person's sentence as of the date of the delinquency and such interruption shall continue until the return of the person to an institution under the jurisdiction of the state department of correction.

(b) When a person has violated the terms of his conditional release and has been declared delinquent by the board having supervision over him, the declaration of delinquency shall interrupt the period of supervision as of the date of the delinquency and such interruption shall continue until the return of the person to the institution from which he was released or, if he was released from an institution under the jurisdiction of the state department of correction, to an institution under the jurisdiction of that department. Upon such return, the person shall resume service of his sentence.

(c) Any time spent by a person in custody from the time of delinquency to the time service of the sentence resumes shall be credited against the term or maximum term of the interrupted sentence, provided:

(i) that such custody was due to an arrest or surrender based upon the delinquency; or

(ii) that such custody arose from an arrest on another charge, which culminated in a dismissal or an acquittal, and the person was denied admission to bail pending disposition of such charge due to a warrant lodged against him because of such delinquency.

ARTICLE 35: REFORMATORY SENTENCE OF IMPRISONMENT FOR YOUNG ADULTS

Section

- 35.00 Reformatory sentence of imprisonment for young adults.
35.05 Place of imprisonment under reformatory sentence.
35.10 Calculation of reformatory sentence.
35.15 Parole under reformatory sentence.

§ 35.00 Reformatory sentence of imprisonment for young adults

1. Young adult. For sentencing purposes, a young adult is a person who is more than sixteen and less than twenty-one years old at the time the court imposes sentence upon him

2. Reformatory sentence. When the court sentences a young adult for a crime, the court may, in lieu of any other sentence of imprisonment authorized by this title, impose a reformatory sentence of imprisonment. This shall be a sentence to imprisonment for a period of unspecified duration which shall commence and terminate as provided in section 35.10 and the court shall not fix the minimum or maximum length of the period.

3. Limitations. The court shall not impose a reformatory sentence in the following cases:

- (a) Where the conviction is of a class A felony; or
- (b) Where the court sentences the young adult for more than one crime and imposes a term of imprisonment for any one of the crimes; or
- (c) Where the young adult is subject to any undischarged indeterminate sentence of imprisonment imposed at a previous time by a court of this state; or
- (d) Where the conviction is of a crime that was committed by the young adult during incarceration in or after parole or release from an institution under the jurisdiction of the state department of correction.

§ 35.05 Place of imprisonment under reformatory sentence

When a reformatory sentence of imprisonment is imposed, the court shall commit the young adult to the custody of the state department of correction for a reformatory period and until released in accordance with the law.

§ 35.10 Calculation of reformatory sentence

1. Commencement and termination. A reformatory period commences when the young adult is received in an institution under the jurisdiction of the state department of correction and terminates upon the first to occur of (a) discharge of the person by the state board of parole, or (b) service by the person of four years from the date the period commenced less any amount of time credited against the sentence pursuant to the provisions of subdivisions three, four and five of this section.

2. Multiple sentences.

(a) When more than one reformatory sentence of imprisonment is imposed on a young adult at the same time, or when a young adult who is subject to a reformatory sentence imposed at a previous time receives an additional reformatory sentence, the periods of the sentences shall run concurrently, and all of the sentences shall be treated as if they had commenced at the time of the first to commence and terminate at the time of the first to terminate.

(b) The service of a reformatory sentence of imprisonment by a young adult shall satisfy any definite sentence of imprisonment imposed on such person for an offense committed prior to the time the reformatory sentence was imposed. A young adult who is serving a definite sentence at the time a reformatory sentence is imposed shall be delivered to the custody of the state department of correction to commence service of the reformatory sentence immediately.

(c) When a person who is subject to a reformatory sentence of imprisonment imposed at a previous time is convicted of an additional crime in a court of this state and is sentenced therefor to a term of imprisonment in excess of one year, the reformatory sentence shall be affected in the following manner:

(i) if the reformatory sentence was imposed for a misdemeanor, such sentence shall be satisfied by service of the new sentence of imprisonment;

(ii) if the reformatory sentence was imposed for a felony, the state board of parole shall fix a termination date for the reformatory sentence, and the amount of time that remains to be served to satisfy such termination date shall be added to the maximum term of the new sentence to arrive at an aggregate maximum term.

3. Jail time. The period of a reformatory sentence imposed on a young adult shall be credited with and diminished by the amount of time spent in custody prior to commencement of the sentence, which shall be determined and calculated in accordance with the provisions of subdivision three of section 30.30.

4. Time served under vacated sentence. When a sentence of imprisonment that has been imposed on a young adult is vacated and a reformatory sentence is imposed on that person for the same offense, or for an offense that is based upon the same act, all time credited against the vacated sentence shall be credited against the period of such reformatory sentence.

5. Escape. When a young adult who is serving a reformatory sentence of imprisonment escapes from custody, the period of such sentence shall be affected in the same manner as the term of a sentence of imprisonment, in accordance with the provisions of subdivision six of section 30.30.

§ 35.15 Parole under reformatory sentence

1. Parole. A young adult who is serving a reformatory sentence may be paroled from the institution in which he is confined at any time. Such person shall continue service of the sentence while on parole, in accordance with and subject to the provisions of the correction law.

2. Delinquency. When a young adult who is serving a reformatory sentence has violated the terms of his parole and the state board of parole has declared such person to be delinquent, the period of such sentence shall be affected in the same manner as the term of a sentence of imprisonment, in accordance with the provisions of subdivision three of section 30.40.

ARTICLE 40: FINES

Section

40.00 Fine for felony.

40.05 Fines for misdemeanors and violation.

40.10 Fines for corporations.

§ 40.00 Fine for felony

1. Criterion for fine. A person who has been convicted of a felony may be sentenced to pay a fine if he has gained money or property through the commission of the crime.

2. Amount of fine. A sentence to pay a fine for a felony shall be a sentence to pay an amount, fixed by the court, not exceeding double the amount of money or double the value of the property gained by the defendant through the commission of the crime. When such a sentence is imposed the court shall make a finding, based upon the record, as to the amount the defendant gained from the crime. If the record does not contain sufficient evidence to support such a finding, the court may conduct a hearing upon the issue.

3. Exception. The provisions of this section shall not apply to a corporation.

§ 40.05 Fines for misdemeanors and violation

1. Class A misdemeanor. A sentence to pay a fine for a class A misdemeanor shall be a sentence to pay an amount, fixed by the court, not exceeding one thousand dollars.

2. Class B misdemeanor. A sentence to pay a fine for a class B misdemeanor shall be a sentence to pay an amount, fixed by the court, not exceeding five hundred dollars.

3. Unclassified misdemeanor. A sentence to pay a fine for an unclassified misdemeanor shall be a sentence to pay an amount, fixed by the court, in accordance with the provisions of the law or ordinance that defines the crime.

4. Violation. A sentence to pay a fine for a violation shall be a sentence to pay an amount, fixed by the court, not exceeding two hundred and fifty dollars.

In the case of a violation defined outside this chapter, if the amount of the fine is expressly specified in the law or ordinance that defines the offense, the amount of the fine shall be fixed in accordance with that law or ordinance.

5. Exception. The provisions of this section shall not apply to a corporation.

§ 40.10 Fines for corporations

1. In general. A sentence to pay a fine, when imposed on a corporation for an offense defined in this chapter or for an offense defined outside this chapter for which no special corporate fine is specified, shall be a sentence to pay an amount, fixed by the court, not exceeding:

(a) Ten thousand dollars, when the conviction is of a felony;

(b) Five thousand dollars, when the conviction is of a class A misdemeanor or of an unclassified misdemeanor for which a term of imprisonment in excess of three months is authorized;

(c) Two thousand dollars, when the conviction is of a class B misdemeanor or of an unclassified misdemeanor for which the authorized term of imprisonment is not in excess of three months;

(d) Five hundred dollars, when the conviction is of a violation;

(e) Any higher amount equal to double the amount of money or double the value of the property gained by the defendant through the commission of the offense.

2. Exception. In the case of an offense defined outside this chapter, if a special fine for a corporation is expressly specified in the law or ordinance that defines the offense, the fine fixed by the court shall be as follows:

(a) An amount within the limits specified in the law or ordinance that defines the offense; or

(b) Any higher amount equal to double the amount of money or double the value of the property gained by the corporation through the commission of the offense.

3. Determination of amount or value. When the court imposes the fine authorized by paragraph (e) of subdivision one or paragraph (b) of subdivision two, the court shall make a finding, based upon the record, as to the amount the corporation gained through the commission of the offense. If the record does not contain sufficient evidence to support such a finding, the court may conduct a hearing upon the issue.

TITLE C. PRINCIPLES OF CRIMINAL LIABILITY

ARTICLE 45: CULPABILITY

Section

- 45.00 Definitions of terms.
45.05 Construction of statutes with respect to culpability requirements.
45.10 Effect of intoxication upon culpability.
45.15 Effect of ignorance or mistake upon culpability.

§ 45.00 Definitions of terms

The following terms and definitions are applicable in the determination of culpability requirements for offenses defined in this chapter:

1. "Act" means a bodily movement.
2. "Omission" means a failure to perform an act as to which a duty of performance is imposed by law.
3. "Conduct" means an act or omission and its accompanying state of mind.
4. "Intentionally".

A person acts intentionally with respect to a result or to conduct described by a statute defining an offense, when his conscious object is to cause that result or to engage in that conduct.

5. "Knowingly".

A person acts knowingly:

(a) with respect to a result described by a statute defining an offense, when he is aware that it is practically certain that his conduct will cause such result; or

(b) with respect to conduct described by a statute defining an offense, when he is aware that his conduct is of such nature; or

(c) with respect to a circumstance described by a statute defining an offense, when he is aware that such circumstance exists.

6. "Recklessly".

A person acts recklessly when he consciously disregards a substantial and unjustifiable risk (a) that the result described by a statute defining an offense will occur, or (b) that a circumstance described by a statute defining an offense exists, and when the disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

7. "Criminal Negligence".

A person acts with criminal negligence when he fails to be aware of a substantial and unjustifiable risk (a) that the result described by a statute defining an offense will occur, or (b) that a circumstance described by a statute defining an offense exists, and the failure to be aware of such risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation.

§ 45.05 Construction of statutes with respect to culpability requirements

1. A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or a voluntary omission. A voluntary act is a bodily movement performed consciously as a result of effort or determination. The possession of property is a voluntary act if the actor was aware of his physical possession of such property or was aware of his control thereof for a sufficient period to have been able to terminate his possession. A voluntary omission is a failure to perform an act as to which a duty of performance is imposed by law and which the actor is physically capable of performing.

2. If no culpable mental state is required for the commission of an offense, the offense is one of absolute liability.

3. If a culpable mental state is required for the commission of an offense, a person is not guilty of such an offense unless he engages in conduct intentionally, knowingly, recklessly or with criminal negligence, as the statute defining the offense may require, with respect to each element of the offense. Although a statute defining an offense does not expressly mention any such culpable mental state, the offense nevertheless is not one of absolute liability if the proscribed conduct necessarily involves any such culpable mental state.

4. When a statute defining an offense prescribes as an element thereof a specified culpable mental state, such mental state is

deemed to apply to every element of the offense unless an intent to limit its application clearly appears.

§ 45.10 Effect of intoxication upon culpability

1. Except as provided in subdivision two of this section, voluntary intoxication is a defense to a criminal charge for an offense if it negatives the culpable mental state required for the commission of the offense.

2. When recklessness is an element of an offense, if the actor, as a result of voluntary intoxication, is unaware of a risk, such unawareness does not negative the mental state of recklessness if he would have been aware of such risk had he not been intoxicated.

§ 45.15 Effect of ignorance or mistake upon culpability

1. A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief of fact, unless:

(a) It negatives the existence of a particular mental state essential to commission of the offense; or

(b) The statute defining the offense or a statute related thereto expressly provides that such factual mistake or the mental state resulting therefrom constitutes a defense or exemption; or

(c) Such factual mistake or the mental state resulting therefrom is of a kind that supports a defense of justification as defined in article sixty-five of this chapter.

2. A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief that it does not, as a matter of law, constitute an offense, unless such mistaken belief is founded upon an official statement of the law contained in (a) a statute or other enactment, or (b) an administrative order or grant of permission, or (c) a judicial decision of a state or federal court, or (d) an interpretation of the statute or law relating to the offense, officially made or issued by a public servant, agency or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute or law.

**ARTICLE 50: PARTIES TO OFFENSES AND LIABILITY
THROUGH ACCESSORIAL CONDUCT****Section**

- 50.00 Criminal liability for conduct of another.
- 50.05 Factors not constituting exemptions or defenses.
- 50.10 Factors constituting exemptions or defenses.
- 50.15 Convictions for different degrees of offense.
- 50.20 Criminal liability of corporations.
- 50.25 Criminal liability and punishment of individual for corporate conduct.

§ 50.00 Criminal liability for conduct of another

When one person engages in conduct which constitutes an offense, or in conduct which would constitute an offense if performed by a criminally responsible person acting with the requisite culpability, another person is guilty of such offense when, acting with the mental culpability required for its commission, he solicits, counsels, encourages, or intentionally aids or causes such person to engage in such conduct.

§ 50.05 Factors not constituting exemptions or defenses

A person criminally liable for the conduct of another person pursuant to section 50.00 is no less liable because:

1. Such other person has not been prosecuted for or convicted of any offense based upon the conduct in question, or has previously been acquitted thereof, or has legal immunity from prosecution therefor; or
2. Such other person is not guilty of the offense in question owing to lack of mental culpability or to lack of criminal responsibility; or
3. The offense in question, as defined, can be committed only by a particular class or classes of persons, and the actor, not belonging to such class or classes, is for that reason legally incapable of committing the offense in an individual capacity.

§ 50.10 Factors constituting exemptions or defenses

1. Notwithstanding the provisions of sections 50.00 and 50.05, a person is not criminally liable for conduct of another person constituting an offense when his own conduct, though causing or aiding the commission of such offense, is of a kind

that is necessarily incidental thereto. If such conduct constitutes a related but separate offense upon the part of the actor, he is liable for that offense only and not for the conduct or offense committed by the other person.

2. In any prosecution of a defendant charged with criminal liability for the conduct or offense of another person, based upon the provisions of section 50.00, it is a defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, attempted to prevent the commission of such conduct or offense by persuading such other person to refrain from engaging therein, or in any other manner made a substantial effort to prevent such conduct. A renunciation of criminal purpose is not voluntary and complete if it results from (a) a belief that circumstances exist which increase the probability of detection or apprehension of the defendant or of such other person, or which render more difficult the accomplishment of the criminal purpose; or (b) a decision to postpone the criminal conduct until another time.

§ 50.15 Convictions for different degrees of offense

When pursuant to section 50.00, two or more persons are criminally liable for an offense which is divided into degrees differentiated on the basis of culpability factors, such persons may, depending upon their individual culpability, be convicted of different degrees of such offense.

§ 50.20 Criminal liability of corporations

1. As used in this section:

(a) "Agent" means any director, officer or employee of a corporation, or any other person who is authorized to act in behalf of the corporation.

(b) "High managerial agent" means an officer of a corporation or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees.

2. A corporation may be guilty of an offense when:

(a) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(b) The conduct constituting the offense is authorized, requested, demanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation; or

(c) The conduct constituting the offense is committed by an agent of the corporation while acting within the scope of his authority and in behalf of the corporation and (i) the offense is a misdemeanor or a violation; or (ii) the offense is one defined by a statute which clearly indicates a legislative intent to impose such criminal liability on a corporation.

§ 50.25 Criminal liability and punishment of individual for corporate conduct

1. A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of a corporation to the same extent as if such conduct were performed in his own name or behalf.

2. A person convicted of an offense so committed is subject to the punishment for such offense applicable to individual offenders rather than to the punishment applicable to corporate offenders.

TITLE D. EXEMPTIONS FROM CRIMINAL LIABILITY

ARTICLE 55: AFFIRMATIVE DEFENSE

§ 55.00 Affirmative defense; definition and application

1. An affirmative defense is one which must be raised by the defendant either (a) by the presentation of evidence during trial, unless the people's evidence itself raises the issue involved, or (b) by motion or notice before or during trial where such is the appropriate method of raising the particular issue.

2. When an affirmative defense is raised by evidence presented during trial, whether by defense evidence or by the people's evidence, the people must sustain the burden of proving the defendant guilty beyond a reasonable doubt with respect to

the issue so raised together with all the other elements of the offense.

3. Every factor or circumstance specified in this title as exempting a person from criminal liability constitutes an affirmative defense.

ARTICLE 60: LACK OF CRIMINAL RESPONSIBILITY

Section

60.00 Infancy.

60.05 Mental disease or defect.

§ 60.00 Infancy

1. Except as provided in subdivision two of this section, a person less than sixteen years old is not criminally responsible for, and may not be convicted of, any offense.

2. A person less than sixteen years old but more than fifteen years old is criminally responsible for the crimes of murder and kidnapping and he may be convicted thereof unless, after indictment for such a crime, the action is removed to the family court pursuant to sections three hundred twelve-b, three hundred twelve-c, three hundred twelve-f and three hundred twelve-h of the code of criminal procedure and section seven hundred fifteen of the family court act.

§ 60.05 Mental disease or defect

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

(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.

ARTICLE 65: JUSTIFICATION

Section

- 65.00 Justification generally.
 65.05 Justifiable use of physical force generally.
 65.10 Justifiable use of physical force in defense of a person.
 65.15 Justifiable use of physical force in defense of real property.
 65.20 Justifiable use of physical force in defense of personal property.
 65.25 Justifiable use of physical force in resisting unlawful arrest.
 65.30 Justifiable use of physical force in making an arrest and in preventing an escape.

§ 65.00 Justification generally

Unless inconsistent with the ensuing provisions of this article defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when:

1. Such conduct is required or authorized by a provision of law or by a judicial decree. Among the kinds of such provisions and decrees are (a) laws defining duties and functions of public servants, (b) laws defining duties of private citizens to assist the public servants in the performance of certain of their functions, (c) laws governing the execution of legal process, (d) laws governing the military services and the conduct of war, and (e) judgments and orders of competent courts; or
2. 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. The injury or evil sought to be avoided must arise from a situation occasioned by or developed through no fault of the actor and must, according to ordinary standards of intelligence and morality, clearly outweigh the injury or evil sought to be prevented by the law defining the offense charged. It must not be founded upon considerations pertaining only to the morality or advisability of the law.

§ 65.05 Justifiable use of physical force generally

The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

1. A parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person, and

a teacher or other person entrusted with the care and supervision of a minor for a special purpose, may use physical force when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such minor or incompetent person, but may not use a degree of physical force which is calculated to cause, or which creates a substantial risk of causing, death, serious physical injury or extreme pain.

2. A warden or other authorized official of a jail, prison or correctional institution may, in order to maintain order and discipline, use such physical force as is authorized by the correction law.

3. A person responsible for the maintenance of order in a common carrier of passengers, or a person acting under his direction, may use physical force when and to the extent that he reasonably believes it necessary to maintain order, but he may use deadly physical force only when he reasonably believes it necessary to assure the safe operation of such carrier.

4. A person acting under a reasonable belief that another is about to attempt suicide or to inflict serious physical injury upon himself may use physical force upon such person to the extent that he reasonably believes it necessary to thwart such result.

5. A physician duly authorized to practice medicine may use physical force for the purpose of administering a recognized form of treatment which he reasonably believes to be adapted to promoting the physical or mental health of the patient if (a) the treatment is administered with the consent of the patient or, if the patient is a minor or an incompetent person, with the consent of his parent, guardian or other person entrusted with his care and supervision, or (b) the treatment is administered in an emergency when the physician reasonably believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

6. A person may use physical force upon another in defending himself or a third person, in defending property, in resisting an unlawful arrest, in making an arrest, or in preventing an escape, as hereafter prescribed in this article.

§ 65.10 Justifiable use of physical force in defense of a person

1. Except as provided in subdivisions two and three of this section, a person is justified in using physical force upon an-

other person when and to the extent that he reasonably believes it necessary to defend himself or a third person against such other person's imminent use of unlawful physical force.

2. Except as provided in subdivision three of this section, a person is justified in using deadly physical force upon another only when he reasonably believes it necessary to prevent the imminent use of unlawful deadly physical force upon himself or a third person, or to prevent the imminent commission of a kidnapping, robbery, forcible rape or forcible sodomy; but the use of deadly physical force is not justifiable if the actor knows that he can avoid the necessity of using such force with complete safety (a) by retreating, except that the actor is not required to retreat (i) if he is in his dwelling and was not the initial aggressor, or (ii) if he is a peace officer or a private person assisting him at his direction, and was acting pursuant to section 65.30, or (b) by surrendering the possession of property to a person asserting a claim of right thereto, or (c) by complying with a demand that he abstain from performing an act which he is otherwise not obligated to perform.

3. A person is not justified in using the physical force prescribed by subdivision one or two of this section: (a) if with intent to cause physical injury or death to another and to provide himself with an excuse therefor, he provoked the use of unlawful physical force by such other person; or (b) if he was the initial aggressor, except that his use of physical force upon another under such circumstances is justifiable if he withdraws from the encounter and effectively communicates to such other person his intent to do so, but the latter notwithstanding continues or threatens the use of unlawful physical force; or (c) if the physical force involved was the product of a combat by agreement.

§ 65.15 Justifiable use of physical force in defense of real property

A person in possession or control of real property or a person who is licensed or privileged to be thereon is justified in using physical force upon another when and to the extent that he reasonably believes it necessary to prevent or terminate such other person's criminal trespass in or upon such real property; but he may use deadly physical force only when he reasonably believes it necessary to prevent such other person from committing arson.

§ 65.20 **Justifiable use of physical force in defense of personal property**

A person is justified in using physical force, but not deadly physical force, upon another when and to the extent that he reasonably believes it necessary to prevent such other person from committing larceny or criminal mischief involving personal property.

§ 65.25 **Justifiable use of physical force in resisting unlawful arrest**

A person is justified in using physical force to resist an arrest which he knows is being made by a peace officer or by a private person assisting him at his direction only when he believes the arrest is unlawful and the arrest in fact is unlawful.

§ 65.30 **Justifiable use of physical force in making an arrest and in preventing an escape**

1. Except as provided in subdivisions two and three of this section, a peace officer or a private person assisting him at his direction, or a private person acting on his own account, is justified in using physical force upon another when and to the extent that he reasonably believes it necessary:

(a) to make an arrest which he reasonably believes to be lawful, or to defend himself or a third person against physical injury while attempting to make such arrest; or

(b) to prevent the escape of an arrested person from a custody which he reasonably believes to be lawful, or to defend himself or a third person against physical injury while attempting to prevent any such escape.

2. A peace officer or a private person assisting him at his direction is justified in using deadly physical force for a purpose specified in subdivision one of this section only when he reasonably believes it necessary:

(a) to prevent the use of deadly physical force upon himself or a third person; or

(b) to prevent the defeat of an arrest, or an escape from custody, of a person who (i) has committed or attempted to commit a felony involving the use or threatened use of deadly physical force, or (ii) is attempting to escape by the use of a deadly weapon, or (iii) otherwise indicates that he

is likely to endanger human life or to inflict serious physical injury unless apprehended without delay; provided that nothing contained in this subdivision shall be deemed to constitute justification for reckless or criminally negligent conduct by such peace officer or private person amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.

3. A private person acting on his own account is justified in using deadly physical force for a purpose specified in subdivision one of this section only when he reasonably believes it necessary to prevent the use of deadly physical force upon himself or a third person.

4. A reasonable belief in the lawfulness of an arrest or of the custody of an arrested person means a reasonable belief in the existence of facts or circumstances which justify an arrest or the custody. If the believed facts or circumstances do not legally justify the arrest or custody, an erroneous though not unreasonable belief or opinion that the law is otherwise does not render justifiable the use of physical force to make the arrest or to prevent an escape from custody. A peace officer who has made or is making an arrest pursuant to a warrant is justified in using the physical force prescribed in subdivisions one and two of this section unless the warrant is invalid and is known by the actor to be invalid.

5. A guard or other peace officer employed in a jail, prison or correctional institution is justified in using physical force, including deadly physical force, when and to the extent that he reasonably believes it necessary to prevent the escape from such jail, prison or correctional institution of a prisoner detained therein under sentence for an offense or to await trial or commitment for an offense.

ARTICLE 70: IMMUNITY

Section

- 70.00 Immunity; defined.
- 70.05 Immunity from prosecution.
- 70.10 Immunity; authorities competent to confer it.
- 70.15 Immunity; how and when conferred.
- 70.20 Waiver of immunity.

§ 70.00 Immunity; defined

A person has "immunity" within the meaning of this article, when, having given testimony or produced evidence in any in-

vestigation or proceeding, (a) he cannot be prosecuted or subjected to any penalty or forfeiture, other than a prosecution or action for perjury or contempt, for or on account of any transaction, matter or thing concerning which he testified or produced evidence, and (b) no such testimony or evidence can be received against him in any criminal proceeding other than one for perjury or contempt.

§ 70.05 Immunity from prosecution

A person may not be convicted of or prosecuted for an offense when he has obtained immunity therefor under circumstances described in section 70.15.

§ 70.10 Immunity; authorities competent to confer it

In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before any joint legislative committee, for or relating to any crime defined in this chapter or any felony defined in any other chapter, such court, magistrate, grand jury or joint legislative committee may confer immunity in accordance with the provisions of section 70.15.

§ 70.15 Immunity; how and when conferred

1. In any investigation or proceeding where, by express provision of section 70.10, or by express provision of any other statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided herein.

2. As used in this section "competent authority" means:

(a) The court or magistrate before whom a person is called to answer questions or produce evidence in a criminal proceeding other than a proceeding before a grand jury, when such court or magistrate is expressly requested by the prosecuting attorney to order such person to give answer or to produce evidence; or

(b) The court before whom a person is called to answer questions or produce evidence in a civil proceeding to which the state or a political subdivision thereof, or a department or agency of the state or of such political subdivision, or an officer of any of them in his official capacity, is a party, when such court is expressly requested by the attorney-general of the state of New York to order such person to give answer or produce evidence; or

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(d) A legislative committee or temporary state commission before which a person is called to answer questions or produce evidence in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein; provided that a majority of the full membership of such committee or commission concur therein; or

(e) The head of a state department or other state agency, a commissioner, deputy or other officer before whom a person is called to answer questions or produce evidence in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein.

Provided, however, that no such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity.

3. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.
4. If, after compliance with the provisions of this section, or any other similar provisions of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure and neglect shall not deprive such person of any immunity otherwise properly conferred upon him.

§ 70.20 Waiver of immunity

When a person is called or appears in any investigation or proceeding for the purpose of giving testimony or producing evidence under circumstances in which he may possibly obtain immunity pursuant to the provisions of section 70.15, he may execute, acknowledge and file in the office of the county clerk a statement expressly waiving such immunity; and in such case he obtains no immunity through the giving of testimony or the production of evidence.

ARTICLE 75: OTHER EXEMPTIONS AND DEFENSES**Section**

75.00 Duress.

75.05 Entrapment.

75.10 Previous prosecution.

75.15 Untimely prosecution.

§ 75.00 Duress

1. A person may not be convicted of an offense based upon conduct in which he engaged because of the use or threatened use of unlawful force upon him or upon another person, which force or threatened use thereof a person of reasonable firmness in his situation would have been unable to resist.

2. The defense of duress as defined in subdivision one of this section is not available when a person intentionally or recklessly places himself in a situation in which it is probable that he will be subjected to duress.

§ 75.05 Entrapment

A person may not be convicted of an offense when he was induced or encouraged to commit such offense by a public servant, or by a person acting in cooperation with a public servant, seeking to obtain evidence against him for purposes of criminal prosecution, and when the methods used to obtain such evidence were such as to create a substantial risk that the actor would commit such offense even though he was not otherwise ready to commit it or to commit any offense of that nature. Inducement or encouragement to commit an offense means active inducement or encouragement. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

§ 75.10 Previous prosecution

1. A person may not be convicted of or prosecuted for an offense when he has previously been prosecuted for (a) the same offense, or (b) an offense comprising the same or substantially the same conduct.

2. The issue of whether a previous prosecution was for an offense "comprising the same or substantially the same conduct" so as to bar double prosecution is determined as follows:

(a) If the two offenses are based upon the same act or conduct, prosecution for one bars prosecution for the other regardless of any legal distinctions between the two offenses.

(b) Except as provided in paragraph (c) of this subdivision, if the two offenses are based upon or interwoven with the same general transaction, incident or course of conduct and have a substantially common factual denominator, the first prosecution bars the second even though the offenses are not factually identical and each contains an element or requires proof of some act or fact not contained in or required by the other; except that, where under such circumstances the first prosecution occurred in another jurisdiction the laws of which did not prescribe any offense equivalent to the one subsequently charged in this state, such first prosecution does not bar the second.

(c) If the acts upon which one offense is based are factually and chronologically distinguishable from the acts upon which the other is based, the first prosecution does not bar the second even though the offenses are so factually related as to be joinable in a single indictment or information, pursuant to section two hundred seventy-nine of the code of criminal procedure, as offenses connected together or constituting parts of a common scheme or plan.

(d) If the offense charged is one necessarily included within the offense previously prosecuted, the first prosecution bars the second, unless the previous prosecution for the inclusive offense occurred in another jurisdiction and was terminated or dismissed by court order founded solely upon insufficiency of grand jury evidence to support some element of such offense which is not an element of the included offense subsequently charged in this state.

(e) If the offense previously prosecuted is one necessarily included within the offense charged, the first prosecution bars the second, unless (i) the first prosecution resulted in a

conviction or was terminated by reason of some factor other than acquittal or judicial determination of legal insufficiency of trial or grand jury evidence supporting such first charge, and (ii) the inclusive or subsequently charged offense could not have been charged in the first prosecution, either because such first prosecution occurred in another jurisdiction the laws of which did not prescribe any such offense, or because, if it occurred in this state, the people did not know at the time, and could not with reasonable diligence have known, of an aggravating factor raising the degree or grade of the offense to the one later charged.

3. A person shall be deemed to have been "previously prosecuted" for an offense when he has been formally charged therewith by indictment, information or equivalent accusation filed in a court of this state or of any jurisdiction within the United States, and when:

(a) Either before or during trial, such criminal action was terminated by:

(i) a valid plea of guilty, or

(ii) by any court order which constituted a final determination of the action on the merits, or

(iii) a final order dismissing an information or indictment upon motion of the district attorney pursuant to section six hundred seventy-one of the code of criminal procedure; or

(b) Such criminal action proceeded to the trial stage and a witness was called and sworn, unless the trial proceeding was subsequently nullified by court order. A trial proceeding is deemed to have been so "nullified" when a new trial of the charge was ordered or permitted under circumstances which restored the action to its pre-trial status.

§ 75.15 Untimely prosecution

1. A person may not be convicted of or prosecuted for an offense when prosecution therefor is not commenced within the lawful period of limitation as prescribed in the ensuing subdivisions of this section.

2. Except as otherwise provided in subdivision three of this section:

(a) A prosecution for murder or kidnapping may be commenced at any time;

(b) A prosecution for any other felony must be commenced within five years after the commission thereof;

(c) A prosecution for a misdemeanor must be commenced within two years after the commission thereof;

(d) A prosecution for a violation must be commenced within one year after the commission thereof.

3. Notwithstanding the provisions of subdivision two of this section:

(a) A prosecution for larceny committed by a person in violation of a fiduciary duty may be commenced within one year after the facts constituting such offense are discovered or, in the exercise of reasonable diligence, should have been discovered by the aggrieved party or by a person under a legal duty to represent him who is not himself implicated in the commission of the offense. However, in no event shall the period of limitation be extended by more than three years beyond the expiration of the period otherwise applicable under subdivision two of this section.

(b) A prosecution for misconduct in office by a public servant may be commenced at any time while the defendant is a public servant or within two years after the termination of his status as such. However, in no event shall the period of limitation be extended by more than five years beyond the expiration of the period otherwise applicable under subdivision two of this section.

4. In calculating the time limitation applicable to commencement of a prosecution for any particular offense, the following periods shall not be included:

(a) Any period following the commission of the offense during which the defendant is either (i) outside this state or (ii) inside this state under such circumstances that his presence herein is not ascertainable by the exercise of reasonable diligence. However, in no event shall the period of limitation be extended by more than five years beyond the period otherwise applicable under subdivision two of this section.

(b) When a prosecution for an offense is lawfully commenced within the prescribed period of limitation therefor, and when an indictment or information upon which such prosecution is based is subsequently dismissed by an authorized court under directions or circumstances permitting the lodging of another charge for the same or a similar

offense, the period during which the thus defeated prosecution was pending does not constitute a part of the period of limitation applicable to commencement of prosecution by a new charge.

5. A prosecution is "commenced" within the meaning of this section when (a) the defendant is charged with the offense in issue by indictment, information or complaint, or (b) he is arrested for the offense, or (c) a summons for the offense is issued, provided that it is promptly executed.

PROPOSED LEGISLATION 21.001

PART TWO

SPECIFIC OFFENSES

TITLE G. ANTICIPATORY AND ACCESSORIAL OFFENSES

ARTICLE 100: CRIMINAL SOLICITATION

Section	
100.00	Criminal solicitation; definitions of terms.
100.05	Criminal solicitation.
100.10	Criminal solicitation; punishment.
100.15	Criminal solicitation; no defense.
100.20	Criminal solicitation; exemptions and defenses.

§ 100.00 Criminal solicitation; definitions of terms

As used in this article, "crime," "felony" and "misdemeanor," when referring to conduct performed or which may be performed by a person other than the actor, mean conduct which constitutes a crime, felony or misdemeanor as the case may be, or which would constitute such if performed by a criminally responsible person acting with the kind of culpability required for the commission thereof.

§ 100.05 Criminal solicitation

A person is guilty of criminal solicitation when he requests, commands, encourages or importunes another person to commit a crime.

§ 100.10 Criminal solicitation; punishment

Criminal solicitation is a:

1. Class D felony when the crime solicited is murder or kidnapping;
2. Class E felony when the crime solicited is a class B or class C felony;
3. Class A misdemeanor when the crime solicited is a class D or class E felony;
4. Violation when the crime solicited is a misdemeanor.

§ 100.15 Criminal solicitation; no defense

It is immaterial and no defense to a prosecution for criminal solicitation that the person solicited was unaware of the criminal nature of the conduct solicited or of the defendant's purpose.

§ 100.20 Criminal solicitation; exemptions and defenses

1. Notwithstanding the provisions of section 100.05, a person is not guilty of criminal solicitation when his solicitation constitutes conduct of a kind that is necessarily incidental to the commission of the crime solicited. When under such circumstances the solicitation constitutes an offense other than criminal solicitation which is related to but separate from the crime solicited, the actor is guilty of such related and separate offense only and not of criminal solicitation.

2. In any prosecution for criminal solicitation, it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, prevented the commission of such crime by persuading the person solicited to refrain from committing the crime, or in any other manner prevented the commission of such crime. A renunciation of criminal purpose is not voluntary and complete within the meaning of this subdivision if it results from (a) a belief that circumstances exist which increase the probability of detection or apprehension of the defendant or the person solicited, or which render more difficult the accomplishment of the criminal purpose, or (b) a decision to postpone the criminal conduct until another time.

ARTICLE 105: CONSPIRACY

Section	
105.00	Conspiracy; definitions of terms.
105.05	Conspiracy in the fourth degree.
105.10	Conspiracy in the third degree.
105.15	Conspiracy in the second degree.
105.20	Conspiracy in the first degree.
105.25	Conspiracy; pleading and proof; necessity of overt act.
105.30	Conspiracy; jurisdiction and venue.
105.35	Conspiracy; defense.

§ 105.00 Conspiracy; definitions of terms

As used in this article, "crime," "felony," and "misdemeanor," when referring to conduct performed or which may be performed

by a person other than the actor, mean conduct which constitutes a crime, felony or misdemeanor as the case may be, or which would constitute such if performed by a criminally responsible person acting with the kind of culpability required for the commission thereof.

§ 105.05 Conspiracy in the fourth degree

A person is guilty of conspiracy in the fourth degree when he conspires with one or more other persons to commit a crime.

Conspiracy in the fourth degree is a **class B misdemeanor**.

§ 105.10 Conspiracy in the third degree

A person is guilty of conspiracy in the third degree when he conspires with one or more other persons to commit a felony.

Conspiracy in the third degree is a **class A misdemeanor**.

§ 105.15 Conspiracy in the second degree

A person is guilty of conspiracy in the second degree when he conspires with one or more other persons to commit a class B or class C felony.

Conspiracy in the second degree is a **class E felony**.

§ 105.20 Conspiracy in the first degree

A person is guilty of conspiracy in the first degree when he conspires with one or more other persons to commit murder or kidnapping.

Conspiracy in the first degree is a **class D felony**.

§ 105.25 Conspiracy; pleading and proof; necessity of overt act

No person may be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators pursuant to the conspiracy and to effect its purpose.

§ 105.30 Conspiracy; jurisdiction and venue

1. A person may be prosecuted for conspiracy in the county in which he entered into such conspiracy or in any county in which an overt act pursuant thereto was committed.

2. When the objective of a conspiracy contrived within this state is to engage in conduct without this state which would constitute a crime under the laws of this state if performed herein, such conspiracy constitutes a crime prosecutable and punishable within this state when and only when the conduct which is the objective of the conspiracy would also constitute a crime within and under the laws of the other jurisdiction if performed therein.

3. A conspiracy contrived in another jurisdiction to engage in conduct within this state which would constitute a crime within and under the laws of this state if performed herein is prosecutable under this article when an overt act pursuant to such conspiracy is committed within this state. Under such circumstances, it is immaterial and no defense to a prosecution for conspiracy that the conduct which is the objective of the conspiracy would not constitute a crime within and under the laws of the other jurisdiction if performed therein.

§ 105.35 Conspiracy; defense

In any prosecution for conspiracy, it is an affirmative defense that the defendant prevented the accomplishment of the objective of the conspiracy under circumstances manifesting voluntary and complete renunciation of his criminal purpose. A renunciation of criminal purpose is not voluntary and complete if it results from (a) a belief that circumstances exist which increase the probability of detection or apprehension of the defendant or any conspirator, or which render more difficult the accomplishment of the objective of the conspiracy, or (b) a decision to postpone the criminal conduct until another time.

ARTICLE 110: ATTEMPT

Section

- 110.00 Attempt to commit a crime.
- 110.05 Attempt to commit a crime; punishment.
- 110.10 Attempt to commit a crime; no defense.
- 110.15 Attempt to commit a crime; defense

§ 110.00 Attempt to commit a crime

A person is guilty of an attempt to commit a crime when, with intent to commit a crime he engages in conduct which constitutes a substantial step toward the execution or commission thereof.

§ 110.05 Attempt to commit a crime; punishment

An attempt to commit a crime is a:

1. Class B felony when the crime attempted is murder or kidnapping;
2. Class C felony when the crime attempted is a class B felony;
3. Class D felony when the crime attempted is a class C felony;
4. Class E felony when the crime attempted is a class D felony;
5. Class A misdemeanor when the crime attempted is a class E felony;
6. Class B misdemeanor when the crime attempted is a misdemeanor.

§ 110.10 Attempt to commit a crime; no defense

If the conduct in which a person engages otherwise constitutes an attempt to commit a crime pursuant to section 110.00, it is immaterial and no defense to a prosecution for such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission, if such crime could have been committed had the attendant circumstances been as such person believed them to be.

§ 110.15 Attempt to commit a crime; defense

When a person's conduct would otherwise constitute an attempt to commit a crime under section 110.00, it is an affirmative defense that he abandoned his effort to commit such crime or in any other manner prevented its commission, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose. A renunciation of criminal purpose is not voluntary and complete if it results from (a) a belief that circumstances exist which increase the probability of detection or apprehension of the defendant, or which render more difficult the accomplishment of the criminal purpose; or (b) a decision to postpone the criminal conduct until another time.

ARTICLE 115: CRIMINAL FACILITATION**Section**

- 115.00 Criminal facilitation; definitions of terms.
- 115.05 Criminal facilitation in the third degree.
- 115.10 Criminal facilitation in the second degree.
- 115.15 Criminal facilitation in the first degree.
- 115.20 Criminal facilitation; no defense.
- 115.25 Criminal facilitation; defense.
- 115.30 Criminal facilitation; corroboration.

§ 115.00 Criminal facilitation; definitions of terms

The following definitions are applicable to this article:

1. "Crime" and "felony," when referring to conduct performed or which may be performed by a person other than the actor, mean conduct which constitutes a crime or felony as the case may be, or which would constitute such if performed by a criminally responsible person acting with the kind of culpability required for the commission thereof.

2. "Facilitate the commission of a crime." A person "facilitates the commission of a crime" when (a) he knows that another person is committing or intends to commit a crime, and (b) regardless of his specific intent, he provides means or opportunity for the commission of such crime in the belief that he is materially aiding or advancing the commission thereof, and (c) such other person does in fact commit some crime, whether it be the crime which the actor believed he was committing or intended to commit or some other crime, and (d) the actor's conduct does materially aid or advance the commission of such crime.

§ 115.05 Criminal facilitation in the third degree

A person is guilty of criminal facilitation in the third degree when he facilitates the commission of a crime.

Criminal facilitation in the third degree is a class B misdemeanor.

§ 115.10 Criminal facilitation in the second degree

A person is guilty of criminal facilitation in the second degree when he facilitates the commission of a crime, and when (a) the

crime which he believes he is facilitating is a felony, and (b) the crime actually committed is a class B or class C felony.

Criminal facilitation in the second degree is a class E felony.

§ 115.15 Criminal facilitation in the first degree

A person is guilty of criminal facilitation in the first degree when he facilitates the commission of a crime, and when (a) the crime which he believes he is facilitating is murder or kidnapping, and (b) the crime actually committed is murder or kidnapping.

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

§ 115.20 Criminal facilitation; no defense

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

1. No person who engaged in the crime committed has been prosecuted for or convicted of such crime or a crime based upon the conduct comprising it, or that one or more of such persons have been acquitted thereof or enjoy immunity from prosecution therefor; or
2. Owing to lack of criminal responsibility, such other person or persons or any one of them are not guilty of such crime or of any crime based upon the conduct in question.

§ 115.25 Criminal facilitation; defense

It is an affirmative defense to a prosecution for criminal facilitation that the defendant aided or facilitated the crime committed solely as a victim thereof.

§ 115.30 Criminal facilitation; corroboration

A conviction for criminal facilitation shall not be had upon the testimony of a person who has committed the crime charged to have been facilitated, unless such testimony be corroborated by such other evidence as tends to connect the defendant with such facilitation.

ARTICLE 120: ACCESSORY AFTER THE FACT**Section**

- 120.00 Accessory after the fact; definition of term.
120.05 Being an accessory after the fact in the fourth degree.
120.10 Being an accessory after the fact in the third degree.
120.15 Being an accessory after the fact in the second degree.
120.20 Being an accessory after the fact in the first degree.

§ 120.00 Accessory after the fact; definition of term

As used in this article, a person "renders criminal assistance" when, with intent to prevent, hinder or delay the detection, discovery or apprehension of, or the lodging of a criminal charge against, a person who has committed a crime, or to assist a person in profiting or benefiting from the commission of a crime, he commits or attempts to commit any of the following acts:

1. Harboring or concealing such person; or
2. Warning him of impending discovery or apprehension;
or
3. Providing him with money, transportation, weapon, disguise or other means of avoiding detection or apprehension; or
4. Preventing or obstructing, by means of deception, force, intimidation or in any other manner, a public servant or anyone else from performing an act which might aid in the detection or apprehension of such person or in the lodging of a criminal charge against him; or
5. Destroying, concealing, suppressing or altering records or other tangible property, matter or possible evidence which might be of aid in the detection or apprehension of such person or in the lodging of a criminal charge against him; or
6. Aiding him to attain the object of his crime or to protect or expeditiously profit from an advantage derived from such crime, as by safeguarding the proceeds of a theft or converting such into more usable property.

§ 120.05 Being an accessory after the fact in the fourth degree

A person is guilty of being an accessory after the fact in the fourth degree when he renders criminal assistance to a person

who has committed a crime, knowing or believing that such person has engaged in the conduct constituting such crime.

Being an accessory after the fact in the fourth degree is a class B misdemeanor.

§ 120.10 Being an accessory after the fact in the third degree

A person is guilty of being an accessory after the fact in the third degree when he renders criminal assistance to a person who has committed a felony, knowing or believing that such person has engaged in the conduct constituting such felony.

Being an accessory after the fact in the third degree is a class A misdemeanor.

§ 120.15 Being an accessory after the fact in the second degree

A person is guilty of being an accessory after the fact in the second degree when he renders criminal assistance to a person who has committed a class B felony, knowing or believing that such person has engaged in the conduct constituting such class B felony.

Being an accessory after the fact in the second degree is a class E felony.

§ 120.20 Being an accessory after the fact in the first degree

A person is guilty of being an accessory after the fact in the first degree when he renders criminal assistance to a person who has committed murder or kidnapping, knowing or believing that such person has engaged in the conduct constituting such murder or kidnapping.

Being an accessory after the fact in the first degree is a class D felony.

TITLE H. OFFENSES AGAINST THE PERSON INVOLVING PHYSICAL INJURY, SEXUAL CONDUCT, RESTRAINT AND INTIMIDATION

ARTICLE 125: ASSAULT AND RELATED OFFENSES

Section

- 125.00 Assault in the third degree.
125.05 Assault in the second degree.
125.10 Assault in the first degree.
125.15 Menacing.
125.20 Reckless endangerment in the second degree.
125.25 Reckless endangerment in the first degree.
125.30 Promoting a suicide attempt.
125.35 Promoting a suicide attempt; when prosecutable as attempt to commit murder.

§ 125.00 Assault in the third degree

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

1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or
2. He recklessly causes physical injury to another person; or
3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a motor vehicle or a vessel equipped for propulsion by mechanical means.

Assault in the third degree is a class A misdemeanor.

§ 125.05 Assault in the second degree

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

1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or
2. With intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon; or
3. For a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness or other physical impairment or injury to another person by administering to him, without his consent, a drug, substance or preparation capable of producing the same; or

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4. With intent to kill another person, he causes serious physical injury to such person or to a third person under circumstances which would constitute assault in the first degree as defined in subdivision one of section 125.10 except that the act is committed under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as the actor believes them to be; or
5. He recklessly causes serious physical injury to another person.

Assault in the second degree is a **class D felony**.

§ 125.10 Assault in the first degree

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

1. With intent to kill another person, he causes serious physical injury to such person or to a third person, except when such conduct constitutes assault in the second degree as defined in subdivision four of section 125.05; or
2. He intentionally disfigures a person seriously and permanently, or intentionally destroys, amputates or permanently disables a member or organ of his body; or
3. Under circumstances evincing a depraved indifference to human life, he recklessly causes serious physical injury to another person; or
4. In the course of and in furtherance of the commission or attempted commission of a felony, he intentionally or recklessly causes serious physical injury to another person by means of a deadly or dangerous weapon.

Assault in the first degree is a **class B felony**.

§ 125.15 Menacing

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

Menacing is a **class B misdemeanor**.

§ 125.20 Reckless endangerment in the second degree

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

Reckless endangerment in the second degree is a class A misdemeanor.

§ 125.25 Reckless endangerment in the first degree

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

Reckless endangerment in the first degree is a class D felony.

§ 125.30 Promoting a suicide attempt

A person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide.

Promoting a suicide attempt is a class E felony.

§ 125.35 Promoting a suicide attempt; when prosecutable as attempt to commit murder

A person who engages in conduct constituting both the offense of promoting a suicide attempt, as defined in section 125.30, and the offense of attempt to commit murder, as defined in section 110.00 and subdivision one of section 130.25, may not be convicted of an attempt to commit murder unless he causes or aids the suicide attempt in issue by the use of force, duress or deception.

ARTICLE 130: HOMICIDE, ABORTION AND RELATED OFFENSES

Section

- 130.00 Homicide defined.
- 130.05 Homicide; definitions of terms.
- 130.10 Criminally negligent homicide.
- 130.15 Manslaughter in the second degree.
- 130.20 Manslaughter in the first degree.
- 130.25 Murder.
- 130.30 Murder; punishment; plea of guilty.
- 130.25 Murder; proceeding to determine sentence; appeal.
- 130.40 Abortion.

Section

- 130.45 Killing an unborn child.
- 130.50 Self-abortion.
- 130.55 Filicide of an unborn child.
- 130.60 Issuing abortifacient articles.

§ 130.00 Homicide defined

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

§ 130.05 Homicide; definitions of terms

The following definitions are applicable to this article:

1. "Person" means a human being who has been born and is alive.
2. "Unborn child" means a child with which a female has been pregnant for more than twenty-six weeks.
3. "Abortifacient act." A female commits an "abortifacient act" upon herself when she takes or submits to the administration of medicine or drugs or does or submits to any physical act to or upon herself which she believes is calculated to procure the miscarriage of pregnant females. A person commits an "abortifacient act" upon a female when he commits a physical act upon her which he believes is calculated to procure her miscarriage, whether directly upon her body or by the administration of drugs or medicine or by other means or treatment, or when he causes her to commit or submit to such an act to or upon herself.
4. "Unlawful abortifacient act" means an abortifacient act which, according to a reasonable belief of a person charged with committing or submitting to the same, is not necessary to preserve the life of the female or of an unborn child with which she is pregnant.

§ 130.10 Criminally negligent homicide

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

Criminally negligent homicide is a class E felony.

§ 130.15 PROPOSED PENAL LAW

§ 130.15 **Manslaughter in the second degree**

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

1. He recklessly causes the death of another person; or
2. With intent to procure a miscarriage of a female whom he believes to be pregnant, he commits an unlawful abortifacient act upon her which causes her death; or
3. He intentionally causes or aids another person to commit suicide.

Manslaughter in the second degree is a **class C felony**.

§ 130.20 **Manslaughter in the first degree**

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

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

or

2. With intent to kill another person, he causes the death of such person or of a third person under circumstances which would constitute murder as defined in subdivision one of section 130.25 except that the homicidal act is committed under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as the actor believes them to be; or

3. With intent to procure the miscarriage of a female pregnant with an unborn child, he commits an unlawful abortifacient act upon her which causes her death.

Manslaughter in the first degree is a **class B felony**.

§ 130.25 **Murder**

A person is guilty of murder when:

1. With intent to kill another person, he causes the death of such person or of a third person, except when:

(a) He engages in such conduct under the influence of extreme emotional disturbance so as to render him guilty of manslaughter in the first degree as defined in subdivision two of section 130.20; or

(b) His conduct consists of causing or aiding a suicide so as to constitute manslaughter in the second degree as de-

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fined in subdivision three of section 130.15, and he does not use force, duress or deception in causing or aiding such suicide; or

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

3. Either alone or in concert with others, he commits or attempts to commit a felonious crime of robbery, burglary, kidnapping, arson, escape or a forcible, felonious sex crime, and, in the course of and in furtherance of such crime or of the immediate flight of the perpetrators thereof or any one of them, one or more commits an act inherently dangerous to human life which causes the death of a person other than one of the perpetrators; except that it shall constitute an affirmative defense to a prosecution under this subdivision that a defendant, though a participant in the underlying felony:

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

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

(c) Did not know that any of his confederates was armed with such a weapon, implement, article or substance; and

(d) Had no reasonable ground to believe that any of his confederates intended to commit an act inherently dangerous to human life.

§ 130.30 Murder; punishment; plea of guilty

1. Murder is punishable as a class A felony unless the death sentence is imposed as provided by section 130.35.

2. When the court and the district attorney consent, a person indicted for murder may plead guilty thereto, in which case the court shall sentence him as for a class A felony.

3. When a defendant has been found guilty after trial of murder, the court shall discharge the jury and shall sentence the defendant as for a class A felony if it is satisfied that he was less than eighteen years old at the time of the commission of the

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

§ 130.35 Murder; proceeding to determine sentence; appeal

1. When a defendant has been found guilty after trial of murder, and such verdict has been recorded upon the minutes, it shall not thereafter be subject to jury reconsideration.
2. Unless the court sentences the defendant as for a class A felony as provided in subdivision two or three of section 130.30, it shall, as promptly as practicable, conduct a proceeding to determine whether defendant should be sentenced as for a class A felony or to death. Such proceeding shall be conducted before the court sitting with the jury that found defendant guilty unless the court for good cause discharges that jury and impanels a new jury for that purpose.
3. In such proceeding, evidence may be presented by either party on any matter relevant to sentence including, but not limited to, the nature and circumstances of the crime, defendant's background and history, and any aggravating or mitigating circumstances. Any relevant evidence, not legally privileged, shall be received regardless of its admissibility under the exclusionary rules of evidence.
4. The court shall charge the jury on any matters appropriate in the circumstances, including the law relating to the maximum and possible minimum terms of imprisonment and to the possible release on parole of a person sentenced as for a class A felony.
5. The jury shall then retire to consider the penalty to be imposed. If the jury report unanimous agreement on the imposition of the penalty of death, the court shall discharge the jury and shall impose the sentence of death. If the jury report unanimous agreement on the imposition of the class A felony sentence, the court shall discharge the jury and shall impose such sentence. If, after the lapse of such time as the court deems reasonable, the jury report themselves unable to agree, the court shall discharge the jury and shall, in its discretion, either impanel a new jury to determine the sentence or impose the sentence for a class A felony.
6. On an appeal by the defendant where the judgment is of death, the court of appeals, if it finds substantial error only in the sentencing proceeding, may set aside the sentence of death

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and remand the case to the trial court, in which event the trial court shall impose the sentence for a class A felony.

§ 130.40 Abortion

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

Abortion is a class E felony.

§ 130.45 Killing an unborn child

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

Killing an unborn child is a class D felony.

§ 130.50 Self-abortion

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

Self-abortion is a class B misdemeanor.

§ 130.55 Filicide of an unborn child

A female is guilty of filicide of an unborn child when, being pregnant with an unborn child and intending to procure her miscarriage, she commits or submits to an unlawful abortifacient act upon herself which causes the death of such unborn child.

Filicide of an unborn child is a class A misdemeanor.

§ 130.60 Issuing abortifacient articles

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

Issuing abortifacient articles is a class B misdemeanor.

ARTICLE 135: SEX OFFENSES

Section

135.00	Sex offenses; definitions of terms.
135.05	Sex offenses; lack of consent.
135.10	Sex offenses; defenses and exceptions.
135.15	Sex offenses; corroboration.
135.20	Sexual misconduct.
135.25	Rape in the third degree.
135.30	Rape in the second degree.
135.35	Rape in the first degree.
135.40	Sodomy in the third degree.
135.45	Sodomy in the second degree.
135.50	Sodomy in the first degree.
135.55	Bestiality.
135.60	Sexual abuse in the second degree.
135.65	Sexual abuse in the first degree.

§ 135.00 Sex offenses; definitions of terms

The following definitions are applicable to this article:

1. "Sexual intercourse" has its ordinary meaning and occurs upon any penetration, no matter how slight.
2. "Deviate sexual intercourse" means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vagina.
3. "Sexual contact" means any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party.
4. "Female" means any female person who is not married to the actor.
5. "Mentally defective" means that a person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct.
6. "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of drugs administered to him without his consent, or to any other act committed upon him without his consent.
7. "Physically helpless" means that a person is unconscious or physically unable to communicate unwillingness to an act owing to the influence of drugs, illness or any other factor.

8. "Unaware" means that a person does not realize that a sexual act is being committed.

9. "Forcible compulsion" means physical force that overcomes earnest resistance; or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person, or in fear that he or another person will immediately be kidnapped.

§ 135.05 Sex offenses; lack of consent

1. Whether or not specifically stated, it is an element of every offense defined in this article that the criminal sexual act was committed without consent of the victim.

2. Lack of consent results from:

(a) Forcible compulsion; or

(b) Incapacity to consent; or

(c) Where the offense charged is sexual abuse pursuant to section 135.60 or section 135.65, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

3. A person is deemed incapable of consent when he is:

(a) less than seventeen years old; or

(b) mentally defective; or

(c) mentally incapacitated; or

(d) physically helpless; or

(e) unaware.

§ 135.10 Sex offenses; defenses and exceptions

1. In a prosecution under this article in which the victim's lack of consent is based solely upon his incapacity to consent because he was mentally defective, mentally incapacitated, physically helpless or unaware, it is a defense to such prosecution that the defendant, at the time he engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent.

2. In a prosecution under this article in which the victim's lack of consent is based solely upon his incapacity to consent because he was less than seventeen years old, it is no defense to such prosecution that the defendant, at the time he engaged in

the conduct constituting the offense, did not know the victim's age.

§ 135.15 Sex offenses; corroboration

A person shall not be convicted of any offense defined in this article, or of an attempt to commit the same, solely on the uncorroborated testimony of the alleged victim.

§ 135.20 Sexual misconduct

A person is guilty of sexual misconduct when:

1. Being a male he engages in sexual intercourse with a female without her consent; or
2. He engages in deviate sexual intercourse with another person without the latter's consent.

Sexual misconduct is a class A misdemeanor.

§ 135.25 Rape in the third degree

A male is guilty of rape in the third degree when:

1. He engages in sexual intercourse with a female who is incapable of consent by reason of some factor other than being less than seventeen years old; or
2. Being twenty one years old or more, he engages in sexual intercourse with a female less than seventeen years old.

Rape in the third degree is a class E felony.

§ 135.30 Rape in the second degree

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

Rape in the second degree is a class D felony.

§ 135.35 Rape in the first degree

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

1. By forcible compulsion of the female's submission thereto; or
2. Who is incapable of consent by reason of being physically helpless; or

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3. Who is less than eleven years old.

Rape in the first degree is a class B felony.

§ 135.40 Sodomy in the third degree

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

1. He engages in deviate sexual intercourse with a person who is incapable of consent by reason of some factor other than being less than seventeen years old; or

2. Being twenty one years old or more, he engages in deviate sexual intercourse with a person less than seventeen years old.

Sodomy in the third degree is a class E felony.

§ 135.45 Sodomy in the second degree

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

Sodomy in the second degree is a class D felony.

§ 135.50 Sodomy in the first degree

A person is guilty of sodomy in the first degree when he engages in deviate sexual intercourse with another person:

1. By forcible compulsion of the other person's submission thereto; or

2. Who is incapable of consent by reason of being physically helpless; or

3. Who is less than eleven years old.

Sodomy in the first degree is a class B felony.

§ 135.55 Bestiality

A person is guilty of bestiality when he engages in sexual conduct with an animal or a dead human body.

Bestiality is a class A misdemeanor.

§ 135.60 Sexual abuse in the second degree

A person is guilty of sexual abuse in the second degree when he subjects another person to sexual contact without the latter's consent.

Sexual abuse in the second degree is a class A misdemeanor.

§ 135.65 Sexual abuse in the first degree

A person is guilty of sexual abuse in the first degree when he subjects another person to sexual contact:

1. By forcible compulsion of the other person's submission thereto; or
2. When the other person is incapable of consent by reason of being physically helpless; or
3. When the other person is less than eleven years old.

Sexual abuse in the first degree is a class D felony.

ARTICLE 140: KIDNAPPING, COERCION AND RELATED OFFENSES

Section

- 140.00 False imprisonment, kidnapping and custodial interference; definitions of terms.
- 140.05 False imprisonment in the second degree.
- 140.10 False imprisonment in the first degree.
- 140.15 Kidnapping.
- 140.20 Kidnapping; punishment; plea of guilty.
- 140.25 Kidnapping; proceeding to determine sentence; appeal.
- 140.30 Kidnapping and false imprisonment; defenses.
- 140.35 Custodial interference in the second degree.
- 140.40 Custodial interference in the first degree.
- 140.45 Substitution of children.
- 140.50 Coercion in the second degree.
- 140.55 Coercion in the first degree.
- 140.60 Coercion; defense.

§ 140.00 False imprisonment, kidnapping and custodial interference; definitions of terms

The following definitions are applicable to this article:

1. "Remove" means to abduct a person or to cause him to go or be taken from one place to another without consent.
2. "Confine" means to hold or imprison a person without consent, secretly or under other circumstances calculated to prevent his liberation.
3. "Restrain" means to remove, confine or in any way restrict a person's movement without consent in such fashion as to interfere substantially with his liberty.
4. "Relative" means a parent, ancestor, brother, sister, uncle, aunt or cousin, and any person married to the same.

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

§ 140.05 False imprisonment in the second degree

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

False imprisonment in the second degree is a class A misdemeanor.

§ 140.10 False imprisonment in the first degree

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

False imprisonment in the first degree is a class E felony.

§ 140.15 Kidnapping

A person is guilty of kidnapping when

(1) he unlawfully:

(a) removes another person from his place of residence or business; or

(b) removes him a substantial distance from the vicinity where the removal commences; or

(c) confines him for a substantial period in a place of isolation; and when

(2) his intent is:

(a) To hold such person for ransom; or

(b) To use him as a shield or hostage; or

(c) To inflict physical injury upon him, or to violate or abuse him sexually; or

(d) To terrorize him or a third person; or

(e) To interfere with the performance of any governmental or political function.

§ 140.20 Kidnapping; punishment; plea of guilty

1. Kidnapping is punishable as a class A felony unless the death sentence is imposed as provided by section 140.25.
2. When the court and the district attorney consent, a person indicted for kidnapping may plead guilty thereto, in which case the court shall sentence him as for a class A felony.
3. When a defendant has been found guilty after trial of kidnapping, the court shall discharge the jury and shall sentence the defendant as for a class A felony if it is satisfied (a) that he was less than eighteen years old at the time of the commission of the crime, or (b) that the person kidnapped has been voluntarily returned alive or voluntarily released alive under circumstances enabling him to return to safety without substantial risk of death, or (c) that the sentence of death is not warranted because of substantial mitigating circumstances.

§ 140.25 Kidnapping; proceeding to determine sentence; appeal

1. When a defendant has been found guilty after trial of kidnapping, and such verdict has been recorded upon the minutes, it shall not thereafter be subject to jury reconsideration.
2. Unless the court sentences the defendant as for a class A felony as provided in subdivision two or three of section 140.20, it shall, as promptly as practicable, conduct a proceeding to determine whether defendant should be sentenced as for a class A felony or to death. Such proceeding shall be conducted in the manner prescribed in section 130.35 for determination of the penalty for murder, and all the provisions of said section 130.35 relating to procedure and to determination and imposition of sentence, appeal, remand and re-sentence are here applicable.

§ 140.30 Kidnapping and false imprisonment; defenses

It is an affirmative defense to any prosecution for kidnapping or false imprisonment that the person allegedly removed, restrained or confined was a child less than eighteen years old at the time thereof, that the defendant is a relative, and that his sole purpose was to assume custody of such child.

§ 140.35 Custodial interference in the second degree

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

1. Being a relative of a child less than eighteen years old, intending to assume permanent or protracted custody or control over him, and knowing that he has no legal right to do so, he entices or takes such child without consent from the lawful custody of a lawful custodian; or
2. Knowing that he has no legal right to do so, he takes or entices from lawful custody any incompetent person, orphan, delinquent child or other person committed by authority of law to the custody of another person or institution.

Custodial interference in the second degree is a class A misdemeanor.

§ 140.40 Custodial interference in the first degree

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

Custodial interference in the first degree is a class E felony.

§ 140.45 Substitution of children

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

Substitution of children is a class E felony.

§ 140.50 Coercion in the second degree

A person is guilty of coercion in the second degree when he compels or induces a person to do an act which the latter has a legal right to abstain from doing, or to abstain from doing an act which he has a legal right to do, by means of instilling in

him a fear that, if the demand is not complied with, the actor will:

1. Cause physical injury to a person; or
2. Cause damage to property; or
3. Engage in other conduct constituting a crime; or
4. Accuse some person of a crime or cause criminal charges to be instituted against him; or
5. Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
6. Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act; or
7. Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
8. Use or abuse his position as a public servant by performing some act within or related to his official duties, or by refusing or omitting to perform an official duty in such fashion as to affect some person adversely; or
9. Do any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

Coercion in the second degree is a class A misdemeanor.

§ 140.55 Coercion in the first degree

A person is guilty of coercion in the first degree when he commits the crime of coercion in the second degree, and when:

1. He commits such crime by instilling in the victim a fear that he will cause physical injury to a person or cause damage to property; or
2. He thereby compels or induces the victim to:
 - (a) Commit or attempt to commit or aid in the commission of a felony; or
 - (b) Inflict or attempt to inflict physical injury upon a person; or
 - (c) Violate his duty as a public servant.

Coercion in the first degree is a class D felony.

§ 140.60 Coercion; defense

It is an affirmative defense to a prosecution for coercion charged to have been committed by instilling fear of the kind prescribed in subdivisions four and five of section 140.50 that the actor reasonably believed the accusation or secret to be true and that his purpose was limited to compelling the other person to behave in a way reasonably related to the circumstances which were the subject of the accusation or exposure.

TITLE I. OFFENSES INVOLVING DAMAGE TO AND INTRUSION UPON PROPERTY

ARTICLE 145: BURGLARY AND RELATED OFFENSES

Section

- 145.00 Criminal trespass and burglary; definitions of terms.
- 145.05 Criminal trespass in the third degree.
- 145.10 Criminal trespass in the second degree.
- 145.15 Criminal trespass in the first degree.
- 145.20 Burglary in the fourth degree.
- 145.25 Burglary in the third degree.
- 145.30 Burglary in the second degree.
- 145.35 Burglary in the first degree.
- 145.40 Possession of burglar's tools.

§ 145.00 Criminal trespass and burglary; definitions of terms

The following definitions are applicable to this article:

1. "Premises" includes the term "building" as defined herein, and any real property.
2. "Building," in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein. Where a building consists of two or more units separately secured or occupied, each unit shall be deemed a separate building.
3. "Dwelling" means a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present.
4. "Night" means the period between thirty minutes after sunset and thirty minutes before sunrise.
5. "Enter or remain unlawfully." A person "enters or remains unlawfully" in or upon premises when he is not licensed

or privileged to do so. A person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or other authorized person.

§ 145.05 Criminal trespass in the third degree

A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon premises.

Criminal trespass in the third degree is a violation.

§ 145.10 Criminal trespass in the second degree

A person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a building or upon real property which is fenced or otherwise enclosed in a manner designed to exclude intruders.

Criminal trespass in the second degree is a class B misdemeanor.

§ 145.15 Criminal trespass in the first degree

A person is guilty of criminal trespass in the first degree when he knowingly enters or remains unlawfully in a dwelling.

Criminal trespass in the first degree is a class A misdemeanor.

§ 145.20 Burglary in the fourth degree

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

Burglary in the fourth degree is a class E felony.

§ 145.25 Burglary in the third degree

A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a dwelling with intent to commit a crime therein.

Burglary in the third degree is a class D felony.

§ 145.30 Burglary in the second degree

A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a dwelling at night with intent to commit a crime therein.

Burglary in the second degree is a **class C felony**.

§ 145.35 Burglary in the first degree

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

1. He is armed with explosives or a deadly weapon; or
2. He physically attacks a person in effecting entry, or while in the building, or in flight therefrom.

Burglary in the first degree is a **class B felony**.

§ 145.40 Possession of burglar's tools

A person is guilty of possession of burglar's tools when he has in his possession any tool, instrument or other thing adapted, designed or commonly used for advancing or facilitating offenses involving unlawful entry into premises, or offenses involving forcible breaking of safes or other containers or depositories of property, under circumstances evincing an intent to use or knowledge that some person intends to use the same in the commission of an offense of such character.

Possession of burglar's tools is a **class A misdemeanor**.

ARTICLE 150: CRIMINAL MISCHIEF**Section**

- 150.00 Criminal mischief in the third degree.
 150.05 Criminal mischief in the second degree.
 150.10 Criminal mischief in the first degree.

§ 150.00 Criminal mischief in the third degree

A person is guilty of criminal mischief in the third degree when, having no reasonable ground to believe that he has a right to do so, he intentionally or recklessly:

1. Damages tangible property of another; or
2. Tampers with tangible property of another and thereby causes property to be placed in danger of damage.

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

§ 150.05 Criminal mischief in the second degree

A person is guilty of criminal mischief in the second degree when:

1. With intent to cause damage to tangible property of another and having no reasonable ground to believe that he has a right to do so, he damages property in an amount exceeding two hundred fifty dollars; or
2. With intent to cause an interruption or impairment of service rendered to the public and having no reasonable ground to believe that he has a right to do so, he damages or tampers with tangible property of a gas, electric, steam or water-works corporation, telephone or telegraph corporation, common carrier, or public utility operated by a municipality.

Criminal mischief in the second degree is a **class E felony**.

§ 150.10 Criminal mischief in the first degree

A person is guilty of criminal mischief in the first degree when:

1. With intent to cause damage to tangible property of another and having no reasonable ground to believe that he has a right to do so, he damages property in an amount exceeding one thousand five hundred dollars; or
2. With intent to cause a substantial interruption or impairment of service rendered to the public and having no reasonable ground to believe that he has a right to do so, he damages or tampers with tangible property of a gas, electric, steam or water-works corporation, telephone or telegraph corporation, common carrier, or public utility operated by a municipality.

Criminal mischief in the first degree is a **class D felony**.

ARTICLE 155: ARSON**Section**

- 155.00 Arson; definition of term.
155.05 Arson in the third degree.
155.10 Arson in the second degree.
155.15 Arson in the first degree.
155.20 Reckless burning.

§ 155.00 Arson; definition of term

As used in this article, "building," in addition to its ordinary meaning, includes any structure, vehicle or water-craft used for

overnight lodging of persons, or used by persons for carrying on business therein. Where a building consists of two or more units separately secured or occupied, each unit shall be deemed a separate building.

§ 155.05 Arson in the third degree

1. A person is guilty of arson in the third degree when he recklessly causes destruction or damage to a building by intentionally starting a fire or causing an explosion.

2. It is an affirmative defense to a prosecution under this section that no person other than the actor had a possessory or proprietary interest in the building.

Arson in the third degree is a class E felony.

§ 155.10 Arson in the second degree

1. A person is guilty of arson in the second degree when, with intent to destroy or damage a building, he starts a fire or causes an explosion.

2. It is an affirmative defense to a prosecution under this section that (a) no person other than the actor had a possessory or proprietary interest in the building, and (b) his sole intent was to destroy or damage the building for a lawful and proper purpose, and (c) there was no reasonable possibility that such act might endanger the life or safety of another person or damage another building.

Arson in the second degree is a class C felony.

§ 155.15 Arson in the first degree

A person is guilty of arson in the first degree when, with intent to destroy or damage a building, he starts a fire or causes an explosion, and when (a) another person is present in such building at the time, and (b) the actor is either aware of that fact or the circumstances are such as to render the presence of a person therein a reasonable possibility.

Arson in the first degree is a class B felony.

§ 155.20 Reckless burning

A person is guilty of reckless burning when he intentionally starts a fire or causes an explosion, whether on his own property

or another's, and thereby recklessly places a building of another in danger of destruction or damage.

Reckless burning is a class A misdemeanor.

TITLE J. OFFENSES INVOLVING THEFT

ARTICLE 160: LARCENY

Section

- 160.00 Larceny; definitions of terms.
- 160.05 Larceny; defined.
- 160.10 Larceny; no defense.
- 160.15 Larceny; defense.
- 160.20 Larceny; pleading and proof.
- 160.25 Larceny; value of stolen property, how ascertained.
- 160.30 Petit larceny.
- 160.35 Grand larceny in the third degree.
- 160.40 Grand larceny in the second degree.
- 160.45 Grand larceny in the first degree.

§ 160.00 Larceny; definitions of terms

The following definitions are applicable to this article:

1. "Property" means any money, personal property, real property, thing in action, evidence of debt or contract, or article of value of any kind.

Commodities of a public utility nature such as gas, electricity, steam and water constitute property, but the supplying of such a commodity to premises from an outside source by means of wires, pipes, conduits or other equipment shall be deemed a rendition of a service rather than a sale or delivery of property.

2. "Obtain." The term "obtain" includes, but is not limited to, the bringing about of a transfer or purported transfer of property or of a legal interest therein, whether to the obtainer or another.

3. "Deprive." To "deprive" another of property means (a) to withhold it or cause it to be withheld from him permanently or for so extended a period or under such circumstances that the major portion of its economic value, or of the use and benefit thereof, is lost to him, or (b) to dispose of the property so as to make it unlikely that the owner will recover it.

4. "Appropriate." To "appropriate" property of another to oneself or a third person means (a) to exercise control over it,

or to aid a third person to exercise control over it, permanently or for so extended a period or under such circumstances as to acquire the major portion of its economic value, or of the use and benefit thereof, or (b) to dispose of the property for the benefit of oneself or a third person.

5. "Owner." An "owner" of property, as used in this article, means a person who has a right to possession thereof which is superior to that of a person who takes, obtains or withholds it from him and which the latter is not privileged to infringe.

One who has obtained possession of property by theft or other illegal means shall be deemed to have a right of possession superior to that of a person who takes, obtains or withholds it from him by larcenous means.

No joint or common owner of property shall be deemed to have a right of possession thereto superior to that of any other joint or common owner or possessor thereof.

In the absence of a specific agreement to the contrary, a person in lawful possession of property shall be deemed to have a right of possession superior to that of a person having only a security interest therein, even if legal title lies with the holder of the security interest pursuant to a conditional sales contract or other security agreement.

§ 160.05 Larceny; defined

1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from the owner.

2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:

(a) By conduct heretofore defined or known as common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses;

(b) By appropriating lost property.

A person appropriates lost property when he obtains property of another which he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or as to the nature or amount of the prop-

erty, without taking reasonable measures to return the same to the owner;

(c) By committing the crime of issuing a bad check, as defined in section 195.05;

(d) By false promise.

A person obtains property by false promise when he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in particular conduct, and when he has no intention of engaging in such conduct or, as the case may be, does not believe that the third person intends to engage in such conduct.

In any prosecution for larceny based upon a false promise, the defendant's intention or belief that the promise would not be performed may not be established by or inferred from the fact alone that such promise was not performed. Such a finding may be based only upon evidence establishing that the facts and circumstances of the case are wholly consistent with guilty intent or belief and wholly inconsistent with innocent intent or belief, and excluding to a moral certainty every hypothesis except that of the defendant's intention or belief that the promise would not be performed.

(e) By extortion.

A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will:

(i) Cause physical injury to some person in the future; or

(ii) Cause damage to property; or

(iii) Engage in other conduct constituting a crime; or

(iv) Accuse some person of a crime or cause criminal charges to be instituted against him; or

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

(vi) Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act; or

(vii) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

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

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

§ 160.10 Larceny; no defense

In any prosecution for larceny, it is immaterial and no defense that:

1. The owner intended to part with title to, as well as possession of, his property; or
2. The accused in the first instance obtained possession of the owner's property lawfully, if subsequently he wrongfully withheld or appropriated such property; or
3. The accused obtained the owner's property with his consent, if he induced such consent by a false representation, pretense or promise; or
4. The purpose for which the owner was induced to part with his property was immoral or unworthy.

§ 160.15 Larceny; defenses

1. It is an affirmative defense to any prosecution for larceny by trespassory taking or embezzlement that the property was appropriated under a claim of right made in good faith.
2. It is an affirmative defense to a prosecution for larceny by extortion, as defined in sub-paragraphs (iv) and (v) of paragraph (e) of subdivision 2 of section 160.05, that the property obtained through instilling a fear of criminal accusation or exposure was honestly claimed as restitution or indemnification for harm done in the circumstances to which such accusation or exposure reasonably related, or as compensation for property or lawful services.

§ 160.20 Larceny; pleading and proof

It shall be sufficient in any prosecution for larceny as defined in section 160.05 that:

1. The indictment, information or complaint charges that the accused stole property and committed larceny in that, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully took, obtained or withheld such property from the owner; and

2. The indictment, information or complaint is supported by proof that the accused engaged in any conduct constituting larceny as defined in this article.

§ 160.25 Larceny; value of stolen property, how ascertained

The value of stolen property shall be ascertained as follows:

1. Except as otherwise specified in this section, value means the market value of the property at the time and place of the larceny, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the larceny.

2. Whether or not they have been issued or delivered, certain written instruments, not including those having a readily ascertainable market value such as some public and corporate bonds and securities, shall be evaluated as follows:

(a) The value of an instrument constituting an evidence of debt, such as a check, draft or promissory note, shall be deemed the amount due or collectable thereon or thereby, such figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.

(b) The value of any other instrument which creates, releases, discharges or otherwise affects any valuable legal right, privilege or obligation shall be deemed the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

3. When the value of property cannot be satisfactorily ascertained pursuant to the standards set forth in subdivisions one and two of this section, its value shall be deemed to be an amount less than two hundred fifty dollars.

§ 160.30 **Petit larceny**

A person who steals property is guilty of petit larceny.
Petit larceny is a class A misdemeanor.

§ 160.35 **Grand larceny in the third degree**

A person who steals property is guilty of grand larceny in the third degree when:

1. The value of the property exceeds two hundred fifty dollars; or
2. The property consists of a public record, writing or instrument kept, filed or deposited according to law with or in the keeping of any public office or public servant; or
3. The property, regardless of its nature and value, is taken from the person of another; or
4. The property, regardless of its nature and value, is obtained by extortionate means as prescribed in paragraph (e) of subdivision two of section 160.05, and under any threat of the kind specified in sub-paragraphs (i) through (viii) of said paragraph (e).

Grand larceny in the third degree is a class E felony.

§ 160.40 **Grand larceny in the second degree**

A person who steals property is guilty of grand larceny in the second degree when the value of the property exceeds one thousand five hundred dollars.

Grand larceny in the second degree is a class D felony.

§ 160.45 **Grand larceny in the first degree**

A person who steals property is guilty of grand larceny in the first degree when the property, regardless of its nature and value, is obtained by extortionate means as prescribed in paragraph (e) of subdivision two of section 160.05, and under a threat of the kind specified in sub-paragraphs (i) and (ii) of said paragraph (e).

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

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ARTICLE 165: ROBBERY**Section**

- 165.00 Robbery; definitions of terms.
165.05 Robbery; defined.
165.10 Robbery in the third degree.
165.15 Robbery in the second degree.
165.20 Robbery in the first degree.

§ 165.00 Robbery; definitions of terms

The definitions contained in section 160.00 are applicable to this article.

§ 165.05 Robbery; defined

Robbery is forcible stealing. A person forcibly steals property and commits robbery when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he takes such property from the person or in the presence of the owner by:

1. Using physical force upon the owner with intent thereby to prevent his power of resistance or to overcome his resistance (a) to the taking of the property, or (b) to the actor's retention of the property immediately after the taking; or
2. Threatening the imminent use of physical force upon the owner or another person who is present, with intent thereby to compel the owner to acquiesce (a) in the taking of the property, or (b) in the actor's retention of the property immediately after the taking.

§ 165.10 Robbery in the third degree

A person who forcibly steals property is guilty of robbery in the third degree.

Robbery in the third degree is a class D felony.

§ 165.15 Robbery in the second degree

A person who forcibly steals property is guilty of robbery in the second degree when he is aided by another person actually present.

Robbery in the second degree is a class C felony.

§ 165.20 Robbery in the first degree

A person who forcibly steals property is guilty of robbery in the first degree when:

1. In the course of and in furtherance of the commission of the crime, he causes serious physical injury to any person present who is not participating in the crime; or
2. He is armed with a deadly weapon during the commission of the crime.

Robbery in the first degree is a class B felony.

ARTICLE 170: OTHER OFFENSES RELATING TO THEFT

Section	
170.00	Misapplication of property.
170.05	Unauthorized use of a propelled vehicle; definition of term.
170.10	Unauthorized use of a propelled vehicle.
170.15	Theft of services; definitions of terms.
170.20	Theft of services.
170.25	Fraudulently obtaining a signature.
170.30	Fortune telling.
170.35	Criminal possession of stolen property; definition of term.
170.40	Criminal possession of stolen property in the third degree.
170.45	Criminal possession of stolen property in the second degree.
170.50	Criminal possession of stolen property in the first degree.
170.55	Criminal possession of stolen property; presumptions.
170.60	Criminal possession of stolen property; liability and proof.
170.65	Obscuring identity of a machine in the second degree.
170.70	Obscuring identity of a machine in the first degree.
170.75	Obscuring identity of a machine; presumptions and defenses.

§ 170.00 Misapplication of property

1. A person is guilty of misapplication of property when, knowingly having tangible personal property of another in his possession pursuant to an agreement that the same will be returned to the owner at a future time, he loans, leases for hire, pledges, pawns or otherwise encumbers such property without the consent of the owner thereof in such manner as to create a risk that the owner will not be able to recover it or will suffer pecuniary loss.

2. It is a defense to a prosecution under this section that, at the time the prosecution was formally instituted, (a) the de-

defendant had recovered possession of the property, unencumbered as a result of the unlawful disposition, and (b) the owner has suffered no material economic loss as a result of the unlawful disposition.

Misapplication of property is a class A misdemeanor.

§ 170.05 Unauthorized use of a propelled vehicle; definition of term

As used in section 170.10, "propelled vehicle" means any motor propelled vehicle or aircraft, or any boat or vessel equipped for propulsion by mechanical means or by a sail.

§ 170.10 Unauthorized use of a propelled vehicle

A person is guilty of unauthorized use of a propelled vehicle when:

1. Knowing that he does not have the consent of the owner, he takes, operates, exercises control over, rides in or otherwise uses a propelled vehicle. A person who engages in any such conduct without the consent of the owner is presumed to know that he does not have such consent.
2. Having custody of a propelled vehicle pursuant to an agreement between himself or another and the owner thereof whereby the actor or another is to perform for compensation a specific service for the owner involving the maintenance, repair or use of such vehicle, he intentionally uses or operates the same, without the consent of the owner, for his own purposes in a manner constituting a gross deviation from the agreed purpose; or
3. Having custody of a propelled vehicle pursuant to an agreement with the owner thereof whereby such vehicle is to be returned to the owner at a specified time, he intentionally retains or withholds possession thereof, without the consent of the owner, for so lengthy a period beyond the specified time as to render such retention or possession a gross deviation from the agreement.

Unauthorized use of a propelled vehicle is a class A misdemeanor.

§ 170.15 Theft of services; definitions of terms

The following definitions are applicable to section 170.20:

1. "Service" includes, but is not limited to, labor, professional service, public utility and transportation service, the supplying of hotel and restaurant accommodations, entertainment, and the supplying of equipment for use.
2. "Credit card" means any instrument, whether known as a "credit card," credit plate, charge plate, or by any other name, which purports to evidence an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer.

§ 170.20 Theft of services

A person is guilty of theft of services when:

1. With intent to defraud, he obtains or attempts to obtain a service, or induces or attempts to induce the supplier of a rendered service to agree to payment therefor on a credit basis, by the use of a credit card which he knows to be stolen, forged, revoked, cancelled, unauthorized or in any way invalid for the purpose; or
2. With intent to avoid payment for restaurant services rendered, or for services rendered to him as a transient guest at a hotel, motel, inn, tourist cabin, rooming house or comparable establishment, he avoids or attempts to avoid such payment by unjustifiable failure or refusal to pay, by stealth, or by any representation of fact which he knows to be false; or
3. With intent to obtain railroad, subway, bus, air, taxi or any other public transportation service without payment of the lawful charge therefor, or to avoid payment of the lawful charge for such transportation service which has been rendered to him, he obtains such service or avoids payment therefor by force, intimidation, stealth, deception or mechanical tampering, or by unjustifiable failure or refusal to pay; or
4. With intent to avoid payment of the lawful charge for any prospective or already rendered telephone service, he obtains or attempts to obtain such service or to avoid payment therefor by any unauthorized mechanical tampering with the equipment of the supplier, by any representation of fact which he knows to be false, or by any other artifice, trick or deception; or
5. With intent to avoid payment by himself or another for a prospective or already rendered service the charge or compen-

sation for which is measured by a meter or other mechanical device provided by the supplier of the service, he tampers with such device or with other equipment related thereto, or in any manner attempts to prevent the meter or device from performing its measuring function, without the consent of the supplier of the service. Any tampering with such a device or equipment without the consent of the supplier of the service raises a presumption of intent to avoid, or to enable another to avoid, payment for the service involved; or

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

7. Obtaining or having control over labor in the employ of another person, or of business, commercial or industrial equipment or facilities of another person, knowing that he is not entitled to the use thereof either personally or in an agency capacity, and intending to derive a commercial or other substantial benefit for himself or a third person, he uses or diverts to the use of himself or a third person such labor, equipment or facilities.

Theft of services is a class A misdemeanor.

§ 170.25 **Fraudulently obtaining a signature**

A person is guilty of fraudulently obtaining a signature when, with intent to defraud or injure another or to acquire a substantial benefit for himself or a third person, he obtains the signature of a person to a written instrument by means of any misrepresentation of fact which he knows to be false.

Fraudulently obtaining a signature is a class A misdemeanor.

§ 170.30 **Fortune telling**

A person is guilty of fortune telling when, for a fee or compensation which he directly or indirectly solicits or receives, he claims or pretends to tell fortunes, or holds himself out as being able, by claimed or pretended use of occult powers, to answer questions or give advice on personal matters or to exorcise, influence or affect evil spirits or curses; except that this section does not apply to one who engages in the aforescribed conduct

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as part of a show or exhibition solely for the purpose of entertainment or amusement

Fortune telling is a class B misdemeanor.

§ 170.35 Criminal possession of stolen property; definition of term

As used in sections 170.40, 170.45, 170.50 and 170.55, "dealer" means a person in the business of buying, selling or otherwise dealing in property, or a pawnbroker.

§ 170.40 Criminal possession of stolen property in the third degree

A person is guilty of criminal possession of stolen property in the third degree when, with intent to benefit himself or a person other than the owner thereof, he possesses property which has been stolen, either within or without the state, and which he knows to have been stolen.

Criminal possession of stolen property in the third degree is a class A misdemeanor.

§ 170.45 Criminal possession of stolen property in the second degree

A person is guilty of criminal possession of stolen property in the second degree when, with intent to benefit himself or a person other than the owner thereof, he possesses property which has been stolen, either within or without the state, and which he knows to have been stolen, and when:

1. The value of the property exceeds two hundred and fifty dollars; or
2. The actor is a dealer.

Criminal possession of stolen property in the second degree is a class E felony.

§ 170.50 Criminal possession of stolen property in the first degree

A person is guilty of criminal possession of stolen property in the first degree when, with intent to benefit himself or a person other than the owner thereof, he possesses property which has been stolen, either within or without the state, and which he

knows to have been stolen, and when the value of the property exceeds one thousand five hundred dollars.

Criminal possession of stolen property in the first degree is a class D felony.

§ 170.55 Criminal possession of stolen property; presumptions

1. A person who possesses stolen property which he knows to have been stolen is presumed to possess it with intent to benefit himself or a person other than the owner thereof.

2. A dealer who possesses stolen property is presumed to know that such property was stolen if he obtained it without having ascertained by reasonable inquiry that the person from whom he obtained it had a legal right to possess it.

§ 170.60 Criminal possession of stolen property; liability and proof.

1. It is no defense to a prosecution for criminal possession of stolen property that the person who stole the property has not been convicted, apprehended or identified.

2. A person may be convicted of criminal possession of stolen property whether or not he participated in the larceny of such property, but no person may be convicted of both larceny of and criminal possession of the same property.

3. A person charged with criminal possession of stolen property who participated in the larceny thereof may not be convicted of criminal possession of such stolen property solely upon the testimony of an accomplice in the larceny without corroborating evidence of the kind prescribed in section three hundred ninety-nine of the code of criminal procedure.

4. Unless inconsistent with the provisions of subdivision three of this section, a person charged with criminal possession of stolen property may be convicted thereof solely upon the testimony of one from whom he obtained such property or solely upon the testimony of one to whom he disposed of such property.

§ 170.65 Obscuring identity of a machine in the second degree

A person is guilty of obscuring identity of a machine in the second degree when he:

1. Removes, defaces, covers, alters, destroys or otherwise obscures the manufacturer's serial number or any other distinguishing identification number or mark upon any machine, vehicle or electrical or mechanical device, with intent to render it unidentifiable; or
2. Possesses such a machine, vehicle or device knowing that such serial number or other identification number or mark has been so removed or otherwise obscured.

Obscuring identity of a machine in the second degree is a class **A misdemeanor**.

§ 170.70 Obscuring identity of a machine in the first degree

A person is guilty of obscuring identity of a machine in the first degree when he:

1. Removes, defaces, covers, alters, destroys or otherwise obscures the manufacturer's serial number or any other distinguishing or identification number or mark upon any motor vehicle, with intent to render it unidentifiable; or
2. Possesses such a motor vehicle knowing that such serial number or other identification number or mark has been so removed or otherwise obscured.

Obscuring identity of a machine in the first degree is a class **D felony**.

§ 170.75 Obscuring identity of a machine; presumptions and defenses

1. A person who removes, defaces, covers, alters, destroys or otherwise obscures a serial number or identification mark upon a machine, vehicle or other electrical or mechanical device is presumed to do so with intent to render it unidentifiable.
2. A person who possesses a machine, vehicle or device in such condition and who does not possess an apparently valid bill of sale or other apparently valid evidence of ownership or right to possession thereof is presumed to possess such machine, vehicle or device with knowledge that the serial number or other identification mark has been obscured.

3. It is an affirmative defense to a prosecution for obscuring identity of a machine under subdivision two of section 170.65 or subdivision two of section 170.70 that, prior to arrest or other institution of the prosecution, the defendant reported to the police or to an appropriate government agency the obscured condition of the serial number or identification mark of the machine charged to have been knowingly possessed by him.

TITLE K. OFFENSES INVOLVING FRAUD

ARTICLE 175: FORGERY AND RELATED OFFENSES

Section

- 175.00 Forgery; definitions of terms.
- 175.05 Forgery in the third degree.
- 175.10 Forgery in the second degree.
- 175.15 Forgery in the first degree.
- 175.20 Criminal possession of a forged instrument in the third degree.
- 175.25 Criminal possession of a forged instrument in the second degree.
- 175.30 Criminal possession of a forged instrument in the first degree.
- 175.35 Forgery and criminal possession of a forged instrument; persons liable.
- 175.40 Criminal possession of forgery devices.
- 175.45 Criminal simulation.
- 175.50 Unlawfully using slugs; definitions of terms.
- 175.55 Unlawfully using slugs in the second degree.
- 175.60 Unlawfully using slugs in the first degree.

§ 175.00 Forgery; definitions of terms

The following definitions are applicable to this article:

1. "Written instrument" means any paper, document or other instrument containing written or printed matter or the equivalent thereof, used for purposes of reciting, embodying, conveying or recording information, and any money, token, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege or identification, which is capable of being used to the advantage or disadvantage of some person.
2. "Complete written instrument" means one which purports to be a genuine written instrument fully drawn with respect to every essential feature thereof.

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3. "Incomplete written instrument" means one which contains some matter by way of content or authentication but which requires additional matter in order to render it a complete written instrument.

4. "Falsely make" a written instrument means to make or draw a complete written instrument in its entirety, or an incomplete written instrument, which purports to be an authentic creation of its ostensible maker, but which is not such either because the ostensible maker is fictitious or because, if real, he did not authorize the making or drawing thereof.

5. "Falsely complete." One "falsely completes" a written instrument when, by adding, inserting or changing matter, he transforms an incomplete written instrument into a complete one, without the authority of anyone entitled to grant it, so that such complete instrument falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker.

6. "Falsely alter." One "falsely alters" a written instrument when, without the authority of anyone entitled to grant it, he changes a written instrument, whether it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner, so that such instrument in its thus altered form falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker.

7. "Forged instrument" means a written instrument which has been falsely made, completed or altered.

§ 175.05 Forgery in the third degree

A person is guilty of forgery in the third degree when, with intent to defraud, he falsely makes, completes or alters a written instrument.

Forgery in the third degree is a class A misdemeanor.

§ 175.10 Forgery in the second degree

A person is guilty of forgery in the second degree when, with intent to defraud, he falsely makes, completes or alters a written instrument which is or purports to be, or which is calculated to become or to represent if completed:

1. A deed, will, codicil, contract, assignment, commercial instrument, or other instrument which does or may evidence, cre-

ate, transfer, terminate or otherwise affect a legal right, interest, obligation or status; or

2. A public record, or an instrument filed or required by law to be filed or legally fileable in or with a public office or public servant; or

3. A written instrument officially issued or created by a public office, public servant or government agency; or

4. Part of an issue of tokens, transfers, certificates or other articles manufactured and designed for use as transportation fees upon public conveyances, or as symbols of value usable in place of money for the purchase of property or services available to the public for compensation.

Forgery in the second degree is a class D felony.

§ 175.15 Forgery in the first degree

A person is guilty of forgery in the first degree when, with intent to defraud, he falsely makes, completes or alters a written instrument which is or purports to be, or which is calculated to become or to represent if completed:

1. Part of an issue of money, stamps, securities or other valuable instruments issued by a government or government agency; or

2. Part of an issue of stock, bonds or other instruments representing interests in or claims against a corporate or other organization or its property.

Forgery in the first degree is a class C felony.

§ 175.20 Criminal possession of a forged instrument in the third degree

A person is guilty of criminal possession of a forged instrument in the third degree when, with knowledge that it is forged and with intent to defraud, he utters or possesses a forged instrument.

Criminal possession of a forged instrument in the third degree is a class A misdemeanor.

§ 175.25 Criminal possession of a forged instrument in the second degree

A person is guilty of criminal possession of a forged instrument in the second degree when, with knowledge that it is

forged and with intent to defraud, he utters or possesses any forged instrument of a kind specified in section 175.10.

Criminal possession of a forged instrument in the second degree is a class D felony.

§ 175.30 Criminal possession of a forged instrument in the first degree

A person is guilty of criminal possession of a forged instrument in the first degree when, with knowledge that it is forged and with intent to defraud, he utters or possesses any forged instrument of a kind specified in section 175.15.

Criminal possession of a forged instrument in the first degree is a class C felony.

§ 175.35 Forgery and criminal possession of a forged instrument; persons liable

A person may not be convicted of both forgery and criminal possession of a forged instrument with respect to the same instrument.

§ 175.40 Criminal possession of forgery devices

A person is guilty of criminal possession of forgery devices when:

1. He makes or possesses with knowledge of its character any plate, die or other device, apparatus, equipment, or article specifically designed or adapted for use in counterfeiting, unlawfully simulating or otherwise forging written instruments; or
2. With intent to use, or to aid or permit another to use, the same for purposes of forgery, he makes or possesses any device, apparatus, equipment or article capable of or adaptable to such use.

Criminal possession of forgery devices is a class D felony.

§ 175.45 Criminal simulation

A person is guilty of criminal simulation when:

1. With intent to defraud, he makes or alters any object in such fashion that it appears to have an antiquity, rarity, source or authorship which it does not in fact possess; or

2. With knowledge of its true character and with intent to defraud, he utters or possesses an object so simulated.

Criminal simulation is a class A misdemeanor.

§ 175.50 Unlawfully using slugs; definitions of terms

The following definitions are applicable to section 175.55 and 175.60:

1. "Coin machine" means a coin box, turnstile, vending machine or other mechanical or electronic device or receptacle designed (a) to receive a coin or bill of a certain denomination or a token made for the purpose, and (b) in return for the insertion or deposit thereof, automatically to offer, to provide, to assist in providing or to permit the acquisition of some property or some public or private service.

2. "Slug" means a metal or other object or article which, by virtue of its size, shape or any other quality, is capable of being inserted, deposited or otherwise used in a coin machine as an improper but effective substitute for a genuine coin, bill or token, and of thereby enabling a person to obtain without valid consideration the property or service sold through the machine.

3. "Value" of a slug means the value it has or would have to a person intending to use it fraudulently in a coin machine, or, in other words, the value of the coin, bill or token for which it is capable of being substituted.

§ 175.55 Unlawfully using slugs in the second degree

A person is guilty of unlawfully using slugs in the second degree when:

1. With intent to defraud the vendor of property or a service sold by means of a coin machine, he inserts, deposits or uses a slug in such machine; or

2. He makes, possesses or disposes of a slug or slugs with intent to enable a person to use it or them fraudulently in a coin machine.

Unlawfully using slugs in the second degree is a class B misdemeanor.

§ 175.60 Unlawfully using slugs in the first degree

A person is guilty of unlawfully using slugs in the first degree when (a) he makes, possesses or disposes of slugs with intent

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to enable a person to use them fraudulently in a coin machine, and
(b) the value of such slugs exceeds one hundred dollars.
Unlawfully using slugs in the first degree is a class E felony.

ARTICLE 180: OFFENSES INVOLVING FALSE
WRITTEN STATEMENTS

Section	
180.00	Falsifying business records; definitions of terms.
180.05	Falsifying business records in the second degree.
180.10	Falsifying business records in the first degree.
180.15	Falsifying business records; defense.
180.20	Tampering with public records in the second degree.
180.25	Tampering with public records in the first degree.
180.30	Offering a false instrument for filing in the second degree.
180.35	Offering a false instrument for filing in the first degree.
180.40	Issuing a false certificate.
180.45	Issuing a false financial statement; definitions of terms.
180.50	Issuing a false financial statement.
180.55	Presenting a false insurance claim.

§ 180.00 Falsifying business records; definitions of terms

The following definitions are applicable to sections 180.05 and 180.10:

1. "Enterprise" means any entity of one or more persons, corporate or otherwise, public or private, engaged in business, commercial, professional, industrial, eleemosynary, social, political or governmental activity.
2. "Business record" means any account, book of accounts, ledger or other writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity.

§ 180.05 Falsifying business records in the second degree

A person is guilty of falsifying business records in the second degree when, with intent to defraud, he:

1. Makes or causes a false entry in the business records of an enterprise; or
2. Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or

3. Omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law or by the nature of his position; or

4. Prevents the making of a true entry or causes the omission thereof in the records of an enterprise.

Falsifying business records in the second degree is a class A misdemeanor.

§ 180.10 Falsifying business records in the first degree

A person is guilty of falsifying business records in the first degree when he commits the crime of falsifying business records in the second degree, and when his intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof.

Falsifying business records in the first degree is a class E felony.

§ 180.15 Falsifying business records; defense

It is an affirmative defense to a prosecution for falsifying business records that the accused was a clerk, bookkeeper or other employee who, without personal profit or gain, merely executed the orders of his employer or of a superior officer or employee generally authorized to direct his activities.

§ 180.20 Tampering with public records in the second degree

A person is guilty of tampering with public records in the second degree when, knowing that he does not have the authority of anyone entitled to grant it, he knowingly removes, mutilates, destroys, conceals, makes a false entry in or falsely alters any record or other written instrument filed, deposited in, or otherwise constituting a record of a public office or public servant.

Tampering with public records in the second degree is a class A misdemeanor.

§ 180.25 Tampering with public records in the first degree

A person is guilty of tampering with public records in the first degree when, knowing that he does not have the authority of anyone entitled to grant it, and with intent to defraud, he knowingly removes, mutilates, destroys, conceals, makes a false entry

in or falsely alters any record or other written instrument filed, deposited in, or otherwise constituting a record of a public office or public servant.

Tampering with public records in the first degree is a class D felony.

§ 180.30 Offering a false instrument for filing in the second degree

A person is guilty of offering a false instrument for filing in the second degree when, knowing that a written instrument contains a false statement or false information, he offers or presents it to a public office or a public servant with the knowledge or belief that it will be filed, registered, recorded or become a part of the records of such public office or public servant.

Offering a false instrument for filing in the second degree is a class A misdemeanor.

§ 180.35 Offering a false instrument for filing in the first degree

A person is guilty of offering a false instrument for filing in the first degree when, knowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any political subdivision thereof, he offers or presents it to a public office or a public servant with the knowledge or belief that it will be filed, registered, recorded or become a part of the records of such public office or public servant.

Offering a false instrument for filing in the first degree is a class E felony.

§ 180.40 Issuing a false certificate

A person is guilty of issuing a false certificate when, being a public servant authorized by law to make and issue official certificates or other official written instruments, he makes and issues such an instrument containing a statement which he knows to be false.

Issuing a false certificate is a class E felony.

§ 180.45 Issuing a false financial statement; definitions of terms

The following definitions are applicable to section 180.50:

1. "False financial statement" means a written instrument which purports to describe the financial condition or ability to pay of some person and which is inaccurate in some material respect.

2. "Intent to defraud" means intent to deprive some person of some direct or indirect financial advantage or benefit, or to obtain such for oneself or another, by means of deceiving some person with respect to one's own or another's financial condition or ability to pay.

§ 180.50 Issuing a false financial statement

A person is guilty of issuing a false financial statement when, with intent to defraud:

1. He knowingly makes a false financial statement or causes such to be made; or

2. He represents in writing that a financial statement respecting a person's financial condition as of a prior date is accurate with respect to such person's current financial condition, whereas he knows that it is materially inaccurate in that respect; or

3. He utters a false financial statement which he knows to be false.

Issuing a false financial statement is a class A misdemeanor.

§ 180.55 Presenting a false insurance claim

A person is guilty of presenting a false insurance claim when, with intent to defraud an insurer with respect to an alleged claim of loss upon a contract of insurance, he presents to the insurer or to an agent thereof a written instrument containing a statement which he knows to be false relating to such claim.

Presenting a false insurance claim is a class A misdemeanor.

**ARTICLE 185: BRIBERY NOT INVOLVING PUBLIC
SERVANTS, AND RELATED OFFENSES**

Section	
185.00	Commercial bribing.
185.05	Commercial bribe receiving.
185.10	Bribery of labor official; definition of term.
185.15	Bribing a labor official.
185.20	Bribe receiving by a labor official.
185.25	Sports bribery; definitions of terms.
185.30	Sports bribing.
185.35	Sports bribe receiving.
185.40	Tampering with a sports contest.
185.45	Rent gouging.

§ 185.00 Commercial bribing

A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.

Commercial bribing is a class B misdemeanor.

§ 185.05 Commercial bribe receiving

An employee, agent or fiduciary is guilty of commercial bribe receiving when, without the knowledge of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs.

Commercial bribe receiving is a class B misdemeanor.

§ 185.10 Bribery of labor official; definition of term

As used in sections 185.15 and 185.20, "labor official," means any duly appointed representative of a labor organization or any duly appointed trustee or representative of an employee welfare trust fund.

§ 185.15 Bribing a labor official

A person is guilty of bribing a labor official when, with intent to influence a labor official in respect to any of his acts, decisions

or duties as such labor official, he confers, or offers or agrees to confer, any benefit upon him.

Bribing a labor official is a class D felony.

§ 185.20 Bribe receiving by a labor official

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

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

§ 185.25 Sports bribery; definitions of terms

The following definitions are applicable to sections 185.30, 185.35 and 185.40:

1. "Sports contest" means any professional or amateur sport or athletic game or contest viewed by the public.
2. "Sports participant" means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.
3. "Sports official" means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest.

§ 185.30 Sports bribing

A person is guilty of sports bribing when he:

1. Confers, or offers or agrees to confer, any benefit upon a sports participant with intent to influence him not to give his best efforts in a sports contest; or
2. Confers or offers or agrees to confer any benefit upon a sports official with intent to influence him to perform his duties improperly.

Sports bribing is a class D felony.

§ 185.35 Sports bribe receiving

A person is guilty of sports bribe receiving when:

1. Being a sports participant, he accepts, agrees to accept or solicits any benefit from another person upon an understanding that he will thereby be influenced not to give his best efforts in a sports contest; or
2. Being a sports official, he accepts, agrees to accept or solicits any benefit from another person upon an understanding that he will perform his duties improperly.

Sports bribe receiving is a class E felony.

§ 185.40 Tampering with a sports contest

A person is guilty of tampering with a sports contest when, with intent to influence the outcome of a sports contest, he tampers with any sports participant, sports official or with any animal or equipment or other thing involved in the conduct or operation of a sports contest in a manner contrary to the rules and usages purporting to govern such a contest.

Tampering with a sports contest is a class A misdemeanor.

§ 185.45 Rent gouging

A person is guilty of rent gouging when, in connection with the leasing, rental or use of real property, he directly or indirectly accepts, agrees to accept, demands or solicits from a person some consideration of value, in addition to lawful rental and other lawful charges, upon a representation or understanding that the furnishing of such consideration will increase the possibility that some person may obtain the lease, rental or use of such property, or that a failure to furnish it will decrease the possibility that some person may obtain the same.

Rent gouging is a class A misdemeanor.

ARTICLE 190: FRAUDS ON CREDITORS

Section

- 190.00 Fraud in insolvency.
190.05 Fraud involving a security interest.
190.10 Fraudulent disposition of mortgaged property.
190.15 Fraudulent disposition of property subject to a conditional sale contract.

§ 190.00 Fraud in insolvency

1. As used in this section, "administrator" means an assignee or trustee for the benefit of creditors, a liquidator, a receiver or any other person entitled to administer property for the benefit of creditors.

2. A person is guilty of fraud in insolvency when, with intent to benefit himself or another or to injure or defraud any creditors and knowing that proceedings have been or are about to be instituted for the appointment of an administrator, or knowing that a composition agreement or other arrangement for the benefit of creditors has been or is about to be made, he

(a) conveys, transfers, removes, conceals, destroys, encumbers or otherwise disposes of any part of or any interest in the debtor's estate; or

(b) obtains any substantial part of or interest in the debtor's estate; or

(c) presents to any creditor or to the administrator any writing or record relating to the debtor's estate knowing the same to contain a false statement of material matter; or

(d) misrepresents or refuses to disclose to the administrator the existence, amount or location of any part of or any interest in the debtor's estate, or any other information which he is legally required to furnish to such administrator.

Fraud in insolvency is a class A misdemeanor.

§ 190.05 Fraud involving a security interest

A person is guilty of fraud involving a security interest, when, having executed a security agreement creating a security

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interest in personal property securing a monetary obligation owed to a secured party, and:

(a) having under the security agreement both the right of sale or other disposition of the property and the duty to account to the secured party for the proceeds of disposition, he sells or otherwise disposes of the property and wrongfully fails to account to the secured party for the proceeds of disposition; or

(b) having under the security agreement no right of sale or other disposition of the property, he knowingly secretes, withholds or disposes of such property in violation of the security agreement.

Fraud involving a security interest is a class A misdemeanor.

§ 190.10 **Fraudulent disposition of mortgaged property**

A person is guilty of fraudulent disposition of mortgaged property, when, having theretofore executed a mortgage of real or personal property or any instrument intended to operate as such, he sells, assigns, exchanges, secretes, injures, destroys or otherwise disposes of any part of the property, upon which the mortgage or other instrument is at the time a lien, with intent thereby to defraud the mortgagee or a purchaser thereof.

Fraudulent disposition of mortgaged property is a class A misdemeanor.

§ 190.15 **Fraudulent disposition of property subject to a conditional sale contract**

A person is guilty of fraudulent disposition of property subject to a conditional sale contract when, prior to the performance of the condition of a conditional sale contract and being the buyer or any legal successor in interest of the buyer, he sells, assigns, mortgages, exchanges, secretes, injures, destroys or otherwise disposes of such goods under claim of full ownership, with intent thereby to defraud another.

Fraudulent disposition of property subject to a conditional sale contract is a class A misdemeanor.

ARTICLE 195: OTHER FRAUDS

Section

195.00	Issuing a bad check; definitions of terms.
195.05	Issuing a bad check.
195.10	Issuing a bad check; presumptions.
195.15	Issuing a bad check; defenses.
195.20	False advertising.
195.25	Criminal impersonation.
195.30	Concealing a will.
195.35	Misconduct by corporate director.
195.40	Misconduct at corporate election.

§ 195.00 Issuing a bad check; definitions of terms

The following definitions are applicable to section 195.05, 195.10 and 195.15:

1. "Check" means any check, draft or similar sight order for the payment of money which is not post-dated with respect to the time of utterance.

2. "Drawer" of a check means a person whose name appears thereon as the primary obligor, whether the actual signature be that of himself or of a person purportedly authorized to draw the check in his behalf.

3. "Representative drawer" means a person who signs a check as drawer in a representative capacity or as agent of the person whose name appears thereon as the principal drawer or obligor.

4. "Utter." One "utters" a check when, as a drawer or representative drawer thereof, he delivers it or causes it to be delivered to a person who thereby acquires a right against the drawer with respect to such check. One who draws a check with intent that it be so delivered is deemed to have uttered it if the delivery occurs.

5. "Pass." One "passes" a check when, being a payee, holder or possessor of a check which previously has been or purports to have been drawn and uttered by another, he delivers it, for a purpose other than collection, to a third party who thereby acquires a right with respect thereto.

6. "Funds" means money or credit.

7. "Insufficient funds." A drawer has "insufficient funds" with a drawee to cover a check when he has no funds or account

whatever, or funds in an amount less than that of the check; and a check dishonored for "no account" shall also be deemed to have been dishonored for "insufficient funds."

§ 195.05 Issuing a bad check

A person is guilty of issuing a bad check when:

1. (a) As a drawer or representative drawer, he utters a check knowing at the time of utterance that he or his principal, as the case may be, does not then have sufficient funds with the drawee to cover it, and (b) he intends or believes at the time of utterance that payment will be refused by the drawee upon presentation, and (c) payment is refused by the drawee upon presentation; or
2. (a) He passes a check knowing that the drawer thereof does not then have sufficient funds with the drawee to cover it, and (b) he then intends or believes that payment will be refused by the drawee upon presentation, and (c) payment is refused by the drawee upon presentation.

Issuing a bad check is a class B misdemeanor.

§ 195.10 Issuing a bad check; presumptions

1. When the drawer of a check has insufficient funds with the drawee to cover it at the time of utterance, the subscribing drawer or representative drawer, as the case may be, is presumed to know of such insufficiency.
2. A subscribing drawer or representative drawer of an ultimately dishonored check is presumed to have intended or believed that the check would be dishonored upon presentation when:
 - (a) The drawer had no account with the drawee at the time of utterance; or
 - (b) (i) The drawer had insufficient funds with the drawee at the time of utterance, and (ii) the check was presented to the drawee for payment not more than thirty days after the date of utterance, and (iii) the drawer had insufficient funds with the drawee at the time of presentation.
3. Dishonor of a check by the drawee and insufficiency of the drawer's funds at the time of presentation may properly be proven by introduction in evidence of a notice of protest of the check, or of a certificate under oath of an authorized representative of the drawee declaring the dishonor and insufficiency,

and such proof shall constitute presumptive evidence of such dishonor and insufficiency.

§ 195.15 Issuing a bad check; defenses

It is an affirmative defense to a prosecution for issuing a bad check that:

1. The defendant or a person acting in his behalf made good the amount of the check within ten days after dishonor by the drawee; or
2. The defendant, in acting as a representative drawer, did so as an employee merely executing the instructions of his employer or of a superior officer or employee of his organization.

§ 195.20 False advertising

1. A person is guilty of false advertising when, with intent to promote the sale or to increase the consumption of property or services, he makes or causes to be made a false or misleading statement in any advertisement addressed to the public or to a substantial segment thereof.

2. It is an affirmative defense to a prosecution under this section, which must be established by a preponderance of the evidence, that the allegedly false or misleading statement was not knowingly or recklessly made.

False advertising is a class A misdemeanor.

§ 195.25 Criminal impersonation

A person is guilty of criminal impersonation when he:

1. Impersonates another and does an act in such assumed character with intent to gain a benefit for himself or another or to injure or defraud another; or

2. Pretends to be a representative of some person or organization and does an act in such pretended capacity with intent to gain a benefit for himself or another or to injure or defraud another; or

3. Pretends to be a public servant or a person performing a governmental function, or wears or displays without authority any uniform or badge by which such public servant or person is lawfully distinguished, with intent to induce another to submit

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to such pretended official authority or otherwise to act in reliance upon that pretense.

Criminal impersonation is a class A misdemeanor.

§ 195.30 Concealing a will

A person is guilty of concealing a will when, with intent to defraud, he conceals, secretes, suppresses, mutilates or destroys a will, codicil or other testamentary instrument.

Concealing a will is a class E felony.

§ 195.35 Misconduct by corporate director

A director of a stock corporation is guilty of misconduct by corporate director when he knowingly concurs in any vote or act of the directors of such corporation by which it is intended:

1. To make a dividend except from surplus and in the manner as provided by law; or
2. To divide, withdraw or in any manner pay to any stockholder any part of the capital stock of the corporation except in the manner as provided by law; or
3. To discount or receive any note or other evidence of debt in payment of an installment of capital stock actually called in and required to be paid, or with intent to provide the means of making such payment; or
4. To receive or discount any note or other evidence of debt with intent to enable any stockholder to withdraw any part of the money paid in by him or his stock; or
5. To apply any portion of the funds of such corporation, directly or indirectly, to the purchase of shares of its own stock, except from surplus and in the manner as provided by law; or
6. To issue any increase of its capital stock beyond the amount of the capital stock thereof duly authorized by law.

Misconduct by corporate director is a class B misdemeanor.

§ 195.40 Misconduct at corporate election

A person is guilty of misconduct at corporate election when:

1. Being entitled to vote at any meeting of the stockholders or bondholders or both of a stock corporation, he sells his vote or issues a proxy to vote to any person for any sum of money or other consideration, except as expressly authorized by law; or

2. Acting as an inspector of election at any such meeting, he violates an oath taken by him in pursuance of law as such inspector, or violates the provisions of an oath required by law to be taken by him as such inspector.

Misconduct at corporate election is a class B misdemeanor.

TITLE L. OFFENSES AGAINST PUBLIC ADMINISTRATION

ARTICLE 200: OFFICIAL MISCONDUCT AND OBSTRUCTION OF PUBLIC SERVANTS GENERALLY

Section

- 200.00 Official misconduct.
200.05 Obstructing governmental administration.
200.10 Refusing to aid a peace officer.
200.15 Obstructing firefighting operations.

§ 200.00 Official misconduct

A public servant is guilty of official misconduct when, with intent to obtain a benefit for himself, or to confer a benefit upon another person, or wrongfully to injure or deprive another person of a benefit:

1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or
2. He consciously refrains from performing a duty which he knows is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a class A misdemeanor.

§ 200.05 Obstructing governmental administration

A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act.

Obstructing governmental administration is a class A misdemeanor.

§ 200.10 Refusing to aid a peace officer

A person is guilty of refusing to aid a peace officer when, upon command by a peace officer identifiable or identified to him as such, he unreasonably refuses or fails to aid such peace officer (a) in effectuating or securing an arrest, or (b) in preventing the commission by another of any offense.

Refusing to aid a peace officer is a class B misdemeanor.

§ 200.15 Obstructing firefighting operations

A person is guilty of obstructing firefighting operations when he intentionally and unreasonably (a) obstructs or impairs the efforts of any fireman in extinguishing a fire, or (b) prevents or dissuades another from extinguishing or helping to extinguish a fire.

Obstructing firefighting operations is a class B misdemeanor.

ARTICLE 205: BRIBERY INVOLVING PUBLIC SERVANTS AND RELATED OFFENSES

Section	
205.00	Bribery.
205.05	Bribe receiving.
205.10	Bribery; no defense.
205.15	Rewarding official misconduct.
205.20	Receiving reward for official misconduct.
205.25	Giving unlawful gratuities.
205.30	Receiving unlawful gratuities.
205.35	Bribe giving and bribe receiving for public office; definition of term.
205.40	Bribe giving for public office.
205.45	Bribe receiving for public office.

§ 205.00 Bribery

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

Bribery is a class D felony.

§ 205.05 Bribe receiving

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

Bribe receiving is a **class D felony**.

§ 205.10 Bribery; no defense

It is no defense to a prosecution under sections 205.00 and 205.05 that the public servant sought to be influenced was not qualified to act in the desired way, whether because he lacked authority or for any other reason.

§ 205.15 Rewarding official misconduct

A person is guilty of rewarding official misconduct when he confers, or offers or agrees to confer, any benefit upon a public servant for having violated his duty as a public servant.

Rewarding official misconduct is a **class E felony**.

§ 205.20 Receiving reward for official misconduct

A public servant is guilty of receiving reward for official misconduct when he accepts, agrees to accept or solicits any benefit from another person for having violated his duty as a public servant.

Receiving reward for official misconduct is a **class E felony**.

§ 205.25 Giving unlawful gratuities

A person is guilty of giving unlawful gratuities when he knowingly confers, or offers or agrees to confer, any money or other property upon a public servant for performing or having performed an official service which such public servant's duties required him to perform without special or additional compensation.

Giving unlawful gratuities is a **class A misdemeanor**.

§ 205.30 Receiving unlawful gratuities

A public servant is guilty of receiving unlawful gratuities when he accepts, agrees to accept or solicits any money or other

property for performing or having performed an official service which his duties required him to perform without special or additional compensation.

Receiving unlawful gratuities is a class A misdemeanor.

§ 205.35 Bribe giving and bribe receiving for public office; definition of term

As used in sections 205.40 and 205.45, "party officer" means a person who holds any position or office in a political party, whether by election, appointment or otherwise.

§ 205.40 Bribe giving for public office

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

Bribe giving for public office is a class D felony.

§ 205.45 Bribe receiving for public office

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

Bribe receiving for public office is a class D felony.

**ARTICLE 210: ESCAPE AND OTHER OFFENSES
RELATING TO CUSTODY**

- Section**
- 210.00 Escape and other offenses relating to custody; definitions of terms.
 - 210.05 Escape in the third degree.
 - 210.10 Escape in the second degree.
 - 210.15 Escape in the first degree.
 - 210.20 Harboring an escapee in the second degree.
 - 210.25 Harboring an escapee in the first degree.
 - 210.30 Promoting prison contraband in the second degree.

Section

- 210.35 Promoting prison contraband in the first degree.
210.40 Resisting arrest in the second degree.
210.45 Resisting arrest in the first degree.
210.50 Bail jumping in the second degree.
210.55 Bail jumping in the first degree.

§ 210.00 **Escape and other offenses relating to custody;
definitions of terms**

The following definitions are applicable to this article:

1. "Detention facility" means any place used for the confinement of a person (a) charged with or convicted of an offense, or (b) charged with being or adjudicated a youthful offender, wayward minor or juvenile delinquent, or (c) held for extradition or as a material witness, or (d) otherwise confined pursuant to an order of a court.

2. "Custody" means confinement in a detention facility or restraint under arrest.

3. "Contraband" means any article or thing which a person confined in a detention facility is prohibited from obtaining or possessing by statute, rule, regulation or order.

4. "Dangerous contraband" means contraband which is capable of such use as may endanger the safety or security of a detention facility or any person therein.

§ 210.05 **Escape in the third degree**

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

1. He unlawfully escapes from custody; or
2. He aids another to escape unlawfully from custody; or
3. He unlawfully and knowingly releases or removes another from custody; or
4. Being a public servant having duties relating to custody, he knowingly permits another to escape unlawfully from custody.

Escape in the third degree is a class A misdemeanor.

§ 210.10 **Escape in the second degree**

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

1. Being charged with or convicted of a felony, he unlawfully escapes from custody; or

2. He aids a person charged with or convicted of a felony to escape unlawfully from custody; or
3. He unlawfully and knowingly releases or removes from custody a person charged with or convicted of a felony; or
4. Being a public servant having duties relating to custody, he knowingly permits a person charged with or convicted of a felony to escape unlawfully from custody.

Escape in the second degree is a class E felony.

§ 210.15 Escape in the first degree

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

1. Being convicted of a felony, he unlawfully escapes from a state prison; or
2. He aids a person convicted of a felony to escape unlawfully from a state prison; or
3. He unlawfully and knowingly releases or removes from a state prison a person convicted of a felony; or
4. Being a public servant having duties relating to custody, he knowingly permits a person convicted of a felony to escape unlawfully from a state prison.

Escape in the first degree is a class D felony.

§ 210.20 Harboring an escapee in the second degree

A person is guilty of harboring an escapee in the second degree when, with intent to prevent, hinder or delay the apprehension of a person who has unlawfully escaped from custody, he harbors or conceals such person.

Harboring an escapee in the second degree is a class A misdemeanor.

§ 210.25 Harboring an escapee in the first degree

A person is guilty of harboring an escapee in the first degree when, with intent to prevent, hinder or delay the apprehension of a person charged with or convicted of a felony who has unlawfully escaped from custody, he harbors or conceals such person.

Harboring an escapee in the first degree is a class E felony.

§ 210.30 Promoting prison contraband in the second degree

A person is guilty of promoting prison contraband in the second degree when:

1. He knowingly and unlawfully introduces any contraband into a detention facility; or
2. Being a person confined in a detention facility, he knowingly and unlawfully makes, obtains or has in his possession any contraband.

Promoting prison contraband in the second degree is a class A misdemeanor.

§ 210.35 Promoting prison contraband in the first degree

A person is guilty of promoting prison contraband in the first degree when:

1. He knowingly and unlawfully introduces dangerous contraband into a detention facility; or
2. Being a person confined in a detention facility, he knowingly and unlawfully makes, obtains or has in his possession any dangerous contraband.

Promoting prison contraband in the first degree is a class D felony.

§ 210.40 Resisting arrest in the second degree

A person is guilty of resisting arrest in the second degree when he intentionally prevents or attempts to prevent a peace officer from effecting a lawful arrest of himself or another person.

Resisting arrest in the second degree is a class A misdemeanor.

§ 210.45 Resisting arrest in the first degree

A person is guilty of resisting arrest in the first degree when he intentionally prevents or attempts to prevent a peace officer from effecting a lawful arrest of himself or another person, by means which create a substantial risk of physical injury to such officer or to any other person, or which justify or require the use of substantial force to effect the arrest.

Resisting arrest in the first degree is a class E felony.

§ 210.50 Bail jumping in the second degree

A person is guilty of bail jumping in the second degree when, having been released from custody, with or without bail, by court

order or by other lawful authority, upon condition that he will subsequently appear personally in connection with a criminal action or proceeding, he fails without lawful excuse to appear personally.

Bail jumping in the second degree is a class A misdemeanor.

§ 210.55 Bail jumping in the first degree

A person is guilty of bail jumping in the first degree when, having been released from custody, with or without bail, by court order or by other lawful authority, upon condition that he will subsequently appear personally in connection with a charge against him of committing a felony, he fails without lawful excuse to appear personally.

Bail jumping in the first degree is a class E felony.

ARTICLE 215: PERJURY AND RELATED OFFENSES

Section

- 215.00 Perjury and related offenses; definitions of terms.
- 215.05 Perjury in the third degree.
- 215.10 Perjury in the second degree.
- 215.15 Perjury in the first degree.
- 215.20 Perjury; pleading and proof where inconsistent statements involved.
- 215.25 Perjury; defense.
- 215.30 Perjury; no defense.
- 215.35 Making an apparently sworn false statement in the second degree.
- 215.40 Making an apparently sworn false statement in the first degree.
- 215.45 Making a punishable false written statement.
- 215.50 Perjury, making an apparently sworn false statement, making a punishable false written statement; requirement of corroboration.
- 215.55 Subornation of perjury in the third degree.
- 215.60 Subornation of perjury in the second degree.
- 215.65 Subornation of perjury in the first degree.

§ 215.00 Perjury and related offenses; definitions of terms

The following definitions are applicable to this article:

1. "Oath" includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated.
2. "Swear" means to state under oath.

3. "Testimony" means an oral statement made under oath in a proceeding before any court, body, agency, public servant or other person authorized by law to conduct such proceeding and to administer the oath or cause it to be administered.

4. "Oath required by law." An affidavit, deposition or other subscribed written instrument is one for which an "oath is required by law" when, absent an oath or swearing thereto, it does not or would not, according to statute or appropriate regulatory provisions, have legal efficacy in a court of law or before any public or government body, agency or public servant to whom it is or might be submitted.

5. "Swear falsely." One "swears falsely" when he intentionally makes a false statement which he does not believe to be true, (a) while giving testimony, or (b) under oath in a subscribed written instrument.

A false swearing in a subscribed written instrument shall not be deemed complete until the instrument is delivered by its subscriber, or by someone acting in his behalf, to another person with intent that it be uttered or published as true.

6. "Attesting officer" means any notary public or other person officially authorized to administer oaths in connection with affidavits, depositions and other subscribed written instruments, and to certify that the subscriber of such an instrument has appeared before him and has sworn to the truth of the contents thereof.

7. "Jurat" means a clause affixed by an attesting officer to a subscribed written instrument certifying, among other matters, that the subscriber has appeared before him and sworn to the truth of the contents thereof.

§ 215.05 Perjury in the third degree

A person who swears falsely is guilty of perjury in the third degree.

Perjury in the third degree is a class A misdemeanor.

§ 215.10 Perjury in the second degree

A person who swears falsely is guilty of perjury in the second degree when his false statement is (a) made in a subscribed written instrument for which an oath is required by law, and (b) made with intent to mislead a public servant in the performance of his official functions, and (c) material to the action, proceeding or matter involved.

Perjury in the second degree is a class E felony.

§ 215.15 Perjury in the first degree

A person who swears falsely is guilty of perjury in the first degree when the false statement (a) consists of testimony and (b) is material to the action, proceeding or matter in which it is made.

Perjury in the first degree is a class D felony.

§ 215.20 Perjury; pleading and proof where inconsistent statements involved

Where a person has made two statements under oath which are inconsistent to the degree that one of them is necessarily false, where the circumstances are such that each statement, if false, is perjuriously so, and where each statement was made within the jurisdiction of this state and within the period of the statute of limitations for the crime charged, the people's inability to establish specifically which of the two statements is the false one does not preclude a prosecution for perjury, and such prosecution may be conducted as follows:

1. The indictment or information may set forth the two statements and, without designating either, charge that one of them is false and perjuriously made.
2. The falsity of one or the other of the two statements may be established by proof or a showing of their irreconcilable inconsistency.
3. The highest degree of perjury of which the defendant may be convicted is determined by hypothetically assuming each statement to be false and perjurious. If under such circumstances perjury of the same degree would be established by the making of each statement, the defendant may be convicted of that degree at most. If perjury of different degrees would be established by the making of the two statements, the defendant may be convicted of the lesser degree at most.

§ 215.25 Perjury; defense

It is an affirmative defense to a prosecution for perjury that the defendant retracted his false statement in the course of the proceeding in which it was made before such false statement substantially affected the proceeding and before it became manifest that its falsity was or would be exposed.

§ 215.30 Perjury; no defense

It is no defense to a prosecution for perjury:

1. That the defendant was not competent to make the false statement alleged; or
2. That the defendant mistakenly believed the false statement to be immaterial; or
3. That the oath was administered or taken in an irregular manner or that the authority or jurisdiction of the attesting officer who administered the oath was defective, if such defect was excusable under any statute or rule of law.

§ 215.35 Making an apparently sworn false statement in the second degree

A person is guilty of making an apparently sworn false statement in the second degree when (a) he subscribes a written instrument knowing that it contains a statement which is in fact false and which he does not believe to be true, and (b) he intends or believes that such instrument will be uttered or delivered with a jurat affixed thereto, and (c) such instrument is uttered or delivered with a jurat affixed thereto.

Making an apparently sworn false statement in the second degree is a class A misdemeanor.

§ 215.40 Making an apparently sworn false statement in the first degree

A person is guilty of making an apparently sworn false statement in the first degree when he commits the crime of making an apparently sworn false statement in the second degree under circumstances which would render him guilty of perjury in the second degree as defined in section 215.10 if the written instrument in question were actually sworn to.

Making an apparently sworn false statement in the first degree is a class E felony.

§ 215.45 Making a punishable false written statement

A person is guilty of making a punishable false written statement when he knowingly makes a false statement which he does not believe to be true, in a written instrument bearing a legally

authorized form notice to the effect that false statements made therein are punishable.

Making a punishable false written statement is a class A misdemeanor.

§ 215.50 Perjury, making an apparently sworn false statement, making a punishable false written statement; requirement of corroboration

In any prosecution for perjury, other than one pursuant to section 215.20, or for making an apparently sworn false statement, or for making a punishable false written statement, falsity of a statement may not be established by the uncorroborated testimony of a single witness.

§ 215.55 Subornation of perjury in the third degree

A person is guilty of subornation of perjury in the third degree when he intentionally causes another person to swear falsely.

Subornation of perjury in the third degree is a class A misdemeanor.

§ 215.60 Subornation of perjury in the second degree

A person is guilty of subornation of perjury in the second degree when, with intent that another person shall swear falsely, he causes such person to commit the crime of perjury in the second degree.

Subornation of perjury in the second degree is a class E felony.

§ 215.65 Subornation of perjury in the first degree

A person is guilty of subornation of perjury in the first degree when, with intent that another person shall swear falsely, he causes such person to commit the crime of perjury in the first degree.

Subornation of perjury in the first degree is a class D felony.

**ARTICLE 220: OTHER OFFENSES RELATING TO
JUDICIAL AND OTHER PROCEEDINGS****Section**

- 220.00 Bribing a witness.
- 220.05 Bribe receiving by a witness.
- 220.10 Tampering with a witness.
- 220.15 Bribing a juror.
- 220.20 Bribe receiving by a juror.
- 220.25 Tampering with a juror.
- 220.30 Misconduct by a juror.
- 220.35 Tampering with physical evidence; definitions of terms.
- 220.40 Tampering with physical evidence.
- 220.45 Compounding a crime.
- 220.50 Criminal contempt.
- 220.55 Criminal contempt; prosecution and punishment.
- 220.60 Criminal contempt of the legislature.
- 220.65 Criminal contempt of a temporary state commission.
- 220.70 Unlawful grand jury disclosure.
- 220.75 Unlawful disclosure of an indictment.

§ 220.00 Bribing a witness

A person is guilty of bribing a witness when he confers, or offers or agrees to confer, any benefit upon a witness or a person about to be called as a witness in any action or proceeding upon any agreement or understanding that (a) the testimony of such witness will thereby be influenced, or (b) such witness will absent himself from, or otherwise avoid or seek to avoid appearing or testifying at, such action or proceeding.

Bribing a witness is a **class D felony**.

§ 220.05 Bribe receiving by a witness

A witness or a person about to be called as a witness in any action or proceeding is guilty of bribe receiving by a witness when he accepts, agrees to accept or solicits any benefit from another person upon any agreement or understanding that (a) his testimony will thereby be influenced, or (b) he will absent himself from, or otherwise avoid or seek to avoid appearing or testifying at, such action or proceeding.

Bribe receiving by a witness is a **class D felony**.

§ 220.10 Tampering with a witness

A person is guilty of tampering with a witness when, knowing that a person is or is about to be called as a witness in an action or proceeding, (a) he wrongfully induces or attempts to induce such person to absent himself from, or otherwise to avoid or seek to avoid appearing or testifying at, such action or proceeding, or (b) he knowingly makes any false statement or practices any fraud or deceit with intent to affect the testimony of such person.

Tampering with a witness is a class A misdemeanor.

§ 220.15 Bribing a juror

A person is guilty of bribing a juror when he confers, or offers or agrees to confer, any benefit upon a juror upon any agreement or understanding that such juror's vote, opinion, judgment, decision or other action as a juror will thereby be influenced.

Bribing a juror is a class D felony.

§ 220.20 Bribe receiving by a juror

A juror is guilty of bribe receiving by a juror when he accepts, agrees to accept or solicits any benefit from another person upon any agreement or understanding that his vote, opinion, judgment, decision or other action as a juror will thereby be influenced.

Bribe receiving by a juror is a class D felony.

§ 220.25 Tampering with a juror

A person is guilty of tampering with a juror when, with intent to influence the outcome of an action or proceeding, he communicates with a juror in such action or proceeding, except as authorized by law.

Tampering with a juror is a class A misdemeanor.

§ 220.30 Misconduct by a juror

A juror is guilty of misconduct by a juror when, in relation to an action or proceeding pending or about to be brought before him, he makes a promise to give a vote, opinion, judgment, decision, or report for or against any party to such action or proceeding.

Misconduct by a juror is a class A misdemeanor.

§ 220.35 Tampering with physical evidence; definitions of terms

The following definitions are applicable to section 220.40:

1. "Physical evidence" means any article, object, document, record or other thing of physical substance which is or is about to be produced or used as evidence in an official proceeding.
2. "Official proceeding" means any action or proceeding conducted by or before a legally constituted judicial, legislative, administrative or other governmental agency or official, in which evidence may properly be received.

§ 220.40 Tampering with physical evidence

A person is guilty of tampering with physical evidence when:

1. With intent that it be used or introduced in an official proceeding or a prospective official proceeding, he (a) knowingly makes, devises or prepares false physical evidence, or (b) produces or offers such evidence at such a proceeding knowing it to be false; or
2. Believing that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use, he suppresses it or causes it to be suppressed by any act of concealment, alteration or destruction, or by employing force, intimidation or deception against any person.

Tampering with physical evidence is a class E felony.

§ 220.45 Compounding a crime

1. A person is guilty of compounding a crime when:

- (a) He accepts, agrees to accept or solicits any benefit for himself or another upon an agreement or understanding that he will refrain from initiating a prosecution for a crime; or
- (b) He confers or offers or agrees to confer any benefit upon another upon an agreement or understanding that such other person will refrain from initiating a prosecution for a crime.

2. It is an affirmative defense to a prosecution under this section that the benefit did not exceed an amount which the actor reasonably believed to be due as restitution or indemnification for harm caused by the crime.

Compounding a crime is a class A misdemeanor.

§ 220.50 Criminal contempt

A person is guilty of criminal contempt when he commits any of the following acts:

1. Disorderly, contemptuous, or insolent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings or to impair the respect due to its authority; or
2. Breach of the peace, noise, or other disturbance, directly tending to interrupt a court's proceedings; or
3. Intentional disobedience or resistance to the lawful process or other mandate of a court except in cases involving or growing out of labor disputes as defined by subdivision two of section seven hundred fifty-three-a of the judiciary law; or
4. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory; or
5. Knowingly publishing a false or grossly inaccurate report of a court's proceeding; or
6. Intentional failure to obey any mandate, process or notice, issued pursuant to articles sixteen, seventeen, eighteen, eighteen-a or eighteen-b of the judiciary law, or to rules adopted pursuant to any such statute or to any special statute establishing commissioners of jurors and prescribing their duties or who refuses to be sworn as provided therein; or
7. On or along a public street or sidewalk within a radius of two hundred feet of any building established as a courthouse, he calls aloud, shouts, holds or displays placards or signs containing written or printed matter, concerning the conduct of a trial being held in such courthouse or the character of the court or jury engaged in such trial or calling for or demanding any specified action or determination by such court or jury in connection with such trial.

Criminal contempt is a class B misdemeanor.

§ 220.55 Criminal contempt; prosecution and punishment

Adjudication for criminal contempt under subdivision A of section seven hundred fifty of the judiciary law shall not bar a prosecution for the crime of contempt under section 220.50 based upon the same conduct but, upon conviction thereunder, the court, in sentencing the defendant shall take into consideration the previous punishment.

§ 220.60 Criminal contempt of the legislature

A person is guilty of criminal contempt of the legislature when, having been duly subpoenaed to attend as a witness before either house of the legislature or before any committee thereof:

1. He fails or refuses to attend without lawful excuse; or
2. He refuses to be sworn; or
3. He refuses to answer any material and proper question; or
4. He refuses, after reasonable notice, to produce books, papers, or documents in his possession or under his control which constitute material and proper evidence.

Criminal contempt of the legislature is a class B misdemeanor.

§ 220.65 Criminal contempt of a temporary state commission

A person is guilty of criminal contempt of a temporary state commission when, having been duly subpoenaed to attend as a witness at an investigation or hearing before a temporary state commission, he fails or refuses to attend without lawful excuse.

Criminal contempt of a temporary state commission is a class B misdemeanor.

§ 220.70 Unlawful grand jury disclosure

A person is guilty of unlawful grand jury disclosure when, being a grand juror, a public prosecutor, a grand jury stenographer, a grand jury interpreter, a peace officer accompanying or guarding a witness in a grand jury proceeding, or a clerk, attendant, warden or other public servant having official duties in or about a grand jury room or proceeding, he intentionally discloses to another the nature or substance of any grand jury testimony, or any decision, result or other matter attending a grand jury proceeding which is legally cloaked in secrecy, except in the proper discharge of official duties or upon written order of the court.

Unlawful grand jury disclosure is a class B misdemeanor.

§ 220.75 Unlawful disclosure of an indictment

A public servant is guilty of unlawful disclosure of an indictment when, except in the proper discharge of his official duties,

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he intentionally discloses the fact that an indictment has been found or filed before the accused person is in custody.
Unlawful disclosure of an indictment is a class B misdemeanor.

TITLE M. OFFENSES AGAINST PUBLIC HEALTH AND MORALS

ARTICLE 225: NARCOTICS OFFENSES

Section	
225.00	Narcotics offenses; definitions of terms.
225.05	Criminally possessing narcotics in the third degree.
225.10	Criminally possessing narcotics in the second degree.
225.15	Criminally possessing narcotics in the first degree.
225.20	Criminally possessing narcotics; presumptions.
225.25	Criminally selling narcotics in the second degree.
225.30	Criminally selling narcotics in the first degree.

§ 225.00 Narcotics offenses; definitions of terms

The following definitions are applicable to this article:

1. "Narcotic drug" means any drug or drugs, article or substance declared to be "narcotic drugs" in section three thousand three hundred one of the public health law.
2. "Sell" means to sell, exchange, give or dispose of to another, or to offer or agree to do the same.
3. "Unlawfully" means in violation of article thirty-three of the public health law.
4. "Ounce" means an avoirdupois ounce as applied to solids and semi-solids, and a fluid ounce as applied to liquids.

§ 225.05 Criminally possessing narcotics in the third degree

A person is guilty of criminally possessing narcotics in the third degree when he knowingly and unlawfully possesses a narcotic drug.

Criminally possessing narcotics in the third degree is a class A misdemeanor.

§ 225.10 Criminally possessing narcotics in the second degree

A person is guilty of criminally possessing narcotics in the second degree when he knowingly and unlawfully possesses a narcotic drug:

1. With intent to sell the same; or
2. Consisting of (a) twenty-five or more cigarettes containing cannabis; or (b) one or more preparations, compounds, mixtures, or substances, of an aggregate weight of (i) one-eighth ounce or more, containing one per centum or more of the respective alkaloids or salts of heroin, morphine, or cocaine, or (ii) one-quarter ounce or more, containing any cannabis, or (iii) one-half ounce or more, containing raw or prepared opium, or (iv) one-half ounce or more containing one or more of any of the narcotic drugs as defined in the public health law.

Criminally possessing narcotics in the second degree is a class D felony.

§ 225.15 Criminally possessing narcotics in the first degree

A person is guilty of criminally possessing narcotics in the first degree when he knowingly and unlawfully possesses a narcotic drug consisting of (a) one hundred or more cigarettes containing cannabis; or (b) one or more preparations, compounds, mixtures or substances, of an aggregate weight of (i) one or more ounces, containing one per centum or more of the respective alkaloids or salts of heroin, morphine or cocaine, or (ii) one or more ounces containing any cannabis, or (iii) two or more ounces containing raw or prepared opium, or (iv) two or more ounces containing one or more than one of any of the narcotic drugs as defined in the public health law.

Criminally possessing narcotics in the first degree is a class C felony.

§ 225.20 Criminally possessing narcotics; presumptions

The presence of a narcotic drug in an automobile, other than a public omnibus, is presumptive evidence of knowing and unlawful possession thereof by each and every person in the automobile at the time such narcotic drug was found; except that such presumption does not apply (a) to a duly licensed operator of an automobile who is at the time operating it for hire in the

lawful and proper pursuit of his trade, or (b) to any person in the automobile if one of them, having obtained the drug and not being under duress, is authorized to possess it and such drug is in the same container as when he received possession thereof.

§ 225.25 Criminally selling narcotics in the second degree

A person is guilty of criminally selling narcotics in the second degree when he knowingly and unlawfully sells a narcotic drug.

Criminally selling narcotics in the second degree is a class C felony.

§ 225.30 Criminally selling narcotics in the first degree

A person is guilty of criminally selling narcotics in the first degree when he knowingly and unlawfully sells a narcotic drug to a person less than twenty-one years old.

Criminally selling narcotics in the first degree is a class B felony.

ARTICLE 230: GAMBLING OFFENSES

Section

- 230.00 Gambling offenses; definitions of terms.
- 230.05 Promoting gambling.
- 230.10 Feloniously promoting gambling.
- 230.15 Possession of gambling records.
- 230.20 Possession of gambling devices.
- 230.25 Lottery offenses; no defense.
- 230.30 Gambling offenses; presumptions.

§ 230.00 Gambling offenses; definitions of terms

The following definitions are applicable to this article:

1. "Contest of chance" means any contest, game, gaming scheme or gaming device in which the outcome or outcomes depend in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.
2. "Gambling." A person engages in "gambling" when he stakes or risks something of value in or upon the outcome of a contest of chance or upon the outcome of a future contingent event not under his control or influence, upon an agreement or understanding that he will receive or become entitled to receive

something of value in the event of a certain outcome. Gambling includes but is not limited to four general types or categories: (a) playing against other persons for stakes in games of chance, (b) playing gambling machines, (c) betting upon the outcome of future contingent events, and (d) participating in lottery contests.

3. "Player" means a person who participates in any form of gambling activity solely as a contestant or bettor, without receiving or becoming entitled to receive any profit therefrom other than personal gambling winnings, and without otherwise rendering any material assistance to the establishment, conduct or operation of the particular gambling activity. A person who gambles at a social game of chance on equal terms with the other participants therein does not "otherwise render material assistance" to the establishment, conduct or operation thereof by performing, without fee or remuneration, acts directed toward the arrangement and facilitation of the game, such as inviting persons to play, extending or permitting the use of premises therefor and supplying cards or other equipment used therein. A person who bets with members of the public upon the outcome of future contingent events in "bookmaking" fashion, as defined in this section, is not a "player."

4. "Advance gambling activity." A person "advances gambling activity" when he performs any act, other than as a player, which materially aids any form of gambling activity, whether such act be directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation. One advances gambling activity when, having substantial proprietary or other authoritative control over premises being used with his knowledge for purposes of gambling activity, he permits such to occur or continue or makes no effort to prevent its occurrence or continuation.

5. "Profit from gambling activity." A person "profits from gambling activity" when, other than as a player, he accepts or receives money or other property, not for a lawful consideration, knowing that it constitutes a consideration for an act committed by himself in advancement of gambling activity, or that it constitutes the proceeds of gambling activity due to him pursuant

to an arrangement or understanding with a person conducting such activity or anyone else, whereby he participates or is to participate in such gambling proceeds.

6. "Something of value" and "consideration of value" mean any money, any property of intrinsic value, any token, object or article exchangeable for money or property of intrinsic value, and any form of credit or promise directly or indirectly contemplating transfer of property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.

7. "Slot machine" means a mechanical device which, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such fashion that, depending upon elements of chance, it may eject something of value. A machine or device so designed and constructed, or readily adaptable or convertible to such use, is no less a slot machine because it is not in working order or because some mechanical act of manipulation or repair is required to accomplish its adaption, conversion or workability. Nor is it any less a slot machine because, apart from its use or adaptability as such, it may also sell or deliver something of value on a basis other than chance.

8. "Bookmaking" means unlawful betting with persons or members of the public as a business or in a professional capacity, rather than in a casual or personal fashion, upon the outcomes of future, contingent events.

9. "Lottery" means a gambling scheme in which (a) the players pay or agree to pay a consideration of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other media, one or more of which chances or combinations thereof are ultimately designated or to be designated the winning ones; and (b) the winning numbers, media or combinations thereof are determined by a drawing or by some other method based upon the element of chance; and (c) the holders of the winning chances or combinations thereby receive or become entitled to receive something of value.

10. "Policy" or "the numbers game" means a form of lottery in which the winning numbers, other media or combinations thereof are not determined upon the basis of a drawing or other act on the part of persons conducting or connected with the game or scheme, but upon the basis of the outcome or outcomes of a future contingent event or events otherwise unrelated to the particular game or scheme.

11. "Bookmaking record" means a writing, paper document or instrument made by a person engaged in bookmaking activity constituting a record of a bet or bets upon the outcome of a future contingent event or events.

12. "Lottery ticket" means a writing, paper, document or instrument constituting a record of a chance in a lottery or a record by means of which a chance in a lottery may be created, sold or transferred.

13. "Lottery and policy instruments" mean writings, records or articles of any kind commonly used in carrying on or promoting games or schemes of "lottery" or "policy," as the case may be.

14. "Unlawful" means not specifically authorized by law.

§ 230.05 Promoting gambling

A person is guilty of promoting gambling when he knowingly advances or profits from unlawful gambling activity.

Promoting gambling is a class A misdemeanor.

§ 230.10 Feloniously promoting gambling

A person is guilty of feloniously promoting gambling when:

1. He engages in book-making to the extent that he receives or accepts in any one day more than five bets totaling more than five thousand dollars upon the outcome or outcomes of a future, contingent event or events; or

2. In connection with a lottery or policy game or scheme, he knowingly receives (a) money or written records from a person or persons other than players whose plays or chances are represented by such money or records, or (b) more than five hundred dollars in any one day of money played in such game or scheme, or (c) written records of more than one hundred plays or chances made or taken over any period of time.

Feloniously promoting gambling is a class E felony.

§ 230.15 Possession of gambling records

A person is guilty of possession of gambling records when, with knowledge of its content, meaning and purpose, he possesses any bookmaking record, lottery ticket, lottery instrument, policy slip or policy instrument; except that possession of lottery and policy records constituting, reflecting or representing

plays or bets of the possessor himself in a number not exceeding ten is not a crime.

Possession of gambling records is a class A misdemeanor.

§ 230.20 Possession of gambling devices

A person is guilty of possession of gambling devices when he manufactures, sells, transports, places or possesses, or conducts or negotiates any transaction designed to affect ownership, custody or use of:

1. A slot machine, knowing it to be such; or
2. Any machine, device, equipment or other paraphernalia usable for or adapted to gambling purposes, knowing or expecting that the same is to be used in the advancement or promotion of unlawful gambling activity.

Possession of gambling devices is a class A misdemeanor.

§ 230.25 Lottery offenses; no defense

Any offense defined in this article which consists of the commission of acts relating to a lottery is no less criminal because the lottery itself is drawn or conducted without the state and is not violative of the laws of the jurisdiction in which it was so drawn or conducted.

§ 230.30 Gambling offenses; presumptions

1. Proof of possession of any gambling record, slip or instrument mentioned in this article is presumptive evidence of possession thereof with knowledge of its content, meaning and purpose.
2. In any prosecution under this article in which it is necessary to prove the occurrence of a sporting event, a published report of its occurrence in any daily newspaper, magazine or other periodically printed publication of general circulation shall be admissible in evidence and shall constitute presumptive proof of the occurrence of such event.

**ARTICLE 235: PROSTITUTION AND RELATED
OFFENSES****Section**

- 235.00 Prostitution.
235.05 Promoting prostitution; definitions of terms.
235.10 Promoting prostitution in the third degree.
235.15 Promoting prostitution in the second degree.
235.20 Promoting prostitution in the first degree.
235.25 Permitting prostitution.

§ 235.00 Prostitution

A person is guilty of prostitution when he or she commits or submits to, or offers to commit or to submit to, any sexual act with or upon another person, whether of a different or of the same sex, in return for a fee or compensation.

Prostitution is a violation.

§ 235.05 Promoting prostitution; definitions of terms

The following definitions are applicable to this article:

1. "Advance prostitution." One "advances prostitution" when, acting other than as a prostitute merely promoting his or her own ends, or as a patron of a prostitute, he causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, knowingly provides persons or premises for prostitution purposes, operates or knowingly assists in the operation of a house of prostitution or a prostitution enterprise, or knowingly does or arranges any other act designed to institute, advance or facilitate an act or enterprise of prostitution.

2. "Profit from prostitution." One "profits from prostitution" when, acting other than as a prostitute receiving a fee for his or her services, he accepts or receives money or other property knowing it to constitute the proceeds of prostitution, and when he receives such money or property not in return for a lawful consideration but (a) in return for conduct on his part rendered in advancement of prostitution, or (b) pursuant to an arrangement or understanding with a prostitute or anyone else whereby he participates or is to participate in the proceeds of certain prostitution activity.

§ 235.10 Promoting prostitution in the third degree

A person is guilty of promoting prostitution in the third degree when he knowingly advances or profits from prostitution.

Promoting prostitution in the third degree is a class E felony.

§ 235.15 Promoting prostitution in the second degree

A person is guilty of promoting prostitution in the second degree when he knowingly advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes.

Promoting prostitution in the second degree is a class D felony.

§ 235.20 Promoting prostitution in the first degree

A person is guilty of promoting prostitution in the first degree when he knowingly advances or profits from prostitution by:

1. Compelling a person by force or intimidation to engage in prostitution, or profiting from such an act of compulsion by another; or
2. Advancing or profiting from prostitution of a person less than seventeen years old.

Promoting prostitution in the first degree is a class C felony.

§ 235.25 Permitting prostitution

A person is guilty of permitting prostitution when, having possession or control of premises which he knows are being used for prostitution purposes, he fails to make reasonable effort to halt or abate such use.

Permitting prostitution is a class B misdemeanor.

ARTICLE 240: OBSCENITY AND RELATED OFFENSES**Section**

- 240.00 Obscenity; definitions of terms.
- 240.05 Obscenity.
- 240.10 Obscenity; presumptions.
- 240.15 Obscenity; defenses.
- 240.20 Disseminating indecent material to minors.
- 240.25 Disseminating indecent comic books.
- 240.30 Failing to identify a comic book publication.

§ 240.00 Obscenity; definitions of terms

The following definitions are applicable to sections 240.05, 240.10 and 240.15:

1. "Obscene." Any material or performance is "obscene" if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

2. "Material" means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

3. "Performance" means any play, motion picture, dance or other exhibition performed before an audience.

4. "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

§ 240.05 Obscenity

A person is guilty of obscenity when, knowing its content and character, he:

1. Promotes, or possesses with intent to promote, any obscene material; or

2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

Obscenity is a class A misdemeanor.

§ 240.10 Obscenity; presumptions

1. A person who promotes obscene material, or possesses the same with intent to promote it, in the course of his business is presumed to do so with knowledge of its content and character.

2. A person who possesses six or more identical or similar obscene articles is presumed to possess them with intent to promote the same.

§ 240.15 Obscenity; defenses

1. It is an affirmative defense to a prosecution for obscenity that the persons to whom allegedly obscene material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, governmental or other similar justification for possessing or viewing the same.

2. It is an affirmative defense to a prosecution for obscenity pursuant to subdivision one of section 240.05 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.

§ 240.20 Disseminating indecent material to minors

A person is guilty of disseminating indecent material to minors when he knowingly sells, lends, gives away, shows, advertises for sale or distributes commercially to any person less than eighteen years old or has in his possession with intent to give, lend, show, sell, distribute commercially, or otherwise offer for sale or commercial distribution to any individual less than eighteen years old any pornographic motion picture; or any still picture or photograph, or any book, "pocket book", pamphlet or magazine the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality or which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which consists of pictures of nude or partially de-nuded figures, posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion for commercial gain or any article or instrument of indecent or immoral use.

For purposes of this section "knowingly" shall mean having knowledge of the character and content of the publication or failure to exercise reasonable inspection which would disclose the character and content of same.

Disseminating indecent material to minors is a class A misdemeanor.

§ 240.25 Disseminating indecent comic books

A person is guilty of disseminating indecent comic books when he publishes or distributes for resale any book, pamphlet or magazine consisting of narrative material in pictorial form, colored or uncolored, and commonly known as comic books, the title or titles of which contain the words crime, sex, horror or terror or the content of which is devoted to or principally made up of pictures or accounts of methods of crime, of illicit sex, horror, terror, physical torture, brutality or physical violence.

Disseminating indecent comic books is a class A misdemeanor.

§ 240.30 Failing to identify a comic book publication

1. Any person who publishes or prints any book, pamphlet or magazine consisting of narrative material in pictorial form, colored or uncolored, and commonly known as comic books, shall have the name and address of such publisher or printer imprinted on such book, pamphlet or magazine.

2. A person is guilty of failing to identify a comic book publication when he violates any duty prescribed in subdivision one of this section.

Failing to identify a comic book publication is a class B misdemeanor.

TITLE N. OFFENSES AGAINST PUBLIC ORDER**ARTICLE 245: RIOT, UNLAWFUL ASSEMBLY
AND CRIMINAL ANARCHY****Section**

- 245.00 Riot.
245.05 Unlawful assembly.
245.10 Criminal anarchy.

§ 245.00 Riot

A person is guilty of riot when he participates with two or more persons in the commission of disorderly conduct with intent to commit a crime, to use unlawful force or violence against another person, to cause property damage, or to prevent or coerce official action.

Riot is a class E felony.

§ 245.05 Unlawful assembly

A person is guilty of unlawful assembly when he assembles with two or more other persons for the purpose of engaging in conduct constituting the crime of riot, or when, being present at an assembly which either has or develops such a purpose, he remains there with intent to advance that purpose.

Unlawful assembly is a class A misdemeanor.

§ 245.10 Criminal anarchy

A person is guilty of criminal anarchy when (a) he advocates the overthrow of the existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes any document which advocates such violent overthrow, or (c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow.

Criminal anarchy is a class E felony.

**ARTICLE 250: DISORDERLY CONDUCT, HARASSMENT
AND RELATED OFFENSES****Section**

250.00	Disorderly conduct, harassment and related offenses; definitions of terms.
250.05	Disorderly conduct.
250.10	Harassment.
250.15	Loitering.
250.20	Public intoxication.
250.25	Criminal nuisance.
250.30	Offensive exhibition.
250.35	Cruelty to animals.

§ 250.00 Disorderly conduct, harassment and related offenses; definitions of terms

The following definitions are applicable to this article:

1. "Public" means affecting or likely to affect a substantial group of persons.
2. "Public place" means a place to which the public or a substantial group of people has access. Among the places included are highways, transportation facilities, schools, prisons, places of business, amusement and government functions which are open to the public, and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence.
3. "Transportation facility" means any conveyance, premises or place used for or in connection with public passenger transportation, whether by air, railroad, motor vehicle or any other method. It includes aircraft, water craft, railroad cars, buses, air, railroad, bus and boat terminals and stations, and all appurtenances thereto.

§ 250.05 Disorderly conduct

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or
2. He makes unreasonable noise; or

3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
 4. In a public place, he lewdly exposes the private or other intimate parts of his person, or commits any lewd act; or
 5. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
 6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
 7. By word or action, he initiates or circulates a report or warning of a fire, impending bombing or other catastrophe, crime or impending crime or catastrophe, knowing such report or warning to be false or baseless; or
 8. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.
- Disorderly conduct is a violation.

§ 250.10 Harassment

A person is guilty of harassment when, with intent to harass, annoy or alarm another person:

1. He taunts or challenges a person in a public place in a manner likely to provoke violent response; or
2. He strikes, shoves, kicks or otherwise touches a person or subjects him to physical contact; or
3. In a public place, he uses abusive or obscene language or makes an obscene gesture; or
4. In a public place, he lewdly exposes the private or other intimate parts of his person, or commits any lewd act; or
5. He follows a person in or about a public place or places; or
6. In a public place, he knowingly jostles against a person or places his hand in the proximity of a person's pocket, wallet, pocketbook or handbag; or
7. In a public place, he accosts a person for the purpose of obtaining money or property from him by means of any trick, artifice, swindle or confidence game; or
8. He communicates with a person, anonymously or otherwise, by telephone, telegraph or mail without legitimate purpose and in a manner likely to cause him annoyance or alarm; or

9. He makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication; or

10. He gratuitously reports or causes to be reported false information to a law enforcement authority relating to an incident or to an offense or the alleged implication of some person therein, knowing that such information is false, or reports the alleged occurrence of an incident or offense, knowing that the same did not occur; or

11. As a student in a school, college or other institution of learning, he engages in conduct commonly called hazing.

Harassment is a violation.

§ 250.15 Loitering

A person is guilty of loitering when he:

1. Loiters or remains in a public place for the purpose of begging; or
2. Loiters or remains in a public place for the purpose of gambling with cards, dice or other gambling paraphernalia; or
3. Loiters or remains in a public place for the purpose of committing, attempting to commit, or soliciting another person to commit, a lewd or sexual act; or
4. Being masked or in any manner disguised by unusual or unnatural attire or facial alteration, loiters, remains or congregates in a public place with other persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place; except that such conduct is not unlawful when it occurs in connection with a masquerade party or like entertainment if, when such entertainment is held in a city which has promulgated regulations in connection with such affairs, permission is first obtained from the police or other appropriate authorities; or
5. Loiters or remains in or about a school building or grounds, not having any reason or relationship involving custody of or responsibility for a pupil or any other specific, legitimate reason for being there, and not having written permission from the principal; or
6. Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to

give a reasonably credible account of his conduct and purposes;
or

7. Loiters or remains in any transportation facility, unless specifically authorized to do so, for the purpose of soliciting or engaging in any business, trade or commercial transactions involving the sale of merchandise or services, or for the purpose of entertaining persons by singing, dancing or playing any musical instrument; or

8. Loiters or remains in any air, railroad, subway or bus station or any appurtenance thereto for the purpose of sleeping, or under circumstances in which no specific, legitimate purpose is apparent, and is unable to give a satisfactory explanation of his presence.

Loitering is a violation.

§ 250.20 Public intoxication

A person is guilty of public intoxication when he appears in a public place under the influence of alcohol, narcotics or other drug to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.

Public intoxication is a violation.

§ 250.25 Criminal nuisance

A person is guilty of criminal nuisance when:

1. By conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons; or

2. He knowingly conducts or maintains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct.

Criminal nuisance is a class B misdemeanor.

§ 250.30 Offensive exhibition

A person is guilty of offensive exhibition when he knowingly produces, operates, manages or furnishes premises for, or in any way promotes or participates in, an exhibition in the nature of public entertainment or amusement in which:

1. A person competes continuously without respite for a period of more than eight consecutive hours in a dance contest, bicycle race or other contest involving physical endurance; or

2. A person is held up to ridicule or contempt by voluntarily submitting to indignities such as the throwing of balls or other articles at his head or body; or

3. A firearm is discharged or a knife, arrow or other sharp or dangerous instrument is thrown or propelled at or toward a person; or

4. A person is projected or thrown for a considerable distance by a cannon or comparable device.

Offensive exhibition is a violation.

§ 250.35 Cruelty to animals

A person is guilty of cruelty to animals when he intentionally:

1. Subjects any animal to cruel mistreatment; or

2. Administers a poisonous or noxious substance or exposes any such substance with the intent that it be eaten by any animal; or

3. Kills any animal belonging to another without legal privilege or consent of the owner; or

4. Abandons any animal over which he has ownership, possession, charge or control; or

5. Performs any act which materially aids or advances the promoting of fights between cocks or any other animal whether such act be directed toward the establishment of such activity, toward the acquisition or maintenance of the premises used therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of such a fight, or toward any other phase of its operation.

Nothing contained in subdivisions one or two of this section shall be construed to prohibit or interfere with any properly conducted scientific tests, experiments or investigations, involving the use of living animals, performed or conducted in laboratories or institutions, which are approved for these purposes by the state commissioner of health. The state commissioner of health shall prescribe the rules under which such approvals shall be granted, including therein standards regarding the care and treatment of any such animals. Such rules shall be published and copies thereof conspicuously posted in each such laboratory or institution. The state commissioner of health or his duly authorized representative shall have the power to inspect such laboratories or institutions to insure compliance with such rules and standards. Each such approval may be revoked at any

time for failure to comply with such rules and in any case the approval shall be limited to a period not exceeding one year.

Cruelty to animals is a class A misdemeanor.

ARTICLE 255: OFFENSES AGAINST PRIVACY OF COMMUNICATIONS

Section

- 255.00 Eavesdropping; definitions of terms.
- 255.05 Eavesdropping.
- 255.10 Possession of eavesdropping devices.
- 255.15 Failure to report wiretapping.
- 255.20 Divulging an eavesdropping order.
- 255.25 Tampering with private communications.
- 255.30 Tampering with private communications; defenses.
- 255.35 Failing to report criminal communications.

§ 255.00 Eavesdropping; definitions of terms

The following definitions are applicable to this article:

1. "Wiretapping" means the interception and overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any mechanical or electronic device, instrument or equipment. Interception and overhearing of such communications in the course of the normal operations of a telephone or telegraph company, and overhearing or listening to a telephone conversation on a party line, do not constitute wiretapping.
2. "Mechanical transmission of a conversation" means the overhearing or recording of a conversation, without the consent of at least one party thereto, by a person not present thereat, by means of any mechanical or electronic device, instrument or equipment.
3. "Unlawfully" means without authorization of a court order issued pursuant to section eight hundred thirteen-a or section eight hundred thirteen-b of the code of criminal procedure.

§ 255.05 Eavesdropping

A person is guilty of eavesdropping when he unlawfully engages in:

1. Wiretapping; or
2. Mechanical transmission of a conversation.

Eavesdropping is a **class E felony**.

§ 255.10 Possession of eavesdropping devices

A person is guilty of possession of eavesdropping devices when, under circumstances evincing an intent to use or to permit the same to be used unlawfully in violation of section 255.05, he possesses any device, instrument or equipment designed for, adapted to or commonly used in wiretapping or mechanical transmission of a conversation.

Possession of eavesdropping devices is a **class A misdemeanor**.

§ 255.15 Failure to report wiretapping

A telephone or telegraph company, or any officer, employee or representative thereof, is guilty of failure to report wiretapping when he has knowledge of the occurrence of unlawful wiretapping as defined and made criminal in section 255.00 and subdivision one of section 255.05, when he knows of the unlawful character of such wiretapping, and when he does not report such matter or attempt to cause it to be reported to an appropriate law enforcement officer or agency.

Failure to report wiretapping is a **class B misdemeanor**.

§ 255.20 Divulging an eavesdropping order

A person is guilty of divulging an eavesdropping order when, possessing information concerning the existence or content of a court order issued pursuant to section eight hundred thirteen-a or section eight hundred thirteen-b of the code of criminal procedure, or concerning any circumstance attending an application for such an order, he discloses such information to another person; except that such disclosure is not criminal or unlawful when made in a legal proceeding, or to a law enforcement officer or agency connected with the application for such order, or to a legislative committee or temporary state commission, or to

the telephone or telegraph company whose facilities are involved.

Divulging an eavesdropping order is a class B misdemeanor.

§ 255.25 Tampering with private communications

A person is guilty of tampering with private communications when:

1. Knowing that he does not have the authority or consent of any person entitled to grant it, he opens or reads, and publishes, publicizes or divulges, whether in whole or in part, a sealed letter, telegram, private paper or other sealed communication, writing or written instrument of another, or a resumé of any portion of the contents thereof; or
2. Knowing that a sealed written instrument has been opened or read and divulged in violation of subdivision one of this section, he publishes or publicizes such instrument in whole or in part, or a resumé of any portion of the contents thereof; or
3. Without authority or privilege to do so, he obtains or attempts to obtain from a telephone or telegraph company, or from any employee or representative thereof, by means of stealth, deception, intimidation or in any other manner, information with respect to the content or nature of a telephonic or telegraphic communication; or
4. Being an employee of a telephone or telegraph company, he knowingly divulges to a person not entitled to such information, the content or nature of a telephonic or telegraphic communication.

Tampering with private communications is a class B misdemeanor.

§ 255.30 Tampering with private communications; defenses

It is an affirmative defense to a prosecution for tampering with private communications that the defendant:

1. Was a law enforcement officer performing official duties in the investigation or prosecution of crime; or
2. Acted at the request of a person whom he believed to be a law enforcement officer so engaged; or
3. Was furnishing information concerning crime to a law enforcement officer or agency pursuant to a duty prescribed in subdivision one of section 255.35.

§ 255.35 Failing to report criminal communications

1. It shall be the duty of a telephone or telegraph company, and of any officer, employee or representative thereof having knowledge that such company's facilities are being used to conduct any criminal business, traffic or transaction, to furnish or attempt to furnish to an appropriate law enforcement officer or agency all pertinent information within his possession relating to such matter, and to cooperate fully with any law enforcement officer or agency investigating such matter.

2. A person is guilty of failing to report criminal communications when he knowingly violates any duty prescribed in subdivision one of this section.

Failing to report criminal communications is a class B misdemeanor.

**TITLE O. OFFENSES AGAINST MARRIAGE,
THE FAMILY, AND THE WELFARE OF
CHILDREN AND INCOMPETENTS****ARTICLE 260: OFFENSES AFFECTING THE
MARITAL RELATIONSHIP**

Section	
260.00	Unlawfully solemnizing a marriage.
260.05	Unlawfully issuing a dissolution decree.
260.10	Unlawfully procuring a marriage license.
260.15	Bigamy.
260.20	Unlawfully procuring a marriage certificate, bigamy; defenses.
260.25	Incest.
260.30	Incest; corroboration.

§ 260.00 Unlawfully solemnizing a marriage

A person is guilty of unlawfully solemnizing a marriage when:

1. Knowing that he is not authorized by the laws of this state to do so, he performs a marriage ceremony or presumes to solemnize a marriage with intent to deceive some person; or
2. Being authorized by the laws of this state to perform marriage ceremonies and to solemnize marriages, he performs a

marriage ceremony or solemnizes a marriage knowing that a legal impediment to such marriage exists.

Unlawfully solemnizing a marriage is a class A misdemeanor.

§ 260.05 Unlawfully issuing a dissolution decree

A person is guilty of unlawfully issuing a dissolution decree when, not being a judicial officer authorized to grant judgments or to issue decrees of divorce or annulment, he issues a written instrument reciting or certifying that he or some other purportedly but not actually authorized person has granted a valid decree of civil divorce, annulment or other dissolution of a marriage.

Unlawfully issuing a dissolution decree is a class A misdemeanor.

§ 260.10 Unlawfully procuring a marriage license

A person is guilty of unlawfully procuring a marriage license when he procures a license to marry another person and when:

1. He has a living spouse at the time; or
2. The other person has a living spouse at the time.

Unlawfully procuring a marriage license is a class A misdemeanor.

§ 260.15 Bigamy

A person is guilty of bigamy when:

1. Having a living spouse, he contracts or purports to contract a marriage with another person; or
2. He contracts or purports to contract a marriage with a person who has a living spouse.

Bigamy is a class E felony.

§ 260.20 Unlawfully procuring a marriage license, bigamy; defenses

It is an affirmative defense to a prosecution for unlawfully procuring a marriage license or bigamy that the defendant acted under a reasonable belief that he or, as the case may be, the other party to the marriage or prospective marriage was unmarried or legally eligible to remarry.

§ 260.25 Incest

A person is guilty of incest when he marries or engages in sexual intercourse with a person whom he knows to be related to him, either legitimately or illegitimately, as an ancestor, descendant, brother or sister of either the whole or the half blood, uncle, aunt, niece or nephew.

Incest is a class E felony.

§ 260.30 Incest; corroboration

A person shall not be convicted of incest or of an attempt to commit incest upon the uncorroborated testimony of the person with whom the offense is alleged to have been committed.

**ARTICLE 265: OFFENSES RELATING TO CHILDREN
AND INCOMPETENTS****Section**

- 265.00 Abandonment of a child.
- 265.05 Non-support of a child.
- 265.10 Endangering the welfare of a child.
- 265.15 Unlawfully dealing with a child.
- 265.20 Endangering the welfare of an incompetent person.

§ 265.00 Abandonment of a child

A person is guilty of abandonment of a child when, being a parent, guardian or other person legally charged with the care or custody of a child less than fourteen years old, he deserts such child in any place with intent to wholly abandon it.

Abandonment of a child is a class E felony.

§ 265.05 Non-support of a child

A person is guilty of non-support of a child when, being a parent, guardian or other person legally charged with the care or custody of a child less than sixteen years old, he fails or refuses without lawful excuse to provide support for such child when he is able to do so.

Non-support of a child is a class A misdemeanor.

§ 265.10 Endangering the welfare of a child

A person is guilty of endangering the welfare of a child when:

1. He knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than sixteen years old; or
2. Being a parent, guardian or other person who has care or custody of a male child less than sixteen years old or of a female child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming a "neglected child," a "juvenile delinquent" or a "person in need of supervision" as those terms are defined in articles three and seven of the family court act.

Endangering the welfare of a child is a class A misdemeanor.

§ 265.15 Unlawfully dealing with a child

A person is guilty of unlawfully dealing with a child when:

1. Being an owner, lessee, manager or employee of a place of entertainment or amusement or of a place where alcoholic beverages are sold or given away, he permits a child less than sixteen years old to enter or remain in such place unless:
 - (a) the child is accompanied by its parent, guardian or an adult authorized by a parent or guardian, or
 - (b) the entertainment or amusement is given for the benefit or under the auspices of a non-profit school, church or other educational or religious institution, or
 - (c) otherwise permitted by law to do so; or
2. He knowingly permits a child less than eighteen years old to enter or remain in a place where illicit sexual activity or illegal narcotics activity is maintained or conducted; or
3. He marks the body of a child less than eighteen years old with indelible ink or pigments by means of tattooing; or
4. He sells or causes to be sold any alcoholic beverage, as defined by section three of the alcoholic beverage control law, to a child less than eighteen years old; or
5. He sells or causes to be sold tobacco in any form to a child less than eighteen years old.

It is no defense to a prosecution pursuant to subdivision four or five of this section that the child acted as the agent or repre-

sentative of another or that the defendant dealt with the child as such.

Unlawfully dealing with a child is a class B misdemeanor.

§ 265.20 Endangering the welfare of an incompetent person

A person is guilty of endangering the welfare of an incompetent person when he knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a person who is unable to care for himself because of mental disease or defect.

Endangering the welfare of an incompetent person is a class A misdemeanor.

TITLE P. OFFENSES AGAINST PUBLIC SAFETY

ARTICLE 270: FIREARMS AND OTHER DANGEROUS WEAPONS

Section

- 270.00 Definitions.
- 270.05 Possession of weapons and dangerous instruments and appliances.
- 270.10 Manufacture, transport, disposition and defacement of weapons and dangerous instruments and appliances.
- 270.15 Presumptions of possession, unlawful intent and defacement.
- 270.20 Exemptions.
- 270.25 Certain wounds to be reported.
- 270.30 Certain convictions to be reported.
- 270.35 Prohibited use of weapons.

§ 270.00 Definitions

As used in this article and in articles 410 and 420 the following terms shall mean and include:

Machine-gun means a weapon of any description, irrespective of size, by whatever name known, loaded or unloaded, from which a number of shots or bullets may be rapidly or automatically discharged from a magazine with one continuous pull of the trigger and includes a sub-machine gun.

Firearm silencer means any instrument, attachment, weapon or appliance for causing the firing of any gun, revolver, pistol or

other firearms to be silent, or intended to lessen or muffle the noise of the firing of any gun, revolver, pistol or other firearms.

Firearm means any pistol, revolver, sawed-off shotgun or other firearm of a size which may be concealed upon the person.

Switchblade knife means any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife.

Gravity knife means any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force and which, when released, is locked in place by means of a button, spring, lever or other device.

Dispose of means to dispose of, give, give away, lease, loan, keep for sale, offer, offer for sale, sell, transfer and otherwise dispose of.

Deface means to remove, deface, cover, alter or destroy the manufacturer's serial number or any other distinguishing number or identification mark.

Gunsmith means any person, firm, partnership, corporation or company who engages in the business of repairing, altering, assembling, cleaning, polishing, engraving or trueing, or who performs any mechanical operation on, any pistol or revolver. Gunsmith shall not include a wholesale dealer.

Dealer in firearms means any person, firm, partnership, corporation or company who engages in the business of purchasing, selling, keeping for sale, loaning, leasing, or in any manner disposing of, any pistol or revolver. Dealer in firearms shall not include a wholesale dealer.

Licensing officer means in the city of New York the police commissioner of that city; in the county of Nassau the commissioner of police of that county; and elsewhere in the state a judge or justice of a court of record having his office in the county of issuance.

§ 270.05 Possession of weapons and dangerous instruments and appliances

1. Any person who has in his possession any bomb, bombshell, firearms silencer or machine-gun is guilty of a class D felony.
2. Any person who has or carries concealed upon his person any firearm which is loaded with ammunition, or who has or carries concealed upon his person any firearm and, at the same time,

has or carries upon his person a quantity of ammunition which may be used to discharge such firearm is guilty of a class D felony.

3. Any person who has in his possession any firearm, gravity knife, switchblade knife, billy, blackjack, bludgeon, metal knuckles, sandbag, sandclub or slingshot is guilty of a class A misdemeanor and he is guilty of a class D felony if he has previously been convicted of any crime.

4. Any person under the age of sixteen years who has in his possession any of the weapons, instruments, appliances or substances specified in the first three subdivisions of this section, or any air-gun, spring-gun or other instrument or weapon in which the propelling force is a spring or air, or any gun or any instrument or weapon commonly known as a toy pistol, or any such instrument or weapon in or upon which any loaded or blank cartridges may be used, or any loaded or blank cartridges or ammunition therefor, or any dangerous knife, shall be adjudged a juvenile delinquent.

5. Any person not a citizen of the United States who has in his possession any deadly weapon other than those prohibited to him in the first three subdivisions of this section is guilty of a class A misdemeanor, and he is guilty of a class D felony if he has previously been convicted of any crime.

6. Any person who has in his possession any explosive substance with intent to use the same unlawfully against the person or property of another is guilty of a class D felony.

7. Any person who knowingly has in his possession a machine-gun or firearm which has been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting the identity of such machine-gun or firearm is guilty of a class D felony.

8. Any person who has in his possession any dagger, dangerous knife, dirk, razor, stiletto, imitation pistol or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another is guilty of a class A misdemeanor, and he is guilty of a class D felony if he has previously been convicted of any crime.

§ 270.10 Manufacture, transport, disposition and defacement of weapons and dangerous instruments and appliances

1. Any person who manufactures or causes to be manufactured any machine-gun is guilty of a **class D felony**. Any person who manufactures or causes to be manufactured any switchblade knife, gravity knife, billy, blackjack, bludgeon, metal knuckles, sandbag, sandclub or slingshot is guilty of a **class A misdemeanor**.
2. Any person who transports or ships any machine-gun or firearm silencer is guilty of a **class D felony**. Any person who transports or ships as merchandise any firearm, switchblade knife, gravity knife, billy, blackjack, bludgeon, metal knuckles, sandbag or slingshot is guilty of a **class A misdemeanor**.
3. Any person who disposes of any machine-gun or firearm silencer is guilty of a **class D felony**. Any person who knowingly buys, receives, disposes of, or conceals a machine-gun or firearm which has been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting the identity of such machine-gun or firearm is guilty of a **class D felony**.
4. Any person who disposes of any of the weapons, instruments or appliances specified in subdivision three of section 270.05 is guilty of a **class A misdemeanor**, and he is guilty of a **class D felony** if he has previously been convicted of any crime.
5. Any person who disposes of any of the weapons, instruments, appliances or substances specified in subdivision four of section 270.05 to any other person under the age of sixteen years is guilty of a **class A misdemeanor**.
6. Any person who wilfully defaces any machine-gun or firearm is guilty of a **class D felony**.
7. Any person, other than a wholesale dealer, or gun-smith or dealer in firearms duly licensed pursuant to article 420, lawfully in possession of a firearm, who disposes of the same without first notifying in writing the licensing officer in the city of New York and county of Nassau and elsewhere in the state the executive department, division of state police, Albany, is guilty of a **class A misdemeanor**.

§ 270.15 Presumptions of possession, unlawful intent and defacement

1. The presence in any room, dwelling, structure or vehicle of any machine-gun is presumptive evidence of its unlawful pos-

session by all persons occupying the place where such machine-gun is found.

2. The presence in any stolen vehicle of any weapon, instrument, appliance or substance specified in section 270.05 is presumptive evidence of its possession by all persons occupying such vehicle at the time such weapon, instrument, appliance or substance is found.

3. The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, sandbag, sandclub or slingshot is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver; or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same.

4. The possession by any person of the substance as specified in subdivision six of section 270.05 is presumptive evidence of possessing such substance with intent to use the same unlawfully against the person or property of another. The possession by any person of any dagger, dirk, stiletto, dangerous knife or of any other weapon, instrument, appliance or substance designed, made or adapted for use primarily as a weapon, is presumptive evidence of intent to use the same unlawfully against another.

5. The possession by any person of a defaced machine-gun or firearm is presumptive evidence that such person defaced the same.

§ 270.20 Exemptions

a. Sections 270.05, 270.10, and 270.15 shall not apply to:

1. Possession of any of the weapons, instruments, appliances or substances specified in section 270.05 by the following:

(a) Persons in the military service of the state of New York and sheriffs, policemen or other peace officers thereof.

(b) Persons in the military or other service of the United States, in pursuit of official duty or when duly authorized by federal law, regulation or order to possess the same.

(c) Persons employed in fulfilling defense contracts with the government of the United States or agencies thereof when possession of the same is necessary for manufacture, transport, installation and testing under the requirements of such contract.

(d) During the month of June only each year, a person voluntarily surrendering such weapon, instrument, appliance or substance, provided that such surrender shall be made to the sheriff of the county in which such person resides and in the county of Nassau to the commissioner of police or a member of the police department thereof designated by him, or if such person resides in a city having a population of seventy-five thousand or more to the police commissioner or head of the police force or department, designated by such commissioner or head; and provided, further, that the same shall be surrendered by such person only after he gives notice in writing to the appropriate authority, stating his name, address, the nature of the weapon to be surrendered, and the approximate time of day and the place where such surrender shall take place. Such notice shall be acknowledged immediately upon receipt thereof by such authority. Nothing in paragraph (d) of subdivision one hereof shall be construed as granting immunity from prosecution for any crime or offense except that of unlawful possession of such weapons, instruments, appliances or substances surrendered as herein provided.

2. Possession of a machine-gun, firearm, switchblade knife, gravity knife, billy or blackjack by a warden, superintendent, head-keeper or deputy of a state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or detained as witnesses in criminal cases, in pursuit of official duty or when duly authorized by regulation or order to possess the same.

3. Possession of a pistol or revolver by a person to whom a license therefor has been issued as provided under article 420.

4. Possession of a switchblade or gravity knife for use while hunting, trapping or fishing by a person carrying a valid license issued to him pursuant to article four, part four of the conservation law.

5. Possession, at an indoor or outdoor rifle range for the purpose of loading and firing the same, of a rifle of not more than twenty-two calibre rim fire, the propelling force of which may be either gunpowder, air or springs, by a person under sixteen years of age but not under twelve, who is a duly enrolled member of any club, team or society organized for educational purposes and maintaining as a part of its facilities, or having written permission to use, such rifle range under the supervision, guidance and instruction of (a) a duly commissioned officer of the United States army, navy, marine corps or coast guard, or of the national guard of the state of New York; or (b) a duly qualified adult citizen of the United States who has been granted a certificate as an instructor in small arms practice issued by the United States army, navy or marine corps, or by the adjutant general of this state, or by the national rifle association of America, a membership corporation duly organized under the laws of this state.

6. The manufacturer of machine-guns, switchblade or gravity knives, billies or blackjacks as merchandise and the disposal and shipment thereof direct to a regularly constituted or appointed state or municipal police department, sheriff, policeman or other peace officer, or to a state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or held as witnesses in criminal cases, or to the military service of this state or of the United States.

7. The regular and ordinary transport of firearms as merchandise, provided that the person transporting such firearms, where he knows or has reasonable means of ascertaining what he is transporting, notifies in writing the police commissioner, police chief or other law enforcement officer performing such functions at the place of delivery, of the name and address of the consignee and the place of delivery, and withholds delivery to the consignee for such reasonable period of time designated in writing by such police commissioner, police chief or other law enforcement officer as such official may deem necessary for investigation as to whether the consignee may lawfully receive and possess such firearms.

8. Engaging in the business of gunsmith or dealer in firearms by a person to whom a valid license therefor has been issued pursuant to article 420.

b. At any time, any person who voluntarily delivers to a peace officer any weapon, instrument, appliance or substance

specified in section 270.05, under circumstances not suspicious, peculiar or involving the commission of any crime, shall not be arrested. Instead, the officer who might make the arrest shall issue or cause to be issued in a proper case a summons or other legal process to the person for investigation of the source of the weapon, instrument, appliance or substance.

§ 270.25 Certain wounds to be reported

Every case of a bullet wound, gunshot wound, powder burn or any other injury arising from or caused by the discharge of a gun or firearm, and every case of a wound which is likely to or may result in death and is actually or apparently inflicted by a knife, ice-pick or other sharp or pointed instrument, shall be reported at once to the police authorities of the city, town or village where the person reporting is located by: (a) the physician attending or treating the case; or (b) the manager, superintendent or other person in charge, whenever such case is treated in a hospital, sanitarium or other institution. Failure to make such report is a **class A misdemeanor**. This subdivision shall not apply to such wounds, burns or injuries received by a member of the armed forces of the United States or the state of New York while engaged in the actual performance of duty.

§ 270.30 Certain convictions to be reported

Every conviction under this article or article 420, of a person who is not a citizen of the United States, shall be certified to the proper officer of the United States government by the district attorney of the county in which such conviction was had.

§ 270.35 Prohibited use of weapons

1. Except as permitted in section 270.20, any person who uses a machine-gun is guilty of a **class D felony**. Any person who attempts to use against another an imitation pistol is guilty of a **class A misdemeanor**, and he is guilty of a **class D felony** if he has previously been convicted of any crime.
2. Any person hunting with a dangerous weapon in any county wholly embraced within the territorial limits of a city is guilty of a **class A misdemeanor**.
3. Any person who wilfully discharges a loaded firearm or any other gun, the propelling force of which is gunpowder, at an aircraft while such aircraft is in motion in the air or in motion or

stationary upon the ground, or at any railway or street railroad train as defined by the public service law, or at a locomotive, car, bus or vehicle standing or moving upon any such railway, railroad or public highway, is guilty of a class D felony if thereby the safety of any person is endangered, and in every other case, of a class E felony.

4. Any person who, otherwise than in self defense or in the discharge of official duty, (a) wilfully discharges any species of firearms, air-gun or other weapon, or throws any other deadly missile, either in a public place, or in any place where there is any person to be endangered thereby, or, in Putnam county within one-quarter mile of any occupied school building other than under supervised instruction by properly authorized instructors although no injury to any person ensues; (b) intentionally, without malice, points or aims any firearm or any other gun the propelling force of which is gunpowder, at or toward any other person; (c) discharges, without injury to any other person, firearms or any other guns, the propelling force of which is gunpowder, while intentionally without malice, aimed at or toward any person; or (d) maims or injures any other person by the discharge of any firearm or any other gun, the propelling force of which is gunpowder, pointed or aimed intentionally, but without malice, at any such person, is guilty of a class A misdemeanor.

ARTICLE 275: OTHER OFFENSES RELATING TO PUBLIC SAFETY

Section

- 275.00 Unlawfully dealing with fireworks.
- 275.05 Unlawfully possessing noxious material.
- 275.10 Creating a hazard.
- 275.15 Unlawfully refusing to yield a party line.

§ 275.00 Unlawfully dealing with fireworks

1. Definition of "fireworks". The term "fireworks", as used in this section, is defined and declared to be and to include any blank cartridge, blank cartridge pistol, or toy cannon in which explosives are used, firecrackers, torpedoes, skyrockets, Roman candles, bombs, sparklers or other combustible or explosive of like construction, or any preparation containing any explosive or inflammable compound or any tablets or other device commonly used and sold as fireworks containing nitrates, chlorates, oxalates, sulphides of lead, barium, antimony, arsenic, mercury,

nitroglycerine, phosphorus or any compound containing any of the same or other explosives, or any substance or combination of substances or article prepared for the purpose of producing a visible or an audible effect by combustion, explosion, deflagration or detonation, or other device containing any explosive substance. The provisions of this definition however, shall not be deemed to include (1) flares of the type used by railroads or any warning lights commonly known as red flares, or marine distress signals of a type approved by the United States Coast Guard or (2) toy pistols, toy canes, toy guns or other devices in which paper caps containing twenty-five hundredths grains or less of explosive compound are used, providing they are so constructed that the hand cannot come in contact with the cap when in place for use, and the toy pistol paper caps which contain less than twenty-five hundredths grains of explosive mixture, the sale and use of which shall be permitted at all times.

2. Offense. Except as herein otherwise provided, or except where a permit is obtained pursuant to article 425, any person who shall offer or expose for sale, possess or sell, furnish, use, explode or cause to explode any fireworks is guilty of a class B misdemeanor.

3. The provisions of this section shall not apply to articles of the kind and nature herein mentioned, while in possession of railroads, transportation agencies for the purpose of transportation, the shipment of which is not prohibited by the interstate commerce commission regulations as formulated and published from time to time, unless the same be held voluntarily by such railroads or transportation companies as warehousemen; provided, that none of the provisions of this section shall apply to signaling devices used by railroad companies or motor vehicles referred to in subdivision seventeen of section fifteen of the vehicle and traffic law, or to high explosives for blasting or similar purposes; provided that none of the provisions of this section shall apply to fireworks and the use thereof by the army and navy departments of the state and federal government; nor shall anything in this act contained be construed to prohibit any manufacturer, wholesaler, dealer or jobber from manufacturing, possessing or selling at wholesale such fireworks to municipalities, religious or civic organizations, fair associations, amusement parks, or other organizations or groups of individuals authorized to possess and use fireworks under this act, or the sale or use of blank cartridges for a show or theatre, or for signal purposes in athletic sports, or the use, or the storage, transporta-

tion or sale for use of fireworks in the preparation for or in connection with television broadcasts; nor shall anything in this act contained be construed to prohibit the manufacture of fireworks, nor the sale of any kind of fireworks, provided the same are to be shipped directly out of the state.

4. Sales of ammunition not prohibited. Nothing contained in this section shall be construed to prevent, or interfere in any way with, the sale of ammunition for revolvers or pistols of any kind, or for rifles, shot guns, or other arms, belonging or which may belong to any persons whether as sporting or hunting weapons or for the purpose of protection to them in their homes, or, as they may go abroad; and manufacturers are authorized to continue to manufacture, and wholesalers and dealers to continue to deal in and freely to sell ammunition to all such persons for such purposes.

§ 275.05 Unlawfully possessing noxious material

1. As used in this section, "noxious material" means any container which contains any drug or other substance capable of generating offensive, noxious or suffocating fumes, gases or vapors.

2. A person is guilty of unlawfully possessing noxious material when he possesses such material under circumstances evincing an intent to use it or to cause it to be used to inflict physical injury upon or to cause annoyance to a person, or to damage property of another, or to disturb the public peace.

3. Possession of noxious material is presumptive evidence of intent to use it or cause it to be used in violation of this section.

Unlawfully possessing noxious material is a class B misdemeanor.

§ 275.10 Creating a hazard

A person is guilty of creating a hazard when:

1. Having discarded in any place where it might attract children, a container which has a compartment of more than one and one-half cubic feet capacity and a door or lid which locks or fastens automatically when closed and which cannot easily be opened from the inside, he fails to remove the door, lid, locking or fastening device; or

2. Being the owner or otherwise having possession of property upon which an abandoned well or cesspool is located, he fails to cover the same with suitable protective construction.

Creating a hazard is a class B misdemeanor.

§ 275.15 Unlawfully refusing to yield a party line

1. As used in this section:

a. "Party line" means a subscriber's line telephone circuit, consisting of two or more main telephone stations connected therewith, each station with a distinctive ring or telephone number.

b. "Emergency call" means a telephone call to a police or fire department, or for medical aid or ambulance service, necessitated by a situation in which human life or property is in jeopardy and prompt summoning of aid is essential.

2. A person is guilty of unlawfully refusing to yield a party line when, being informed that a party line is needed for an emergency call, he refuses immediately to relinquish such line.

Unlawfully refusing to yield a party line is a class B misdemeanor.

PART THREE
ADMINISTRATIVE AND CIVIL
PROVISIONS

TITLE V. SEIZURE AND DESTRUCTION
OF CONTRABAND

ARTICLE 400: IN RELATION TO GAMBLING

Section	
400.00	Seizure of gambling implements authorized.
400.05	Gambling implements to be destroyed or delivered to district attorney.
400.10	Gambling implements to be destroyed upon conviction.
400.15	Seizures of slot machines and arrest of person in possession.
400.20	Destruction of slot machines by magistrate.
400.25	Destruction of slot machines by the trial court.
400.30	Disposition of contents of destroyed gambling articles and apparatus.

§ 400.00 Seizure of gambling implements authorized

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

§ 400.05 Gambling implements to be destroyed or delivered to district attorney

The magistrate, to whom any thing suitable for gambling purposes is delivered pursuant to the last section, must, upon the examination of the defendant, or if such examination is delayed or prevented, without awaiting such examination, determine the character of the thing so delivered to him, and whether it was actually employed by the defendant in violation of the provisions of article 230; and if he finds that it is of a character suitable for gambling purposes, and that it has been used by the defendant in violation of such article, he must cause it to be destroyed.

or to be delivered to the district attorney of the county in which the defendant is liable to indictment or trial, as the interests of justice may, in his opinion, require.

§ 400.10 Gambling implements to be destroyed upon conviction

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

§ 400.15 Seizures of slot machines and arrest of person in possession

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

§ 400.20 Destruction of slot machines by magistrate

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

§ 400.25 Destruction of slot machines by the trial court

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

for trial, to cause the immediate destruction of the machine, apparatus or device.

§ 400.30 Disposition of contents of destroyed gambling articles and apparatus

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

ARTICLE 405: IN RELATION TO OBSCENITY

Section

- 405.00 Warrant to sheriff to search.
405.05 Seizure and forfeiture of equipment used in photographing, filming, producing, manufacturing, projecting or distributing pornographic still or motion pictures.

§ 405.00 Warrant to sheriff to search

A magistrate having jurisdiction to issue warrants in criminal cases, upon complaint that any person within his jurisdiction is offending against the provisions of article 240, supported by oath or affirmation, must issue a warrant, directed to the sheriff or to any constable, marshal, or public officer within the county, directing him to search for, seize, and take possession of any of the articles specified in article 240, in the possession of the person against whom complaint is made. The magistrate must immediately transmit every article seized by virtue of the warrant, to the district attorney of the county, who must, upon conviction of the person from whose possession the same was taken, cause

it to be destroyed, and the fact of such destruction to be entered upon the records of the court in which the conviction is had. Nothing in this section shall be construed as preventing the district attorney of any county, from delivering any seized article to a duly authorized agent of the federal bureau of investigation or of the New York state police or to a state or federal legislative committee, for the purpose of investigation, laboratory examination or classification.

§ 405.05 Seizure and forfeiture of equipment used in photographing, filming, producing, manufacturing, projecting or distributing pornographic still or motion pictures

1. Any peace officer of this state may seize any equipment used in the photographing, filming, printing, producing, manufacturing or projecting of pornographic still or motion pictures and may seize any vehicle or other means of transportation, other than a vehicle or other means of transportation used by any person as a common carrier in the transaction of business as such common carrier, used in the distribution of such obscene prints and articles and such equipment or vehicle or other means of transportation shall be subject to forfeiture as hereinafter in this section provided.
2. The seized property shall be delivered by the peace officer having made the seizure to the custody of the district attorney of the county wherein the seizure was made, except that in the cities of New York and Buffalo, the seized property shall be delivered to the custody of the police department of such cities, together with a report of all the facts and circumstances of the seizure.
3. It shall be the duty of the district attorney of the county wherein the seizure was made, if elsewhere than in the cities of New York or Buffalo, and where the seizure is made in either such city it shall be the duty of the corporation counsel of the city, to inquire into the facts of the seizure so reported to him and if it appears probable that a forfeiture has been incurred, for the determination of which the institution of proceedings in the supreme court is necessary, to cause the proper proceedings to be commenced and prosecuted, at any time after thirty days from date of seizure, to declare such forfeiture, unless, upon inquiry and examination such district attorney or corporation counsel decides that such proceedings cannot probably be sustained or that the ends of public justice do not require that they should be

instituted or prosecuted, in which case, the district attorney or corporation counsel shall cause such seized property to be returned to the owner thereof.

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

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

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

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

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

name and serial number, or if none, any other distinguishing number or identification mark. A search of the files of such division and notification of the results of the search to such official

T. V

CONTRABAND

§ 410.00

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

**ARTICLE 410: IN RELATION TO FIREARMS
AND OTHER DANGEROUS WEAPONS**

§ 410.00 Destruction of weapons and dangerous instruments, appliances and substances

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

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

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

4. In the case of any machine-gun or firearm taken from the possession of any person, the official to whom such weapon is surrendered pursuant to subdivision one of this section shall immediately notify the executive department, division of state police, Albany, giving the calibre, make, model, manufacturer's

TITLE W. LICENSING PROVISIONS

ARTICLE 420: IN RELATION TO FIREARMS

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

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

2. Types of licenses. A license for gunsmith or dealer in firearms shall be issued to engage in such business. A license for a pistol or revolver shall be issued to (a) have and possess in his dwelling by a householder; (b) have and possess in his place of business by a merchant or storekeeper; (c) have and carry concealed while so employed by a messenger employed by a banking institution or express company; (d) have and carry concealed while so employed by a regular employee of an institution of the state, or of any county, city, town or village, under control of a commissioner of correction of the city or any warden, superintendent or head keeper of any state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or held as witnesses in criminal cases, provided that application is made therefor by such commissioner, warden, superintendent or head keeper; and

(e) have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof.

3. Applications. Applications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper; and, in the case of a license as gunsmith or dealer in firearms, to the licensing officer where such place of business is located. Blank applications shall, except in the city of New York, be approved as to form by the superintendent of state police. An application shall state the full name, date of birth, residence, present occupation of each person or individual signing the same, whether or not he is a citizen of the United States, whether or not he complies with each requirement for eligibility specified in subdivision one of this section and such other facts as may be required to show the good character, competency and integrity of each person or individual signing the application. An application shall be signed and verified by the applicant. Each individual signing an application shall submit one photograph of himself and a duplicate for each required copy of the application. Such photographs shall have been taken within thirty days prior to filing the application. In case of a license as gunsmith or dealer in firearms, the photographs submitted shall be two inches square, and the application shall also state the previous occupation of each individual signing the same and the location of the place of such business, or of the bureau, agency, subagency, office or branch office for which the license is sought, specifying the name of the city, town, or village, indicating the street and number and otherwise giving such apt description as to point out reasonably the location thereof. In such case, if the applicant is a firm, partnership or corporation, its name, date and place of formation, and principal place of business shall be stated. For such firm or partnership, the application shall be signed and verified by each individual composing or intending to compose the same, and for such corporation, by each officer thereof.

4. Investigation. Before a license is issued or renewed, there shall be an investigation of all statements required in the application by the duly constituted police authorities of the locality where such application is made. For that purpose, the records of the department of mental hygiene concerning previous or present mental illness of the applicant shall be available for in-

spection by the investigating officer of the police authority. In order to ascertain any previous criminal record, the investigating officer shall take the fingerprints and physical descriptive data in quadruplicate of each individual by whom the application is signed and verified. Two copies of such fingerprints shall be taken on standard fingerprint cards eight inches square, and one copy may be taken on a card supplied for that purpose by the federal bureau of investigation. When completed, one standard card shall be forwarded to and retained by the division of criminal identification, department of correction, at Albany. A search of the files of such division and written notification of the results of the search to the investigating officer shall be made without unnecessary delay. Thereafter, such division shall notify the licensing officer and the executive department, division of state police, Albany, of any criminal record of the applicant filed therein subsequent to the search of its files. A second standard card, or the one supplied by the federal bureau of investigation, as the case may be, shall be forwarded to that bureau at Washington with a request that the files of the bureau be searched and notification of the results of the search be made to the investigating police authority. Of the remaining two fingerprint cards, one shall be filed with the executive department, division of state police, Albany, within ten days after issuance of the license, and the other remain on file with the investigating police authority. No such fingerprints may be inspected by any person other than a peace officer, except on order of a judge or justice of a court of record either upon notice to the licensee or without notice, as the judge or justice may deem appropriate. Upon completion of the investigation, the police authority shall report the results to the licensing officer without unnecessary delay.

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

6. License: validity. Any license issued pursuant to this section shall be valid notwithstanding the provisions of any local law or ordinance. No license shall be transferable to any other person or premises. A license to carry or possess a pistol or re-

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

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

8. License: exhibition and display. Every licensee while carrying a pistol or revolver shall have on his person a license to carry the same. Every person licensed to possess a pistol or revolver on particular premises shall have the license for the same on such premises. Upon demand, the license shall be exhibited for inspection to any peace officer. A license as gunsmith or dealer in firearms shall be prominently displayed on the licensed premises. Failure of any licensee to so exhibit or display his license, as the case may be, shall be presumptive evidence that he is not duly licensed.

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

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

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

12. Records required of gunsmiths and dealers in firearms. Any person licensed as gunsmith or dealer in firearms shall keep a record book approved as to form, except in the city of New York, by the superintendent of state police. In the record book shall be entered at the time of every transaction involving a firearm the date, name, age, occupation and residence of any person from whom a firearm is received or to whom a firearm is delivered, and the calibre, make, model, manufacturer's name and serial number, or if none, any other distinguishing number or identification mark on such firearm. Before delivering a fire-

arm to any person, the licensee shall require him to produce either a license valid under this section to carry or possess the same, or proof of lawful authority as a peace officer or other exempt person pursuant to section 270.20. The licensee shall remove and retain the attached coupon and enter in the record book the date of such license, number, if any, and name of the licensing officer, in the case of the holder of a license to carry or possess, or the shield or other number, if any, assignment and department or unit, in the case of an exempt person. The record book shall be maintained on the premises mentioned and described in the license and shall be open at all reasonable hours for inspection by any peace officer. In the event of cancellation or revocation of the license for gunsmith or dealer in firearms, or discontinuance of business by a licensee, such record book shall be immediately surrendered to the licensing officer in the city of New York and county of Nassau, and elsewhere in the state to the executive department, division of state police.

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

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

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

ARTICLE 425: IN RELATION TO FIREWORKS

§ 425.00 Permits for public displays of fireworks

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

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

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

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

(c) The exact location planned for the display.

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

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

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

(g) A diagram of the grounds on which the display is to be held showing the point at which the fireworks are to be discharged, the location of all buildings, highways and other lines of communication, the lines behind which the audience will be

restrained and the location of all nearby trees, telegraph or telephone lines or other overhead obstructions.

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

3. Applications for permits. All applications for permits for the public display of fireworks shall be made at least five days in advance of the date of the display and the permit shall contain provisions that the actual point at which the fireworks are to be fired shall be at least two hundred feet from the nearest permanent building, public highway or railroad or other means of travel and at least fifty feet from the nearest above ground telephone or telegraph line, tree or other overhead obstruction, that the audience at such display shall be restrained behind lines at least one hundred and fifty feet from the point at which the fireworks are discharged and only persons in active charge of the display shall be allowed inside these lines, that all fireworks that fire a projectile shall be so set up that the projectile will go into the air as nearly as possible in a vertical direction, unless such fireworks are to be fired from the shore of a lake or other large body of water, when they may be directed in such manner that the falling residue from the deflagration will fall into such lake or body of water, that any fireworks that remain unfired after the display is concluded shall be immediately disposed of in a way safe for the particular type of fireworks remaining, that no fireworks display shall be held during any wind storm in which the wind reaches a velocity of more than thirty miles per hour, that all the persons in actual charge of firing the fireworks shall be over the age of eighteen years, competent and physically fit for the task, that there shall be at least two such operators constantly on duty during the discharge and that at least two soda-acid or other approved type fire extinguishers of at least two and one-half gallons capacity each shall be kept at as widely separated points as possible within the actual area of the display. The legislative body of a state park, county park, city, village or town may provide for approval of such permit by the head of the police or fire department or both where there are such departments. No permit granted and issued hereunder shall be transferable. After such permit shall have been granted, sales, possession, use and distribution of fireworks for such display shall be lawful solely therefor.

4. Bonds. Before granting and issuing a permit for a public display of fireworks as herein provided, the permit authority

shall require an adequate bond from the applicant therefor, unless it is a state park, county park, city, village or town, or from the person to whom a contract for such display shall be awarded, in a sum to be fixed by the permit authority, which, however, shall not be less than five thousand dollars, conditioned for the payment of all damages, which may be caused to a person or persons or to property, by reason of the display so permitted and arising from any acts of the permittee, his agents, employees, contractors or subcontractors. Such bond shall run to the state park, county park, city, village or town in which the permit is granted and issued and shall be for the use and benefit of any person or persons or any owner or owners of any property so injured or damaged, and such person or persons or such owner or owners are hereby authorized to maintain an action thereon, which right of action also shall accrue to the heirs, executors, administrators, successors or assigns of such person or persons or such owner or owners. The permit authority may accept, in lieu of such bond, an indemnity insurance policy with liability coverage and indemnity protection equivalent to the terms and conditions upon which such bond is predicated and for the purposes herein provided.

TITLE X. CIVIL PROVISIONS

ARTICLE 430: IN RELATION TO GAMBLING

Section	
430.00	Illegal wagers, bets and stakes.
430.05	Contracts on account of money or property wagered, bet or staked are void.
430.10	Securities for money lost at gaming, void.
430.15	Certain transfers of property in pursuance of lottery, void.
430.20	Contracts, agreements and securities on account of lottery, void.
430.25	Property staked may be recovered.
430.30	Losers of certain sums may recover them.
430.35	Money paid for lottery tickets may be recovered by action.
430.40	Property offered for disposal in lotteries, forfeited.
430.45	Prizes in lotteries, forfeited.

§ 430.00 Illegal wagers, bets and stakes

All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance,

casualty, or unknown or contingent event whatever, shall be unlawful.

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

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

§ 430.10 Securities for money lost at gaming, void

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

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

§ 430.15 Certain transfers of property in pursuance of lottery, void

Every grant, bargain, sale, conveyance, or transfer of any real estate, or of any goods, chattels, things in action, or any

personal property, which shall hereafter be made in pursuance of any lottery, or for the purpose of aiding and assisting in such lottery, game or other device, to be determined by lot or chance is hereby declared void and of no effect.

§ 430.20 Contracts, agreements and securities on account of lottery, void

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

§ 430.25 Property staked may be recovered

Any person who shall pay, deliver or deposit any money, property or thing in action, upon the event of any wager or bet prohibited, may sue for and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or other person in whose hands shall be deposited any such wager, bet or stake, or any part thereof, whether the same shall have been paid over by such stakeholder or not, and whether any such wager be lost or not.

§ 430.30 Losers of certain sums may recover them

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

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

§ 430.35 Money paid for lottery tickets may be recovered by action

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

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

§ 430.40 Property offered for disposal in lotteries, forfeited

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

§ 430.45 Prizes in lotteries, forfeited

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

ARTICLE 435: IN RELATION TO PROSTITUTION

§ 435.00 Removal of tenants using premises for prostitution purposes

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

TITLE Y. LAWS REPEALED; TIME OF TAKING EFFECT

ARTICLE 500: LAWS REPEALED; TIME OF TAKING EFFECT

§ 500.00 Laws repealed

Chapter eighty-eight of the laws of nineteen hundred nine, entitled "An act providing for the punishment of crime, constituting chapter forty of the consolidated laws," and all acts amendatory thereof and supplemental thereto, constituting the penal law as heretofore in force, are hereby REPEALED.

§ 500.05 Time of taking effect

This act shall take effect July first, nineteen hundred sixty-six.
NOTE.—The Temporary Commission on Revision of the Penal Law and Criminal Code has prepared two bills, of which this is the main bill, to revise the Penal Law. The companion bill supplements this bill by relocating 340 sections of the Penal Law repealed by this bill in other, more appropriate bodies of law. See New York Legislative Documents No. 41 (1962); No. 8 (1963). These bills are being introduced at the 1964 Legislative Session for study purposes only.

Section 500.00 repeals the present Penal Law in its entirety. Explanatory notes and commentaries concerning this bill are in the process of preparation.

PROPOSED PENAL LAW

TABLE I

The left column of this table lists each section of the revised Penal Law. The right column shows the corresponding section of the old Penal Law (or where indicated, some other law) from which the new section is specifically or generally derived. The word "new" indicates that there is no counterpart in the old Penal Law.

Penal Law Section (REVISED)	Penal Law Section (OLD)
1.00	1
1.05	20
5.00	21
5.05(1)	22
5.05(2)	new
5.05(3)	22, 38
5.10(1)	41
5.10(2)	39
5.10(3)	23, 24, 37
10.00	cf. 370, 741, 1230
15.00	2
15.05(1)	2
15.05(2)	new
15.05(3)	1935
15.10(1)	2
15.10(2)	new
15.10(3)	1937
15.10(4)	new
15.15	new
20.00	new
25.00(1, 2)	2188, Code of Cr.Proc., 483
25.00(3)	Code of Cr.Proc., 933
25.05	2188
25.10	2188, 2188-b, Code of Cr.Proc. 932
25.15(1)	new
25.15(2)	Code of Cr.Proc., 933
25.15(3)	new
25.20	new
30.00(1)	2189
30.00(2)	new
30.00(3)	new
30.05	2186, 2187
30.10	1941, 1942
	200

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TABLE I—DERIVATION

Penal Law Section (REVISED)	Penal Law Section (OLD)
30.15	new
30.20(1)	2183, 2187
30.20(2)	2181, 2182(2)
30.25(1)	2190
30.25(2)	1938, 406
30.25(3)	new
30.30(1, 2)	new; see, however, Correction Law, 231
30.30(3)	2193(1)
30.30(4)	new; see, however, Correction Law, 230, 250
30.30(5)	2193(4)
30.30(6)	1693; Correction Law, 132
30.35	new
30.40(1-a)	new; see, however, Correction Law, 212
30.40(1-b)	new; see, however, Correction Law, 230(4)
30.40(2)	new; see, however, Correction Law, Article 7A
30.40(3-a, b)	new; see, however, Correction Law, 218
30.40(3-c)	2193(3)
35.00	2184-a, 2187-a, 2195
35.05	2184-a, 2187-a
35.10(1)	1931, 2184-a, 2187-a, 2195
35.10(2)	new
35.10(3)	2193(1)
35.10(4)	2193(4)
35.10(5)	new
35.15	new; see, Correction Law, 281-283
40.00	new
40.05	new
40.10	new
45.00	new
45.05	new
45.10(1)	1220
45.10(2)	new
45.15	new
50.00	cf. 2 (5th par.), 26, 27, 1934, 1936
50.05	new
50.10	new
50.15	new
50.20	new

PROPOSED PENAL LAW

Penal Law Section (REVISED)	Penal Law Section (OLD)
50.25	new
55.00(1)	new, cf. 815
55.00(2)	new
55.00(3)	new
60.00	2186
60.05	1120; see, 34, 815
65.00	new
65.05	see, generally, 42, 246, 1054, 1055
65.10	42, 246(3), 1055(B 1, 2)
65.15	246(3)
65.20	246(3)
65.25	new
65.30	246(1), 1055(A 3)
70.00	2447(2)
70.05	new
70.10	81-a, 166, 381, 584, 713, 996, 1256, 1472, 1752-a, 1787, 1904(6), 2038, 2052, 2097
70.15	2447
70.20	2446
75.00	859
75.05	new
75.10	28, 32, 33, 1938
75.15	new, see, Code of Cr.Proc., 142, 143, 144, 144-a
100.00	new
100.05	new
100.10	new
100.15	new
100.20	new
105.00	new
105.05	580(1)
105.10	580(1), 580-a
105.15	580(1), 580-a
105.20	580(1), 580-a
105.25	583
105.30	new
110.00	2 (last par.)
110.05	261
110.10	new
110.15	new

TABLE I—DERIVATION

Penal Law Section (REVISED)	Penal Law Section (OLD)
115.00	new
115.05	new
115.10	new
115.15	new
115.20	new
115.25	new
115.30	new
120.00	2 (8th par.)
120.05	New
120.10	1934
120.15	1934
120.20	1934; see, 1250-b
125.00(1)	244(1), 245, see 2 (last par.), 244(3)
125.00(2)	new, see, 244(2), 247, 1761
125.00(3)	244(2)
125.05(1)	242(3), 243
125.05(2)	2 (last par.), 242(4), 243
125.05(3)	2 (last par.), 242(1, 2), 243, see, 1752
125.05(4)	new
125.05(5)	new, see, 242(2), 1761
125.10(1)	2 (last par.), 240, 241
125.10(2)	1400
125.10(3)	new
125.10(4)	cf. 242(5), 1392
125.15	new, see, 244(1)
125.20	new, cf. 197, 1222, 1422, 1423(1, 2, 3, 10, 11, 12, 12-a), 1424, 1433, 1760, 1760-a, 1761, 1890, 1892, 1893, 1895, 1911, 1913, 1984, 1991
125.25	new, cf. 197, 1222, 1422, 1423(1, 2, 3, 10, 11, 12, 12-a), 1424, 1433, 1760, 1760-a, 1761, 1890, 1892, 1893, 1895, 1911, 1913, 1984, 1991
125.30	2305
125.35	new
130.00	1042
130.05	new
130.10	1052 (last 7 unnumbered pars.), 1053-a-1053-f
130.15(1)	1052(3), 1053-a-1053-f, 1391
130.15(2)	1050 (unnumbered pars.)
130.15(3)	2304
130.20(1)	cf. 1050(2), 1052(2)

PROPOSED PENAL LAW

Penal Law Section (REVISED)	Penal Law Section (OLD)
130.20(2)	cf. 1046
130.20(3)	1050(2)
130.25(1)	1044(1), 1046
130.25(2)	1044(2)
130.25(3)	1044(2)
130.30	1045
130.35	1045-a
130.40	80
130.45	80, 1050 (last 2 unnumbered pars.), 1051
130.50	81
130.55	81, 1052 (1st unnumbered par.), 1053
130.60	82, 1142
135.00	new, see, 691, 2011
135.05	new
135.10	new
135.15	2013
135.20(1)	2010 (last unnumbered par.)
135.20(2)	690 (last unnumbered par.)
135.25(1)	2010 (1, 4, 5)
135.25(2)	2010 (2d unnumbered par.)
135.30	new, see, 2010 (last unnumbered par.)
135.35(1)	2010(2, 3)
135.35(2)	see 2010(1)
135.35(3)	cf. 2010(1)
135.40(1)	690(1, 4, 5)
135.40(2)	690 (1st numbered par.)
135.45	new, see, 690 (last unnumbered par.)
135.50(1)	690(2, 3)
135.50(2)	see, 690(1)
135.50(3)	cf. 690(1)
135.55	690(5)
135.60	483-a, 483-b
135.65(1)	483-a, 483-b
135.65(2)	483-a, 483-b
135.65(3)	483-a
140.00	new
140.05	new, cf. 70, 1121, 1250
140.10	new, cf. 70, 1121, 1250
140.15	1250(A)
140.20	1250(B)
140.25	1250(C)
140.30	new
140.35(1)	see, 1250 (A, 1st unnumbered par.)
140.35(2)	1250-a

TABLE I—DERIVATION

Penal Law Section (REVISED)	Penal Law Section (OLD)
140.40	1250-a, see, 1250 (A, 1st unnumbered par.)
140.45	923
140.50	530, 853, 1323, 1324, 1327, 1454, 2070, 2073
140.55	530, 853, 860, 1323, 1324, 1327, 1824, 2070, 2073
140.60	new
145.00	400, 401
145.05	new, cf., 466, 927, 1425(5), 1990(4), 2034, 2035, 2036, 2036-a
145.10	new, cf. 1990(4)
145.15	new
145.20	404, 405
145.25	403
145.30	402, 403
145.35	402
145.40	408
150.00	223, 463, 466, 1420, 1420-a, 1421, 1423, 1423-a, 1423-b, 1423-c, 1424, 1425, 1426, 1427(2), 1428, 1430, 1431, 1432 (1, 2), 1433, 1873, 1906(1, 2), 1911, 1991
150.05	same reference as for § 150.00
150.10	same reference as for § 150.00
155.00	220
155.05	new, cf. 1906
155.10	see, 222, 223, 1420, 1420-a
155.15	see, 221, 222, 1420, 1420-a, 1895 (and 2, last par.)
155.20	new, see, 225, 226, 1906(1, 2, 3)
160.00	new
160.05(1)	1290 (1st unnumbered par.)
160.05(2)	new, see, 194-b, 466, 662, 665(1), 850, 851, 856, 922, 925-b, 930, 937-a, 945, 947, 960, 1292-a, 1293-c, 1300, 1302, 1310, 1311, 1347, 1838(2), 1863, 1864, 1865, 1867, 1873, 1911
160.10	1290(1-4)
160.15(1)	1306
160.15(2)	new
160.20	1290-a
160.25	1303, 1304, 1305
160.30	1296(1), 1298, 1299

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Penal Law Section (REVISED)	Penal Law Section (OLD)
160.35	850, 851, 852, 856, 1296(1, 2, 3), 1297, 1298
160.40	1294(3), 1295
160.45	850, 851, 852, 856
165.00	new
165.05	2120, 2121, 2122, 2123
165.10	2126, see, 2129
165.15	2124(2), see, 2127
165.20	2124(1, 3), see, 2125
170.00	941, 1310
170.05	1293-a
170.10	1293-a
170.15	new
170.20(1)	new
170.20(2)	925
170.20(3)	1990, 1990-b
170.20(4)	967, 1293-c
170.20(5)	1431, 1431-a, 1432
170.20(6)	1431, 1432
170.20(7)	new
170.25	932, 934, 935, 937-a
170.30	new, see, Code of Cr.Proc., 899(3)
170.35	see, 1308
170.40	1308, see, 1301
170.45	1308(2), see, 1301
170.50	new, see, 1308
170.55(1)	new
170.55(2)	1308(3)
170.60(1)	1309
170.60(2)	new
170.60(3)	new
170.60(4)	1308-a
170.65	436-a(3, 4)
170.70	436-a(1, 2)
170.75	new
175.00	880, 882
175.05	660, 889(2, 3), 889-b, 926(1), see, 893
175.10	884(1, 2, 4, 6), 887(1, 2, 4), 889(4), 889-a, 890, 891, 1325, 1326, see, 888
175.15	884(3, 5), 892, see, 886
175.20	661, 881(3), 889(3), 889-b, 926(2)
175.25	662, 881(1, 3), 887(4), 889(4), 891
175.30	881(2), 892, 894

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Penal Law Section (REVISED)	Penal Law Section (OLD)
175.35	new
175.40	881, 887(3, 5)
175.45	see, 959
175.50	new
175.55	1293-d
175.60	1293-d
180.00	new
180.05	665(2, 3, 4), 887(2), 889(A1, B1-4), 1865(2, 3)
180.10	665(2, 3, 4), 887(2), 889(A1, B1-4), 1865(2, 3)
180.15	889(B4)
180.20	1836, 1838(1), 2050
180.25	1836, 1838(1), 2050
180.30	460, 1872, 1872-a, 2051, 2321
180.35	460, 1872, 1872-a, 2051, 2321
180.40	461, 1860, 1861
180.45	new
180.50	665(3), 1293-b
180.55	1202
185.00	439
185.05	439
185.10	new, see, 380
185.15	380(1)
185.20	380(2)
185.25	new, see, 382
185.30	382(1)
185.35	382(2)
185.40	190-a
185.45	965
190.00	1170, 1171, 1172, 1173
190.05	940-a
190.10	940(1), 1291(2)
190.15	940(2)
195.00	new
195.05	1292-a
195.10	1292-a
195.15	new
195.20	421
195.25(1)	928, 930, 942
195.25(2)	930, 1278
195.25(3)	854, 931, 936-b, 1846
195.30	2052

PROPOSED PENAL LAW

Penal Law Section (REVISED)	Penal Law Section (OLD)
195.35	664(1-6)
195.40	668
200.00(1)	373, 461, 489, 854, 1231(1, 3, 4, 5, 6), 1792, 1830, 1839(2), 1847, 1862, 1863, 1864, 1866, 1867, 1875, 1876, see, 1786, 1788
200.00(2)	462, 997, 1231(2, 4, 7), 1792, 1840, 1841, 1842, 1843, 1844, 1857, 1865(4), 1866, 1867, 1869, 1874, 1875
200.05	196, 490(2d unnumbered par.), 1320, 1322, 1824, 1825, 1851
200.10	1848, 2095
200.15	1906(4), 1914
205.00	371, 378, 465, 1233(1), 1327, 1822
205.05	372, 374, 465, 1233(3), 1328, 1823, 1826, 1829, 1833, 1839(1)
205.10	new
205.15	new
205.20	new, see 1826
205.25	new
205.30	855, 1826, 1831
205.35	new
205.40	1832(1)
205.45	1832(2)
210.00	cf. 1690
210.05(1)	1694
210.05(2)	1692, 1696
210.05(3)	1692
210.05(4)	1697
210.10(1)	1694
210.10(2)	1692, 1696
210.10(3)	1692
210.10(4)	1697
210.15(1)	1694, see 1695
210.15(2)	1692, 1696
210.15(3)	1692
210.15(4)	1697
210.20	1698
210.25	1698
210.30(1)	489, 1691(1, 2), 1791, 1796, 1828-a(1)
210.30(2)	new
210.35(1)	1691(3), 1796, 1828-a(2)
210.35(2)	new
210.40	see, 242(5)

TABLE I—DERIVATION

Penal Law Section (REVISED)	Penal Law Section (OLD)
210.45	see, 242(5)
210.50	1694-a, 1694-b
210.55	1694-a, 1694-b
215.00	1621(3), 1622, 1625, 1626, cf. 1620(1, 2, 3)
215.05	1232, 1620-b, see, 1633(2)
215.10	1232, 1620-a, see, 1633(1)
215.15	1232, 1620-a, see, 1633(1)
215.20(1)	1627-a
215.20(2)	1627, 1627-a
215.20(3)	new
215.25	new
215.30(1)	1623
215.30(2)	1624
215.30(3)	1621(1, 2)
215.35	new
215.40	new
215.45	new, see, 1232-a, 1620(4, 5, 6), 2321
215.50	new
215.55	813, 1632-a, 1633(2)
215.60	813, 1632-a, 1633(1, 2)
215.65	813, 1632, 1633(1)
220.00	2440
220.05	379
220.10	2441, 2442
220.15	371
220.20	374
220.25	376, 376-a, 860
220.30	373(1)
220.35	new
220.40(1)	810, 811
220.40(2)	812, 814
220.45	570
220.50	600, 1235
220.55	601, 602, 1939
220.60(1)	1329
220.60(2)	1330
220.60(3)	1330
220.60(4)	1330
220.65	2448
220.70	1783, 1783-a, 1784
220.75	1782
225.00	see, 1751
225.05	1751-a(1)

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<u>Penal Law Section (REVISED)</u>	<u>Penal Law Section (OLD)</u>
225.10(1)	1751(2)
225.10(2)	1751(3)
225.15	new, see, 1751(2)
225.20	1751(4)
225.25	1751(1)
225.30	1751(1)
230.00	cf., 982(2), 1370, see, 1387
230.05	970, 973, 974, 980, 986, 1372, 1373, 1376, 1377, 1378, 1381, 1388
230.10(1)	986-c
230.10(2)	974-a
230.15	975, 986-b
230.20(1)	970-a, 982(1, 3)
230.20(2)	970-a, 970-b
230.25	1382
230.30(1)	see, 986-b
230.30(2)	986-a
235.00	new, see, Code of Cr. Proc. 887(4)
235.05	new
235.10	70(2), 1090, 1148, 2460
235.15	1146 (1st unnumbered par.), 2460, see, Code of Cr. Proc. 899(4)
235.20(1)	1090, 2460(7)
235.20(2)	70(1, 4)
235.25	1146 (3rd unnumbered par.)
240.00	new
240.05(1)	1141, 1141-a, 1141-b, 1143
240.05(2)	1140, 1140-a, 1140-b
240.10(1)	new
240.10(2)	1141(4)
240.15	new
240.20	484-h
240.25	484-f
240.30	484-g
245.00	2090, 2091
245.05	2092, 2094
245.10	160, 161, see, 162, 164
250.00	new
250.05(1)	722(1)
250.05(2)	722(1, 5)
250.05(3)	722(1, 10)
250.05(4)	1140
250.05(5)	1321, 1470, 2071
250.05(6)	722(3), 2093

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Penal Law Section (REVISED)	Penal Law Section (OLD)
250.05(7)	727, 1424
250.05(8)	722(2, 4, 9)
250.10(1)	720
250.10(2)	720
250.10(3)	720
250.10(4)	1140
250.10(5)	new
250.10(6)	722(6)
250.10(7)	722(6)
250.10(8)	551, 555
250.10(9)	1423(6)
250.10(10)	727, 1250-b(3), 1786
250.10(11)	1030
250.15(1)	722(7), see, Code of Cr. Proc. 887(5)
250.15(2)	see, Code of Cr. Proc. 899(8)
250.15(3)	722(8), 1148
250.15(4)	710, 711
250.15(5)	722-b
250.15(6)	new
250.15(7)	150(1), 1990-a(1)
250.15(8)	150(2), 1990-a(2)
250.20	1221
250.25(1)	1530, 1533(1)
250.25(2)	1530(2), 1533(2, 3)
250.30(1)	832, 833
250.30(2)	834
250.30(3)	831(1, 2)
250.30(4)	834
250.35(1)	185, 187, 189, 191, 194
250.35(2)	185, 190
250.35(3)	185
250.35(4)	185, 186
250.35(5)	181, 182
255.00	new, cf. 739
255.05(1)	738(1)
255.05(2)	738(2)
255.10	742
255.15	744
255.20	745
255.25(1)	553(1)
255.25(2)	553(2, 3, 4)
255.25(3)	743(1)
255.25(4)	743(1)
255.30	new
255.35	743(1)

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Penal Law Section (REVISED)	Penal Law Section (OLD)
260.00	1450
260.05	1451
260.10(1)	1453
260.10(2)	new
260.15(1)	340
260.15(2)	343
260.20	new, cf. 341, 1453
260.25	1110
260.30	new
265.00	481
265.05	482(1)
265.10(1)	483
265.10(2)	494
265.15(1)	484(1)
265.15(2)	484(2)
265.15(3)	483-c
265.15(4)	484(3)
265.15(5)	484 (5th and last unnumbered par.)
265.20	1121, 1123
270.00	1896
270.05	1897
270.10	1898, 1902
270.15	1899
270.20	1900
270.25	1902
270.30	1902
270.35	1904
275.00	1894-a
275.05	726
275.10	1920, 1923
275.15	1424-a
400.00	977
400.05	978
400.10	979
400.15	983
400.20	984
400.25	985
400.30	985-a
405.00	1144
405.05	1141-c
410.00	1901, 1902
415.00	1894-a
420.00	1903
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Penal Law Section (REVISED)	Penal Law Section (OLD)
425.00	1894-a
430.00	991
430.05	992
430.10	993
430.15	1385
430.20	1386
430.25	994
430.30	995
430.35	1383
430.40	1380
430.45	1334
435.00	1146
500.00	new
500.05	new

PROPOSED PENAL LAW

TABLE II

The left column of this table lists each section of the old Penal Law; the right column shows the disposition of each such section. The numbers in the right column employing the decimal system refer to the appropriate section of the revised Penal Law which specifically or generally covers the same or approximately the same subject matter. The word "omitted" indicates that the old section has not been included in the revision because it has no further utility, or because it duplicates a provision in some other body of law. The word "transferred" indicates that the old section has been relocated in the designated body of law.

<u>Penal Law Section (OLD)</u>	<u>Disposition</u>
Article 1	
Short Title and Definitions	
1	1.00
2	15.00, 15.05(1), 15.10, 50.00, 110.00, 125.00(1), 125.05(2), 125.10(1), 155.15.
3	omitted
Article 2	
General Provisions	
20	1.05
21	5.00
22	5.05(1)
23	5.10(3)
24	5.10(3)
25	omitted
26	50.00
27	50.00
28	75.10
29	omitted
30	omitted
31	omitted
32	75.10
33	75.10
34	60.05
35	omitted
36	omitted
37	5.10(3)
38	5.05(3)
39	5.10(2)
40	omitted

TABLE II—DISPOSITION

<u>Penal Law Section (OLD)</u>	<u>Disposition</u>
Article 2 General Provisions	
41	5.10(1)
42	65.05, 65.10
43	omitted
Article 3 Abandonment	
50	omitted
Article 4 Abduction	
70	140.05, 140.10, 235.10, 235.20(2)
71	omitted
Article 6 Abortion	
80	130.40, 130.45
81	130.50, 130.55
81-a	70.10
82	130.60
Article 8 Adultery	
100-103	omitted
Article 13 Air and Bus Terminals	
150	250.15(7, 8)
Article 14 Anarchy	
160	245.10
161	245.10
162	245.10
163	115.00, 115.05, 115.10, 115.15, 115.20, 115.25, 115.30
164	245.10
165	omitted
166	70.10

PROPOSED PENAL LAW

Penal Law Section (OLD)	Disposition
Article 16	
Animals	
180	omitted
181	250.35(5)
182	250.35(5)
185	250.35
185-a	transferred—Agriculture and Mar- kets Law
186	250.35(4)
187	250.35(1)
188	transferred—Agriculture and Mar- kets Law
188-a	transferred—General Business Law
189(1)	250.35(1)
189(2)	transferred—Agriculture and Mar- kets Law
190	250.35(2)
190-a	185.40
191	250.35(1)
192-a	omitted
194	250.35(1)
194-a	transferred—Agriculture and Mar- kets Law
194-b	160.05
195	omitted
195-a	omitted
196	200.05
197	125.20, 125.25
Article 18	
Arson	
220	155.00
221	155.15
222	155.10, 155.15
223	150.00, 150.05, 150.10, 155.10
224	155.05, 155.1C, 155.15
225	155.20
226	155.20
227	155.05, 155.10, 155.15
Article 20	
Assault	
240	125.10(1)
241	125.10(1)
242	125.05, 125.10(4)

TABLE II—DISPOSITION

Penal Law Section (OLD)	Disposition
Article 20 Assault	
243	125.05
244	125.00, 125.15
245	125.00
246	65.05, 65.10, 65.15, 65.20, 65.30
247	125.00(2)
248	125.00
Article 22 Attempt to Commit Crime	
260	omitted
261	110.05
262	omitted
Article 24 Attorneys	
270-280	transferred—Judiciary Law
Article 26 Banking	
290-306	transferred—Banking Law
Article 28 Barratry	
320-323	omitted
Article 30 Bigamy	
340	260.15(1)
341	260.20
342	omitted
343	260.15(2)
Article 31 Billiard and Pocket Billiard Rooms	
344-355	transferred—General Business Law

PROPOSED PENAL LAW

<u>Penal Law Section (OLD)</u>	<u>Disposition</u>
Article 32 Bills of Lading, Warehouse Receipts, Other Receipts and Vouchers	
360-369-f	transferred—General Business Law
Article 34 Bribery and Corruption	
370	10.00(9)
371	205.00
372	205.05
373	200.00, 220.30(1)
374	205.05, 220.20
375	omitted
376	220.25
376-a	220.25
377	omitted
378	205.00
379	220.05
380	70.10, 185.10, 185.15, 185.20
381	70.10
382	185.25, 185.30, 185.35
Article 36 Bucket Shops	
390-395	transferred—General Business Law
Article 38 Burglary	
400	145.00
401	145.00
402	145.30, 145.35
403	145.25, 145.30
404	145.20
405	145.20
406	30.25(2)
407	145.20, 145.25, 145.30, 145.35
408	145.40
Article 39 Budget Planning	
410-412	transferred—General Business Law

TABLE II—DISPOSITION

Penal Law Section (OLD)	Disposition
Article 40 Business and Trade	
420	omitted
421	195.20
421-a	transferred—General Business Law
421-b	transferred—General Business Law
421-c	transferred—General Business Law
421-d	transferred—General Business Law
421-e	transferred—General Business Law
422	transferred—General Business Law
423	transferred—General Business Law
424	transferred—General Business Law
425	transferred—General Business Law
426	transferred—General Business Law
427	transferred—General Business Law
428	transferred—General Business Law
429	transferred—General Business Law
430	transferred—General Business Law
431	transferred—General Business Law
432	omitted
433	omitted
434	transferred—Agriculture and Mar- kets Law
435(1)	transferred—General Business Law
435(2)	transferred—General Business Law
435(3)	transferred—General Business Law
435(4)	omitted
435-a	omitted
435-b	omitted
435-c	omitted
435-d	transferred—General Business Law
436	transferred—General Business Law
436-a	170.65, 170.70
436-b	transferred—Navigation Law
436-c	transferred—Agriculture and Mar- kets Law
436-d	omitted
437	omitted
438	transferred—Agriculture and Mar- kets Law
438-a	transferred—General Business Law
439	185.00, 185.05
440	transferred—General Business Law
440-a	transferred—General Business Law

PROPOSED PENAL LAW

Penal Law Section (OLD)	Disposition
Article 40	
Business and Trade	
440-b	transferred—General Business Law
441	transferred—General Business Law
441-a	transferred—General Business Law
442	omitted
442-a	transferred—Insurance Law
442-b	transferred—Insurance Law
442-c	transferred—Insurance Law
443	omitted
444	transferred—General Business Law
445	transferred—General Business Law
446	transferred—General Business Law
447	transferred—General Business Law
448	transferred—General Business Law
449	transferred—General Business Law
450	transferred—General Business Law
451	transferred—General Business Law
452	transferred—General Business Law
Article 42	
Canals	
460	180.30, 180.35
461	180.40, 200.00
462	200.00
463	150.00, 150.05, 150.10
464	150.00
465	205.00, 205.05
466	145.05, 150.00, 150.05, 150.10
Article 44	
Children	
480	omitted
481	265.00
482(1)	265.05
482(2)	omitted
482(3)	transferred—Public Health Law
483	265.10(1)
483-a	135.60, 135.65
483-b	135.60, 135.65
483-c	265.15(3)
484(1)	265.15(1)
484(2)	265.15(2)
484(3)	265.15(4)

TABLE II—DISPOSITION

Penal Law Section (OLD)	Disposition
Article 44	
Children	
484(4)	transferred—General Business Law
484(5)	265.15(5)
484(5-a)	omitted
484(6)	transferred—General Business Law
484-a	transferred—General Business Law
484-b	transferred—General Business Law
484-c	50.00
484-d	transferred—Alcoholic Beverage Control Law
484-e	omitted
484-f	240.25
484-g	240.30
484-h	240.20
485	omitted
485-a	transferred—New York City Administrative Code
486	omitted
487	omitted
487-a	omitted
488	omitted
489	200.00, 210.50
490	200.05
492	omitted
494	265.10(2)
495	omitted
496	transferred—Alcoholic Beverage Control Law
Article 46	
Civil Rights	
510	transferred—Civil Rights Law
510-a	transferred—Election Law
511	transferred—Civil Rights Law
512	transferred—Civil Rights Law
512-a	transferred—Civil Rights Law
512-b	transferred—Civil Rights Law
513	omitted
514	transferred—Civil Rights Law
515	transferred—Civil Rights Law
516	transferred—Civil Rights Law
517	transferred—Civil Rights Law
518	transferred—Civil Rights Law

PROPOSED PENAL LAW

<u>Penal Law Section (OLD)</u>	<u>Disposition</u>
Article 48 Coercion	
530	140.50, 140.55
531	omitted
Article 50 Communication	
550	omitted
551	250.10(8)
551-a	omitted
553	255.25(1, 2)
554	omitted
555	250.10(8)
Article 52 Compounding Crime	
570	220.45
571	omitted
Article 54 Conspiracy	
580(1)	105.05, 105.10, 105.15, 105.20
580(2-6)	omitted
580-a	105.10, 105.15, 105.20
581	omitted
581-a	transferred—General Municipal Law
582	omitted
583	105.25
584	70.10
Article 56 Contempt of Court	
600	220.50
601	220.55
602	220.55
Article 58 Conviction	
610	omitted

TABLE II—DISPOSITION

<u>Penal Law Section (OLD)</u>	<u>Disposition</u>
Article 64	
Corporations	
660	175.05
661	175.20
662	160.05, 175.25
663	omitted
663-a	omitted
664	195.35
665(1)	160.05
665(2)	180.05, 180.10
665(3)	180.05, 180.10, 180.50
665(4)	180.05, 180.10
665(5)	omitted
665(6)	omitted
666	transferred—General Business Law
667	omitted
668	195.40
669	transferred—Transportation Corporations Law
671	transferred—Election Law
Article 66	
Crime Against Nature	
690	135.20, 135.40, 135.45, 135.50, 135.55
691	135.00(2)
Article 67	
Discrimination	
700	transferred—Civil Rights Law
701	transferred—Civil Rights Law
Article 68	
Disguises	
710	250.15(4)
711	260.15(4)
712	omitted
713	70.10
Article 70	
Disorderly Conduct	
720	250.10(1, 2, 3)
722(1-10)	250.05, 250.10, 250.15
722(11-12)	omitted
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PROPOSED PENAL LAW

<u>Penal Law Section (OLD)</u>	<u>Disposition</u>
Article 70	
Disorderly Conduct	
722-a	omitted
722-b	250.15(5)
723	250.10
724	omitted
725	omitted
726	275.05
727	250.05(7), 250.10(10)
 Article 72	
Dueling	
730-737	65.10(3) (c)
 Article 73	
Eavesdropping	
738(1)	255.05(1)
738(2)	255.05(2)
739	255.00
740	255.05
741	10.00(1)
742	255.10
743	255.25(3, 4), 255.35
744	255.15
745	255.20
 Article 74	
Elective Franchise	
750-783	transferred—Election Law
 Article 76	
Evidence	
810	220.40(1)
811	220.40(1)
812	220.40(2)
813	215.55, 215.60, 215.65
814	220.40(2)
815	55.00, 60.05
816	omitted
817	omitted

TABLE II--DISPOSITION

Penal Law Section (OLD)	Disposition
Article 78	
Exhibitions	
831(1)	250.30(3)
831(2)	250.30(3)
831(3)	omitted
832	250.30(1)
833	250.30(1)
834	250.30(2, 4)
835	omitted
Article 80	
Extortion and Threats	
850	160.05, 160.35, 160.45
851	160.05, 160.35, 160.45
852	160.35, 160.45
853	140.50, 140.55
854	195.25(3), 200.00
855	205.30
856	160.05, 160.35, 160.45
857	omitted
858	omitted
859	75.00
860	140.55, 220.25
861	transferred—Real Property Law
Article 82	
Ferries	
870	transferred—Navigation Law
871	omitted
872	omitted
Article 84	
Forgery	
880	175.00
881	175.20, 175.25, 175.30, 175.40
882	175.00
883	omitted
884	175.10, 175.15
885	200.00
886	175.15
887	175.10, 175.25, 175.40, 180.05, 180.10
888	175.10
889	175.05, 175.10, 175.20, 175.25, 180.05, 180.10, 180.15

PROPOSED PENAL LAW

Penal Law Section (OLD)	Disposition
Article 84	
Forgery	
889-a	175.10
889-b	175.05, 175.20
890	175.10
891	175.10, 175.25
892	175.15, 175.30
893	175.05
894	175.30
895	omitted
Article 86	
Frauds and Cheats	
920	omitted
921	omitted
922	160.05(2)
923	140.45
924	transferred—General Business Law
925	170.20(2)
925-a	transferred—General Business Law
925-b	160.05(2)
926(1)	175.05
926(2)	175.20
926(3)	omitted
926-a	omitted
927	145.05
928	195.25
929	omitted
930	160.05(2), 195.25(1, 2)
931	195.25(3)
932	170.25
932-a	transferred—Agriculture and Mar- kets Law
933	transferred—Agriculture and Mar- kets Law
934	170.25
935	170.25
936	transferred—General Business Law
936-a	omitted
936-b	195.25(3)
937	omitted
937-a	160.05(2), 170.25
938	omitted
939	omitted
940(1)	190.10

TABLE II—DISPOSITION

<u>Penal Law Section (OLD)</u>	<u>Disposition</u>
Article 86	
Frauds and Cheats	
940(2)	190.15
940-a	195.05
940-b	transferred—General Business Law
941	170.00
942	195.25(1)
943	transferred—General Business Law
944	omitted
945	160.05(2)
946	transferred—General Business Law
947	160.05(2)
948	transferred—General Business Law
949	omitted
950	omitted
951	transferred—General Business Law
952	transferred—General Business Law
953	transferred—General Business Law
954	transferred—General Business Law
955	transferred—General Business Law
956	transferred—General Business Law
957	transferred—General Business Law
958	transferred—General Business Law
959	175.45
960	160.05(2)
961	transferred—General Business Law
962	transferred—Labor Law
962-a	transferred—Labor Law
963	transferred—General Business Law
964	transferred—General Business Law
964-a	transferred—General Business Law
965	185.45
966	transferred—General Business Law
967	170.20(4)
Article 88	
Gambling	
970	230.05
970-a	230.20
970-b	230.20(2)
971	omitted
972	omitted
973	230.05
974	230.05
974-a	230.10(2)

PROPOSED PENAL LAW

Penal Law Section (OLD)	Disposition
Article 88 Gambling	
975	230.15
977	400.00
978	400.05
979	400.10
980	230.05
981	omitted
982(1)	230.20
982(2)	230.00
982(3)	230.20
983	400.15
984	400.20
985	400.25
985-a	400.30
986	230.05
986-a	230.30(2)
986-b	230.15, 230.30(1)
986-c	230.10(1)
987	omitted
988	omitted
989	omitted
990	omitted
991	430.00
992	430.05
993	430.10
994	430.25
995	430.30
996	70.10
997	200.00(2)
998	omitted
Article 90 Habitual Criminals	
1020-1022	omitted
Article 92 Hazing	
1030	250.10(11)

TABLE II--DISPOSITION

Penal Law Section (OLD)	Disposition
Article 94	
Homicide	
1040	omitted
1041	omitted
1042	130.00
1043	130.00
1044	130.25
1045	130.30
1045-a	130.35
1046	130.20, 130.25
1047	omitted
1048	omitted
1049	130.00
1050	130.15(2), 130.20(1, 3), 130.45
1051	130.20, 130.45
1052	130.10, 130.15(1), 130.20(1), 130.55
1053	130.15
1053-a	130.10, 130.15(1)
1053-b	130.10, 130.15(1)
1053-c	130.10, 130.15(1)
1053-d	130.10, 130.15(1)
1053-e	130.10, 130.15(1)
1053-f	130.10, 130.15(1)
1054	65.05
1055	65.05, 65.10, 65.30
Article 96	
Horse Racing	
1081	transferred--Unconsolidated Laws
1082	omitted
Article 98	
Husband and Wife	
1090	235.10, 235.20
1091	omitted
1092	omitted
Article 100	
Ice	
1100	omitted
Article 102	
Incest	
1110	260.25

PROPOSED PENAL LAW

Penal Law Section (OLD)	Disposition
Article 104	
Incompetent Persons	
1120	60.05
1121	140.05, 140.10, 265.20
1122	transferred—Mental Hygiene Law
1123	265.20
Article 106	
Indecency	
1140	240.05(2), 250.05(4), 250.10(4)
1140-a	240.05(2)
1140-b	240.05(2)
1141	240.05, 240.10(2)
1141-a	240.05(1)
1141-b	240.05(1)
1141-c	405.05
1142	130.60 (in part); transferred—Public Health Law (in part)
1142-a	transferred—Public Health Law
1143	240.05(1)
1144	405.00
1145	transferred—Public Health Law
1146(para. 1)	235.15
1146(para. 2)	435.00
1146(para. 3)	235.25
1146(para. 4)	omitted
1146(para. 5)	omitted
1147	omitted
1148	235.10, 250.15(3)
Article 108	
Indians	
1160	omitted
1161	omitted
Article 110	
Insolvency	
1170	190.00
1171	190.00
1172	190.00
1173	190.00

TABLE II—DISPOSITION

Penal Law Section (OLD)	Disposition
Article 112	
Insurance	
1190	transferred—Insurance Law
1191	omitted
1192	omitted
1194	omitted
1195	omitted
1196	transferred—Insurance Law
1196-a	transferred—Insurance Law
1197	omitted
1197-a	transferred—Insurance Law
1198	omitted
1199	transferred—Insurance Law
1200	transferred—Insurance Law
1201	omitted
1202	180.55
1203	transferred—Insurance Law
1204	transferred—Insurance Law
Article 113	
Intoxicating	
Liquor	
1220	45.10(1)
1221	250.20
1222	125.20, 125.25
Article 116	
Juries and Jurors	
1230	10.00(9)
1231	200.00
1232	215.05, 215.10, 215.15
1232-a	215.45
1233(1)	205.00
1233(2)	omitted
1233(3)	205.05
1233(4)	omitted
1234	omitted
1235	220.50(6)
Article 118	
Kidnapping	
1250(para. A)	140.00, 140.05, 140.10, 140.15, 140.30,
	140.40
1250(para. B)	140.20
1250(para. C)	140.25(1)
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PROPOSED PENAL LAW

Penal Law Section (OLD)	Disposition
Article 118 Kidnapping	
1250(para. D)	140.25(2)
1250-a	140.35(2), 140.40
1250-b	120.20, 250.10(10)
1251	omitted
1252	140.00(5)
1253	omitted
1255	omitted
1256	70.10
Article 120 Labor	
1270	omitted
1271(1)	transferred—Labor Law
1271(2)	omitted
1271(3)	omitted
1271(4)	omitted
1272	transferred—Labor Law
1274	transferred—Labor Law
1275	transferred—Labor Law
1276	omitted
1278	transferred—Labor Law
1279	transferred—General Business Law
Article 122 Larceny	
1290	160.05(1), 160.10
1290-a	160.20
1291(1)	160.00(1)
1291(2)	190.10
1292	160.00(1)
1292-a	160.05(2), 195.05, 195.10
1293	160.05
1293-a	170.05, 170.10
1293-b	180.50
1293-c	160.05, 170.20(4)
1293-d	175.50, 175.55, 175.60
1294	160.35, 160.40
1295	160.35, 160.40
1296	160.30, 160.35
1297	160.30, 160.35
1298	160.30, 160.35
1299	160.30, 160.35
1300	160.05(2)

TABLE II—DISPOSITION

Penal Law Section (OLD)	Disposition
Article 122	
Larceny	
1301	170.40, 170.45
1302	160.05(2)
1302-a	transferred—Real Property Law
1302-b	omitted
1302-c	transferred—Lien Law
1303	160.25
1304	160.25
1305	160.25
1306	160.15(1)
1307	omitted
1307-a	omitted
1308	170.35, 170.40, 170.45, 170.50, 170.55
1308-a	170.60(4)
1309	170.60(1)
1310	160.05(2), 170.00
1311	160.05(2)
1312	160.05(2)
1313	160.05(2)
Article 124	
Legislature	
1320	200.05
1321	250.05(5)
1322	200.05
1323	140.50, 140.55
1324	140.50, 140.55
1325	175.10
1326	175.10
1327	140.50, 140.55, 205.00
1328	205.05
1329	220.60(1)
1330	220.60(2, 3, 4)
1331	omitted
Article 126	
Libel	
1340	omitted
1341	omitted
1342	omitted
1343	omitted
1344	omitted
1345	omitted
1346	omitted

PROPOSED PENAL LAW

<u>Penal Law Section (OLD)</u>	<u>Disposition</u>
Article 126	
Libel	
1347	160.05(2)
1348	omitted
1349	omitted
Article 130	
Lotteries	
1370	230.00
1371	omitted
1372	230.05
1373	230.05
1374	omitted
1375	omitted
1376	230.05
1377	230.05
1378	230.05
1379	omitted
1380	430.40
1381	230.05
1382	230.25
1383	430.35
1384	430.45
1385	430.15
1386	430.20
1387	230.00
1388	230.05
Article 131	
Lynching and Mob Violence	
1390	omitted
1391	130.15(1)
1392	125.10(4)
Article 132	
Maiming	
1400	125.10(2)
1401	omitted
1402	omitted
1403	omitted
1404	omitted

TABLE II—DISPOSITION

Penal Law Section (OLD)	Disposition
Article 134	
Malicious Mischief	
1420	150.00, 150.05, 150.10, 155.10, 155.15
1420-a	150.00, 150.05, 150.10, 155.10, 155.15
1421	150.00, 150.05, 150.10
1422	125.20, 125.25
1423	125.20, 125.25, 150.00, 150.05, 150.10
1423-a	150.00, 150.05, 150.10
1423-b	150.00, 150.05, 150.10
1423-c	150.00, 150.05, 150.10
1424	125.20, 125.25, 150.00, 150.05, 150.10
1424-a(1)	275.15
1424-a(2)	275.15
1424-a(3)	transferred—General Business Law
1425	145.05, 150.00, 150.05, 150.10
1425(16)	transferred—General Business Law
1425-a	omitted
1426	150.00, 150.05, 150.10
1427	150.00, 150.05, 150.10
1428	150.00, 150.05, 150.10
1429	transferred—Election Law
1430	150.00, 150.05, 150.10
1431	150.00, 150.05, 150.10, 170.20(5, 6)
1431-a	170.20(5)
1432	150.00, 150.05, 150.10, 170.20
1432-a	150.00, 150.05, 150.10, 170.20
1433(1)	150.00, 150.05, 150.10
1433(2)	150.00, 150.05, 150.10
1433(3)	150.00, 150.05, 150.10
1435	omitted
1436	transferred—Military Law
1437	omitted
1438	omitted
	150.00, 150.05, 150.10
Article 136	
Marriage and Divorce	
1450	260.00
1451	260.05
1452	transferred—General Business Law
1453	260.10, 160.20
1454	140.50
1455	omitted

PROPOSED PENAL LAW

<u>Penal Law Section (OLD)</u>	<u>Disposition</u>
Article 140 Meetings	
1470	250.05(5)
1471	omitted
1472	70.10
Article 142 Military	
1480	transferred—Military Law
1481	transferred—Military Law
1482	omitted
1483	transferred—Military Law
1484	transferred—Military Law
1484-a	transferred—Military Law
1486	omitted
1487	omitted
Article 144 Navigation	
1500	transferred—Navigation Law
1500-a	transferred—Navigation Law
1500-b	transferred—Navigation Law
1501	transferred—Navigation Law
1502	transferred—Navigation Law
1503	transferred—Navigation Law
1504	transferred—Navigation Law
1505	transferred—Navigation Law
1505-a	transferred—Navigation Law
1506	omitted
1507	omitted
1508	omitted
1509	omitted
1510	transferred—Navigation Law
1511	transferred—Navigation Law
Article 146 Negotiable Instruments	
1520-1522	transferred—General Business Law
Article 148 Nuisances	
1530	250.25(1)
1531	omitted

TABLE II—DISPOSITION

Penal Law Section (OLD)	Disposition
Article 148 Nuisances	
1532	omitted
1533	250.25
1534	transferred—General Business Law
Article 150 Oysters	
1550	omitted
1551	omitted
Article 152 Passage Tickets	
1560-1574	transferred—General Business Law
Article 154 Pawnbrokers	
1590-1593	omitted
Article 156 Peddlers	
1610	omitted
Article 158 Perjury and Subornation of Perjury	
1620(1)	215.00
1620(2)	215.00
1620(3)	215.00
1620(4)	215.45
1620(5)	215.45
1620(6)	215.45
1620-a	215.10, 215.15
1620-b	215.05
1621(1)	215.30(3)
1621(2)	215.30(3)
1621(3)	215.00
1622	215.00(1)
1623	215.30(1)
1624	215.30(2)
1625	215.00(5)
1626	215.00(5)
1627	215.20(2)

PROPOSED PENAL LAW

<u>Penal Law Section (OLD)</u>	<u>Disposition</u>
Article 158 Perjury and Subornation of Perjury	
1627-a	215.20(1, 2)
1628	omitted
1629	omitted
1630	omitted
1632	215.65
1632-a	215.55, 215.60
1633(1)	215.10, 215.20, 215.60, 215.65
1633(2)	215.05, 215.55
1634	omitted
Article 159 Platinum Stamping	
1635-1643	transferred—General Business Law
Article 160 Poor Persons	
1650	omitted
Article 161 Portable Kerosene Heaters	
1670-1674	transferred—Real Property Law
Article 162 Prisoners	
1690	210.00
1691	210.30, 210.35
1692	210.05, 210.10, 210.15
1693	30.30(6)
1694	210.05, 210.10, 210.15
1694-a	210.50, 210.55
1694-b	210.50, 210.55
1695	210.15(1)
1696	210.05, 210.10, 210.15
1697	210.05(4), 210.10(4), 210.15(4)
1698	210.20, 210.25
1699	omitted
1699-a	transferred—Correction Law

TABLE II—DISPOSITION

Penal Law Section (OLD)	Disposition
Article 164 Prize-Fighting and Sparring 1710-1716	omitted
Article 166 Public Health	
1740	transferred—Public Health Law
1741	transferred—Public Health Law
1742	transferred—Education Law
1743	omitted
1744	omitted
1745	transferred—Education Law
1747	transferred—Education Law
1747-a	transferred—Education Law
1747-b	transferred—Public Health Law
1747-c	transferred—Public Health Law
1747-d	transferred—Public Health Law
1747-e	transferred—Public Health Law
1748	omitted
1749	transferred—Agriculture and Mar- kets Law
1750	transferred—Agriculture and Mar- kets Law
1751(1)	225.25, 225.30
1751(2)	225.10(1), 225.15
1751(3)	225.10(2)
1751(4)	225.20
1751(5)	omitted
1751-a(1)	225.05
1751-a(2)	omitted
1751-a(3)	omitted
1751-a(4)	omitted
1751-a(5)	omitted
1752	125.05(3)
1752-a	70.10
1753	transferred—Public Health Law
1754	transferred—Public Health Law
1755	omitted
1756	omitted
1757	transferred—Agriculture and Mar- kets Law
1758	transferred—Public Health Law
1759	transferred—Public Health Law
1760	125.20, 125.25

PROPOSED PENAL LAW

Penal Law Section (OLD)	Disposition
Article 166	
Public Health	
1760-a	125.20, 125.25
1761	125.00, 125.20, 125.25
1762	omitted
1763	omitted
1764	transferred—Agriculture and Markets Law
Article 168	
Public Justice	
1780	omitted
1781	omitted
1782	220.75
1783	220.70
1783-a	220.70
1784	220.70
1785	omitted
1786	200.00, 250.10(10)
1787(1)	105.00
1787(2)	omitted
1787(3)	70.10
1788	200.00(1)
1789	omitted
1790	omitted
1791	210.30
1792	200.00
Article 170	
Public Offices and Officers	
1820	omitted
1820-a	transferred—Executive Law
1821	omitted
1822	205.00
1823	205.05
1824	140.55, 200.05
1825	200.05
1826	205.05, 205.20, 205.30
1827	transferred—Tax Law
1828	transferred—Correction Law
1828-a	210.30(1), 210.35(2)
1829	205.05
1830	200.00(1)
1831	205.30
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TABLE II—DISPOSITION

Penal Law Section (OLD)	Disposition
Article 170 Public Offices and Officers	
1832	205.40, 205.45
1833	205.05
1834	omitted
1835	omitted
1836	180.20, 180.25
1837	10.00(8)
1838(1)	180.20, 180.25
1838(2)	160.05
1839(1)	205.05
1839(2)	200.05(1)
1840	200.00(2)
1841	200.00(2)
1842	200.00(2)
1843	200.00(2)
1844	200.00(2)
1845	transferred—Public Officers Law
1846	195.25(3)
1847	200.00(1)
1848	200.00 (in part); transferred—Gen- eral Municipal Law (in part)
1849	omitted
1850	omitted
1851	200.05
1852	omitted
1853	omitted
1854	omitted
1855	omitted
1856	omitted
1857	200.00(2)
1858	omitted
1859	omitted
1860	180.40
1861	180.40
1862	200.00(1)
1863	160.05, 200.00(1)
1864	160.05, 200.00(1)
1865(1)	160.05
1865(2)	180.05, 180.10
1865(3)	180.05, 180.10
1865(4)	200.00(2)
1866	200.00
1867	160.05, 200.00

PROPOSED PENAL LAW

Penal Law Section (OLD)	Disposition
Article 170 Public Offices and Officers	
1868	transferred—Education Law
1869	200.00(2)
1870	omitted
1871	transferred—Education Law
1872	180.30, 180.35
1872-a	180.30, 180.35
1873	150.00, 150.05, 150.10, 160.05
1874	200.00(2)
1875	200.00
1876	200.00(1)
1877	omitted
1878	transferred—Public Officers Law
1879	transferred—General City Law
Article 172 Public Safety	
1890	125.20, 125.25
1891	omitted
1892	125.20, 125.25
1893	125.20, 125.25
1894	transferred—General Business Law
1894-a(1-a)	275.00
1894-a(1-b)	425.00
1894-a(2)	275.00
1894-a(3)	425.00
1894-a(4)	425.00
1894-a(5)	425.00
1894-a(6)	275.00
1894-a(7)	275.00
1894-a(8)	275.00
1894-a(9)	omitted
1894-a(10)	415.00
1895	125.20, 125.25, 155.15
1896	270.00
1897	270.05
1898	270.10(1-6)
1899	270.15
1900	270.20
1901	410.00(1, 2, 3)
1902(1)	410.00(4, 5)
1902(2)	410.00(4, 5)
1902(3)	270.10(7)

TABLE II—DISPOSITION

Penal Law Section (OLD)	Disposition
Article 172	
Public Safety	
1902(4)	270.25
1902(5)	270.30
1903	420.00
1904(1)	270.35
1904(2)	270.35
1904(3)	270.35
1904(4)	270.35
1904(5)	omitted
1904(6)	70.10
1905	omitted
1906(1)	150.00, 150.05, 150.10, 155.20
1906(2)	150.00, 150.05, 150.10, 155.20
1906(3)	150.00, 150.05, 150.10, 155.20
1906(4)	200.15
1907	omitted
1908	omitted
1909	omitted
1910	omitted
1911	125.20, 125.25, 150.05, 150.10, 150.15, 160.05(2)
1912	omitted
1913	125.20, 125.25
1914	200.15
1915	transferred—General Business Law
1916	transferred—Vehicle and Traffic Law
1917	transferred—New York City Admin- istrative Code
1918	transferred—General Business Law
1919	transferred—General Business Law
1920	275.10(1)
1921	transferred—General Business Law
1922 (para. 1)	transferred—General Business Law
1922 (para. 2)	omitted
1923	275.10(2)
Article 174	
Punishment	
1930	omitted
1931	omitted
1932	40.10
1933	omitted
1934	50.00, 120.10, 120.15, 120.20
1935	15.05(3)

PROPOSED PENAL LAW

Penal Law Section (OLD)	Disposition
Article 174	
Punishment	
1936	50.00
1937	15.10(3)
1938	30.25(2), 75.10
1939	220.55
1940	Under study
1941	30.10
1942	30.10
1943	To be treated in Code of Criminal Procedure
1944	omitted
1944-a	Under study
1945	omitted
Article 176	
Quarantine	
1960	omitted
1961	omitted
1962	omitted
1963	omitted
1964	omitted
Article 178	
Railroads	
1980	omitted
1981	omitted
1982	omitted
1983	omitted
1984	125.20, 125.25
1985	transferred—Railroad Law
1987	omitted
1988	omitted
1989	omitted
1990	145.05, 145.10, 170.20(3)
1990-a	250.15(7, 8)
1990-b	170.20(3)
1991	125.20, 125.25, 150.00, 150.05 150.10
Article 180	
Rape	
2010	135.20, 135.25, 135.30, 135.35
2011	135.00

TABLE II—DISPOSITION

Penal Law Section (OLD)	Disposition
Article 180	
Rape	
2012	omitted
2013	135.15
Article 182	
Real Property	
2030	omitted
2034	145.05
2035	145.05
2036	145.05
2036-a	145.05
2037	omitted
2038	70.10
2039	omitted
2040	transferred—Real Property Law
2041	transferred—Real Property Law
2042	transferred—Real Property Law
Article 184	
Records and Documents	
2050	180.20, 180.25
2051	180.30, 180.35
2052(1)	195.30
2052(2)	70.10
2053	omitted
Article 186	
Religion	
2070	140.50, 140.55
2071	250.05(5)
2072	omitted
2073	140.50, 140.55
2074	omitted
Article 188	
Riots and Unlawful Assemblies	
2090	245.00
2091	245.00
2092	245.05
2093	250.05(6)
2094	245.05
	245

PROPOSED PENAL LAW

Penal Law Section (OLD)	Disposition
Article 188	
Riots and Unlawful Assemblies	
2095	200.10
2095-a	omitted
2096	omitted
2097	70.10
Article 190	
Robbery	
2120	165.05
2121	165.05
2122	165.05
2123	165.05
2124	165.15, 165.20
2125	165.20
2126	165.10
2127	165.15
2128	omitted
2129	165.10
Article 192	
Sabbath	
2140-2153	transferred—General Business Law
Article 194	
Salt Works	
2170	omitted
Article 195	
Seduction	
2175	omitted
2176	omitted
2177	omitted
Article 196	
Sentence	
2180	To be treated in Correction Law
2181	30.20(2)
2182(1)	30.20(2)
2182(2)	30.00(3)
2182(3)	To be treated in Correction Law
2183	30.20(1)
2184	omitted
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TABLE II—DISPOSITION

Penal Law Section (OLD)	Disposition
Article 196 Sentence	
2184-a	35.00, 35.05, 35.15
2185	omitted
2186	30.05, 60.00
2187	30.20, 35.00
2187-a	35.00, 35.05, 35.10, 35.15
2188	25.00, 25.05, 25.10, 25.15, 25.20
2188-a	To be treated in Correction Law
2188-b	25.10
2189	30.00(1)
2189-a	Under study
2190	30.25(1), 30.30(1, 2)
2191	omitted
2192	omitted
2193(1)	30.30(3)
2193(2)	30.40(3)
2193(3)	30.40(3)
2193(4)	30.30(5)
2194	omitted
2195	35.00
2196	30.20(2); also to be treated in Cor- rection Law
2198	To be treated in Code of Criminal Procedure and Correction Law
Article 198 Sepulture	
2214	transferred—Public Health Law
2216	transferred—Public Health Law
2217	transferred—Public Health Law
2218	transferred—Public Health Law
2219	transferred—Public Health Law
2220	transferred—Public Health Law
2221	omitted
Article 200 Societies and Orders	
2240	transferred—General Business Law
2240-a	omitted
2241	transferred—Civil Service Law

PROPOSED PENAL LAW

<u>Penal Law Section (OLD)</u>	<u>Disposition</u>
Article 202	
Suicide	
2300	omitted
2301	omitted
2304	130.15(3)
2305	125.30
2306	omitted
Article 204	
Taxes	
2320	omitted
2321	215.45
2322	transferred—Tax Law
Article 206	
Trade-Marks	
2350-2357	transferred—General Business Law
Article 208	
Trading Stamps	
2360	omitted
2361	omitted
Article 210	
Tramps	
2370	omitted
2371	omitted
2372	omitted
Article 212	
Treason	
2380	omitted
2381	omitted
2382	omitted
2383	omitted
Article 214	
Usury	
2400	transferred—General Obligations Law
Article 216	
Weights and Measures	
2410-2416	omitted
	248

TABLE II—DISPOSITION

Penal Law Section (OLD)	Disposition
Article 218	
Witness	
2440	220.00
2441	220.10
2442	220.10
2443	omitted
2444	omitted
2445	omitted
2446	70.20
2447	70.00, 70.15
2448	220.65
Article 220	
Women	
2460(1)	235.10, 235.15
2460(2)	235.10, 235.15
2460(3)	235.10, 235.15
2460(4)	235.10, 235.15
2460(5)	235.10, 235.15
2460(6)	235.10, 235.15
2460(7)	235.20
2460(8)	235.10, 235.15
2460(9)	omitted
2461	omitted
Article 222	
Wrecks	
2480	transferred—Navigation Law
2481	transferred—Navigation Law
2482	transferred—Navigation Law
Article 224	
Repeal of Provisions of Penal Law Must Be Explicit; Laws Re- pealed; Time of Tak- ing Effect	
2500	omitted
2501	omitted
2502	omitted

COMMISSION STAFF NOTES
ON THE
PROPOSED NEW YORK PENAL LAW

The major changes which would be effected by the proposed Penal Law that was introduced for study purposes at the 1964 session of the Legislature, are explained in the following notes which were prepared by the staff of the State Commission on Revision of the Penal Law and Criminal Code.

PART ONE
GENERAL PROVISIONS

As the phrase "General Provisions" suggests, Part One applies to all the specific offenses dealt with in Part Two of the proposed Penal Law. Here are contained all the provisions relating to the classification of offenses and the sentencing structure (proposed Articles 15 through 40) and the multi-faceted concepts of criminal liability (proposed Articles 45 through 75). Although in one respect the revision in this area is formal, since it draws together relevant material scattered throughout the existing Penal Law, it is primarily substantively new. This is particularly true of the classification of offenses and the sentencing structure.

ARTICLE 1: SHORT TITLE AND PURPOSE

This Article serves formally to identify this body of law (proposed § 1.00) and to state, in broad terms, the salutary objectives it seeks to achieve (proposed § 1.05).

**ARTICLE 5: GENERAL RULES OF CONSTRUCTION
AND APPLICATION**

§ 5.00 Penal Law not strictly construed

This section substantially restates existing Penal Law § 21.

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§ 5.05 Application of chapter to offenses committed before and after enactment

This section sets forth the method of transition from the existing Penal Law to the proposed Penal Law, i. e., all of the provisions of the proposed Penal Law apply only to offenses committed after its effective date.

§ 5.10 Other limitations of scope, application and function of this chapter

This section substantially restates existing Penal Law §§ 23, 24, 37, 39 and 41.

ARTICLE 10: DEFINITIONS

§ 10.00 Definitions of terms of general use in this chapter

This section defines nine terms used in various provisions of the proposed Penal Law. Where a different meaning is expressly specified, that meaning, of course, controls; e. g., proposed § 10.00(1) (definition of "person") is inapplicable to the homicide article since another definition of "person" is set forth in proposed § 130.05(1). All of the definitions of § 10.00 are new, and are largely self-explanatory. The only term defined in the existing Penal Law is "juror" (see §§ 370, 741, 1230).

ARTICLE 15: DEFINITIONS AND CLASSIFICATION OF OFFENSES

§ 15.00 Classification of offenses

The proposed section makes one significant change in the existing law. It establishes and integrates, as part of the Penal Law, a specific statutory classification for non-criminal offenses.

Under existing law, the term "crime" is used as the generic description for any act that subjects a person to a penal sanction (Penal Law, § 2). This term is inaccurate because it includes non-criminal offenses. Thus, while the laws of the state have always recognized the existence of the petty or quasi-criminal offense (see *Duffy v. People*, 6 Hill 75, 78-79 [1843]; *Steinert v. Sobey*, 14 App.Div. 505, 44 N.Y.Supp. 146 (2d Dept.1897); e. g., Penal Law, § 722; Code of Cr.Proc., §§ 887-912), the definition of the term "crime" has prevented the integration of a non-criminal offense category as part of the formal statutory system of classification of offenses. As a result, in order to identify a non-criminal offense, one must refer to the history of the offense, judicial opinions, or in

some cases, specific statutory exceptions. In recent years this problem has become quite important because the Legislature has been using the non-criminal offense in an increasing number of modern situations where criminal procedure and criminal sanctions are desirable for enforcement purposes but where it would be impolitic to brand the offender with the stigma that accompanies conviction of a "crime" (see, e. g., Conservation Law, § 388; Defense Emergency Act, § 100 subd. 4; Multiple Dwelling Law, § 304 subd. 1-a; Penal Law, § 496; Tax Law, § 481 subd. 2, Vehicle and Traffic Law, § 155).

The proposed section employs the term "offense" to describe any statutory breach for which a penal sanction may be imposed. The use of this term rather than the term "crime" to denote the broadest classification makes it possible to classify and define criminal and non-criminal offenses within an integrated system. All crimes are either "misdemeanors" or "felonies" and all non-criminal offenses are termed "violations." This, of course, eliminates the present necessity to create an individual exception for each non-criminal offense and has the advantage of providing a ready-made general category of non-criminal offense for future legislation.

The traffic infraction is excluded from the proposed system of classification because the sentences of imprisonment presently authorized for traffic infractions¹ are incompatible with the proposed uniform sentences for violations (see comments to § 15.10 subd. 1, § 30.15 subd. 4, infra) and the Commission was reluctant to make any adjustment in traffic infraction sentences without a complete study of this special area.

§ 15.05 Felony; definition, classifications and designation

Subdivision 1. Definition

The proposed section defines the term "felony" as an offense for which a person may be sentenced to a term of imprisonment which is in excess of one year. This is in substance the present definition of that term (see App., pp. A1-4).

It might be noted that the practice of classifying crimes as either felonies or misdemeanors on the basis of the authorized sentence, rather than some other criterion, is based upon cer-

¹The Vehicle and Traffic Law provides severe terms of imprisonment for second and third offenders but nevertheless classifies these offenses as infractions. The terms are as follows:

	Ordinary infraction (§ 1800)	Speeding infraction (§ 1801-a)
1st offense	15 days	30 days
2nd offense	45 days	90 days
3rd offense	90 days	180 days

tain New York constitutional requirements for the trial of a crime that is punishable by death, imprisonment in a state prison, or imprisonment in any jail for a term in excess of one year. The Constitution requires that such crimes be prosecuted by indictment (Art. 1, § 6) and provides the right to a common law jury (Art. 1, § 2). These provisions do not apply to offenses punishable by imprisonment for one year or less, or by a fine (App., pp. A1-4).

Subdivision 2. Classifications

Subdivision two sets forth five categories of felonies for sentencing purposes. This system of classification is for the purpose of avoiding the need for separate authorized sentences for each offense.

Under the proposed system the specific offenses are merely labeled as to category and all aspects of the sentence are dealt with in one title of the law. This has the advantages of avoiding prolix duplication of the authorized sentences, facilitating future reappraisals of the sentencing structure, and furnishing sentencing brackets to be used as guidelines when new crimes are added. In the latter connection, it might be noted that the lack of clear-cut guidelines for authorized sentences has resulted in a situation where New York now has thirteen different maximum terms for felonies (2 years, 3 years, 4 years, 5 years, 7 years, 10 years, 15 years, 20 years, 25 years, 30 years, 40 years, 50 years and life imprisonment) and at least as many separate terms for misdemeanors. Clearly, it would be difficult if not impossible to find any justification for this plethora of limits. The lack of guidelines has also resulted in inconsistencies. For example, the sentences authorized for many non-criminal offenses are presently more severe than the sentences authorized for various misdemeanors, and certain misdemeanors are punishable by sentences which can only be imposed for felonies (see *e. g.*, Penal Law, §§ 163, 711, 1141 subds. 2, 3 [3rd offense], 1866).

The decision to propose five felony categories—rather than a greater or lesser number—reflects an attempt to achieve a balance between: (1) a sentencing structure that vests the court and Parole Board with broad authority to fashion a sentence to suit the individual offender, irrespective of his particular crime; and (2) a recognition of the practical problems inherent in the administration of such a system and the consequent need for limitations based upon legislative judgments that reflect society's, rather than individual, views of the gravity of particular criminal conduct.

The most significant element in the selection of precisely five categories was the degree structure of the various specific felonies. Five categories were deemed necessary in order to

place all of the crimes and the various degrees of crimes in a reasonable spectrum.

Subdivision 3. Designation

The purpose of subdivision three is to classify the felonies that are defined outside the Penal Law and not specifically classified in accordance with the new system. The proposed subdivision places all such felonies in the lowest sentencing category, "class E," irrespective of the sentences that are presently provided.

An inspection of other chapters of the consolidated laws reveals that there are about twenty felonies outside the Penal Law. In cases where the Legislature has expressly prescribed the authorized sentences for these felonies the maxima do not, with one exception, exceed five years. In cases where the Legislature has not expressly specified the authorized sentence, the sentence is governed by the catchall sentencing provision of the existing Penal Law (§ 1935) and is seven years.

The Commission has initiated a detailed study of these felonies. In future proposals it will recommend elimination of a number of them, which are covered by provisions of the proposed Penal Law, and specific classifications for the others. However, the proposed subdivision was nevertheless deemed necessary to cover future situations where the classification may be omitted through oversight.

§ 15.10 Misdemeanor; definition, classifications and designation

Subdivisions 1 and 4. Definition and Exceptions

Subdivision one defines the term "misdemeanor" as an offense for which a person may be sentenced to a term of imprisonment which is in excess of fifteen days but which cannot exceed one year.* This differs from the existing definition (Penal Law, § 2). Under existing law, offenses punishable by any sort of penal discipline are crimes unless specifically excepted. Under the proposed statute, offenses punishable by certain forms of penal discipline are crimes. All others would be non-criminal violations (§ 15.15, *infra*).

Thus, the proposed subdivision extends the principle of gauging the gravity of offenses by the length of the authorized sentence (presently applicable to the felony-misdemeanor distinction) to the distinction between criminal and non-criminal offenses. Offenses for which a term of imprisonment in excess of fifteen days is authorized would be misdemeanors (or felonies, depending upon the sentence). Those for which a lesser term or only a fine is authorized would be non-criminal "violations" (see § 15.15, *infra*).

In application, this would automatically reduce to a "violation" any offense defined outside the Penal Law which is presently designated a misdemeanor but punishable by a term of imprisonment that cannot exceed fifteen days, or punishable by a fine alone. Here it can reasonably be assumed, by virtue of the expressly specified sentence, that there has been a legislative judgment that the offense is relatively innocuous and also that the offense would have been placed in the non-criminal "violation" category had one been integrated into the general structure at the time the offense was defined.²

The exception set forth in subdivision four of the proposed section prevents automatic reclassification of any offense defined outside the Penal Law which presently is not a crime but which, by virtue of an expressly specified sentence, falls within the definition of the term "misdemeanor" in subdivision one of the section. These offenses are designated as "violations" in section 15.15, subdivision 2(b).

Subdivisions 2 and 3. Classification and Designation

Subdivision two provides three classifications of misdemeanors for sentencing purposes, and subdivision three sets forth the manner in which the misdemeanors are designated.

Two basic categories are used (class A and class B). Such division seems to exhaust the possibilities of reasonable legislative discrimination in dealing with crimes for which the maximum sentence cannot exceed one year.

The third proposed misdemeanor category—the "unclassified misdemeanor"—is for the numerous misdemeanors with specifically designated sentences defined outside the Penal Law. This category was created so that the sentences for such crimes would be left as they are.

In the case of a misdemeanor defined outside the Penal Law for which no sentence is expressly specified, the class A designation would apply (see subd. 3 [b]). The reason for this distinction is that the sentence for such crimes is specified in the existing Penal Law (§ 1937). Hence, the sentence would have to be provided in the proposed Penal Law. The class A designation herein proposed leaves these crimes in their existing sentencing category (*i. e.*, crimes punishable by the maximum term that can be imposed for a misdemeanor).

The misdemeanors defined outside the Penal Law cover the widest variety of subject matter. Some are obviously grave and some are obviously petty, but the sentences that are specifically prescribed in the sections that define these crimes

² Examples of such offenses may be found in the following statutes: Domestic Relations Law, §§ 13-b, 15-a; Personal Property Law, § 414; Public Health Law, § 2223; Railroad Law, § 61-a; Social Welfare Law, § 149.

do not in many cases reflect the relative gravity of the offenses. Therefore, it would be impossible to allocate them between the two basic sentencing classifications without a complete analysis. For example, if the proposed law were to provide that all misdemeanors defined outside the Penal Law with specific sentences of more than three months would henceforth be deemed class A misdemeanors for sentencing purposes, the result would be an eight month increase in a presently authorized sentence of four months (see § 30.15 subd. 1, *infra*). However, an appraisal of the substance of the offense might reveal that it ought to be a class B misdemeanor. Nor is it possible to automatically reclassify these misdemeanors by making them all class A misdemeanors or all class B misdemeanors. Such action would be completely arbitrary in view of the fact that some are obviously grave and some are obviously petty.

§ 15.15 Violation; definition and designation

Subdivision one defines the term "violation" which is used in the proposed law for classification of the non-criminal offenses (see comments to § 15.10 subd. 1, *supra*).

Subdivision two is primarily for the purpose of identifying the offenses defined outside the Penal Law that will be deemed to be violations (see comments to § 15.10 subd. 1, *supra*).

ARTICLE 20: AUTHORIZED DISPOSITION OF OFFENDERS

§ 20.00 Authorized dispositions

Subdivision 1. In general.

Subdivision one makes it clear that all sentences must be in accordance with the sentencing provisions of the proposed Penal Law. This subdivision has no counterpart in any existing statute. It has been included in the proposed Penal Law to prevent deviations from the sentencing plan and also because the proposed sentencing structure is applicable to all offenses, whether defined in or outside of the Penal Law.

Subdivision 2. Class A felony

The purpose of this subdivision is to indicate the sections that apply to sentencing for capital felonies and to make it clear that, where the death penalty is not imposed, the sentence must be a particular term of imprisonment.

The requirement of mandatory imprisonment for murder and kidnapping (in cases when the death penalty is not imposed) is in accordance with the present law and, in view of

the nature of the crimes involved, it has been retained in the proposed law.

Subdivision 3. Revocable dispositions; probation and conditional discharge

Subdivision three makes a significant change in existing law. It eliminates the "suspended sentence" and the "suspended execution of sentence" dispositions, which are—in form—confusing and ambiguous.

The suspended sentence, as currently used in New York State, serves two basic purposes: (1) it is a method of discharging a person without fine or imprisonment in a case where there are extenuating circumstances; and (2) it is a vehicle for imposing the comparatively modern sanction of probation supervision (see App., pp. A51-52). Suspended execution of sentence serves the same purposes. The only difference between the two is that in the former the court does not pronounce a sentence, while in the latter the court pronounces a sentence and then suspends execution thereof. In either case, if the court revokes the suspension, it may impose any sentence it originally might have imposed, irrespective of the sentence previously pronounced in the case of suspended execution (see App., p. A52).

The purposes served by these dispositions are necessary and desirable, but the form is anachronistic. The form is a carry-over from the days when the only way for a court to relieve a defendant from the effect of an error or miscarriage of justice was to refuse to adjudicate guilt. Since the sentence is the judgment of the court, this was accomplished by suspending sentence (see App., pp. A46-47). Thus, a suspended sentence was not a judgment of conviction and a person who received one was not deemed to have been convicted. Subsequent developments in criminal procedure vested the defendant with an arsenal of other adequate remedies for error or miscarriage of justice and the suspended sentence evolved into a vehicle for leniency based upon matters extraneous to the legality of the conviction (see App., pp. A53-56). Nevertheless, confusion persists to this day on the question of whether a person who has received a suspended sentence or suspended execution of sentence has been "convicted" (App., pp. A53-56).

If the sole problem with the suspended sentence were the question of whether it is or is not a judgment of conviction, the solution would be simply to clarify that aspect and retain the present form of the disposition. However, due to the fact that the disposition was never designed as a judgment, it is undesirable for another reason: it does not express, in positive terms, the actual disposition the court is making. The

form of the disposition is not designed to provide a clear distinction between instances where the defendant is discharged without probation and instances where he is placed on probation; or a clear line between a case where the court expects performance of some specific condition in exchange for withholding imprisonment or a fine and a case where no condition is imposed. Moreover, it leaves the judgment of the court *sub judice* even where no condition is imposed and the court never expects to reconsider the disposition. The additional confusion that has been caused by suspended execution of sentence, and the inconsistency in allowing the court to change an already specified sentence, are other objectional features.

Under the proposed Penal Law, when the court decides to place an offender on probation it will impose a "sentence of probation." When probation supervision is not necessary and the court wishes to discharge the offender without fine or imprisonment, but subject to certain conditions, the sentence will be one of "conditional discharge." In cases where neither of these is necessary or desirable the sentence will be one of "absolute discharge" (see subd. 4 [e] of this section). This arrangement has the advantage of clarity.

Another very important advantage of the proposed system is that it will aid in the development of probation as an independent and separate disposition. Freed of its connection with the suspended sentence, the practice of offering an offender an opportunity to rehabilitate himself without institutional confinement but under the supervision of a probation officer and the continuing power of the court to use a more stringent sanction in the event the opportunity is abused, will come into clearer focus as an ordinary disposition much in the way that imprisonment or a fine is accepted as an ordinary disposition. This should encourage its use in appropriate cases.

Subdivision three deals with the proposed revocable dispositions: probation and conditional discharge. It provides that the court may impose these sentences as authorized in the applicable articles. It also provides that notwithstanding the tentative nature of the dispositions, they are final judgments of conviction.

Authority is granted under this subdivision to impose a sentence of probation and a fine. This will be useful in cases where the defendant profited from the crime, but restitution (which may be a condition of probation) is impracticable. Proposed subdivision three does not authorize the use of conditional discharge in conjunction with a fine. Where a fine is imposed and probation supervision is not necessary, there is no reason to keep the matter open. If the court wants to

order restitution in a case where probation supervision is not necessary, it may use the sentence of conditional discharge and make restitution one of the conditions imposed (see § 25.10 subd. 2 [f], *infra*).

Subdivision 4. Other dispositions

Subdivision four sets forth the choice of dispositions other than probation or conditional discharge, and also sets forth the authority of the court to use another disposition when probation or conditional discharge is revoked.

Although there is no comparable provision in the existing law, the provisions of this subdivision are substantially in accordance with existing law. Two variations should be noted. Under existing law, the court may impose a fine as an alternative to imprisonment for some of the more serious felonies and cannot impose a fine at all for most of the more serious felonies (see App., p. A56). The proposed law changes this. It permits the use of a fine for any felony other than a class A felony, but prohibits the use of a fine as the sole sentence in the case of any class B felony or any narcotic felony. In these cases the fine will have to be coupled with probation supervision or imprisonment (see comments to § 25.05, *infra*). The other variation consists of the authority to impose sentence in the form of an "absolute discharge."

Subdivision 5. Corporations

This subdivision defines the court's power when sentencing a corporation (see comments to § 40.10, *infra*).

Subdivision 6. Civil penalties

Subdivision six makes it clear that the court can impose any applicable civil penalty as part of the judgment of conviction. It does not add any new power. The civil penalty will only be made part of the judgment when the statute that authorizes such penalty permits the procedure.

ARTICLE 25: SENTENCES OF PROBATION, CONDITIONAL DISCHARGE AND ABSOLUTE DISCHARGE

§ 25.00 Sentence of probation

The sentence of probation as proposed in this section is a method of offering an offender an opportunity to rehabilitate himself, without institutional confinement, under the supervision of a probation officer and the continuing power of the court to use a more stringent sanction in the event the opportunity is abused.

Subdivision 1. Criteria

Subdivision one sets forth the guidelines for the use of probation. It authorizes the court to impose the sentence for any crime other than a class A felony and defines the basic factors to be considered by the court in deciding whether to do so. These factors, which are not contained in the existing suspended sentence statute (Penal Law, § 2188), are designed to facilitate the use of probation as an ordinary disposition in cases where a person who is not a serious threat to the public and whose imprisonment is not required as a deterrent to others can be rehabilitated without confinement in a penal institution.

The proposed statute does not require proof of any fact as a prerequisite for the exercise of the court's discretionary authority to use the sentence. The general criteria set forth in the statute are for the purpose of focusing the court's attention upon the proper use of the sentence.

Under the proposed law the sentence of probation will be available in certain cases where existing law does not permit the court to suspend sentence or execution of sentence. These are as follows: (1) fourth felony offenders; (2) third narcotic felony offenders; and (3) felonies committed while armed with a weapon (App., p. A49).

The reason for placing these situations within the court's discretionary authority is that it would be arbitrary to assume that there can never be circumstances which would justify chancing probation in such cases. If we trust our courts, as we have for many years, to suspend sentence—with or without probation—in cases of arson, burglary, extortion, rape and robbery, etc., there is no reason to suspect that we cannot trust them to exercise proper discretion in choosing between institutionalization and release under supervision in the case of a recidivist or a person who commits a crime while armed with a weapon.

It might be noted that the courts seem to have used their discretionary powers in this area quite well. Were any general criticism to be made; it would be that they are conservative. During 1962, for example, the average number of persons under probation supervision imposed by courts of this State that have jurisdiction to try indictments was 11,022. Of this number 339 had to be committed for violation of probation, 338 were convicted of additional offenses and 144 absconded. Thus only 821 or 7½% of the number under supervision failed in that year.³ Moreover, a recent sample study made by State Department of Correction's Division of Pro-

³Statistics furnished by the New York State Department of Correction, Division of Probation.

bation indicates that 85% of the persons who successfully completed probation supervision in 1950 did not recidivate during a ten-year period following discharge, and 90% of the persons discharged in 1955 did not recidivate during a five-year period following discharge. (79% of the failures in the first group occurred in the first five years.)⁴

The proposed subdivision does not permit use of the sentence of probation where the court imposes a sentence of imprisonment for some other crime, or where the defendant is, at the time of sentencing, under a state prison or reformatory sentence. The use of the sentence would be improper in the former situation because its basic purpose is to provide a method of supervising offenders without removing them from the community. It would be improper in the latter situation because persons who are serving state prison and state reformatory sentences cannot receive probation supervision in the institutions and will be under parole supervision when released. If the court decides to withhold additional imprisonment in these cases, it can impose a concurrent sentence, or, where authorized, conditional or absolute discharge.

Under the proposed subdivision, a sentence of probation cannot be imposed for a non-criminal offense. In cases involving such petty offenses there seems little sense in burdening the defendant with probation supervision or the overloaded facilities of the probation department with the job of supervising him. Conditional or absolute discharge would be more appropriate dispositions.

Subdivision 2. Sentence

This subdivision sets forth the form in which the sentence is to be imposed and provides the court with authority to alter or revoke it.

As to form, the proposed law provides that when the court imposes a sentence of probation it must specify, as components of the sentence, both the duration of the sentence and the terms and conditions to be complied with. This will require a change in the procedure used by some courts. The existing statutes do not expressly require the court to follow this procedure (Code of Cr.Proc., §§ 932, 933). Hence, some judges omit these specifications and merely refer the offender to a probation officer or to a probation department. The offender is then furnished a copy of the section that sets forth the type of conditions the court can impose (Code of Cr.Proc. § 932), and the conditions are explained (*Id.*, § 936). In such

⁴This study covered the experience of county courts in ten counties with an aggregate population of 5,112,376: Nassau, Erie, Westchester, Monroe, Onondaga, Niagara, Broome, Dutchess, Schenectady and Chautauqua.

a case the period of probation is deemed to be the maximum period allowed under the law—which may or may not be explained to the offender—and, since the conditions set forth in the statute are not tailored to individual situations, the probation officer fixes the conditions of probation (see App., pp. A51-52).

The proposed requirement that the court specify the period of probation and the terms and conditions thereof as components of the sentence will mean that the court must explain the entire sentence, including its conditions. This will make the sentence more meaningful to the defendant and also provide a clear specification of the conditions in the event of a revocation proceeding.

The authority to modify or enlarge the conditions at any time during the period of probation furnishes flexibility for adjustment of the sentence to fit changing circumstances. The authority to revoke the sentence for violation of the conditions provides the power to enforce the conditions imposed. These aspects of the sentence are substantially the same as the provisions that are presently applicable to probation (Code of Cr.Proc., §§ 932, 935; Penal Law, § 2188; see App., pp. A51-53).

Subdivision 3. Periods of probation

This subdivision sets forth the periods of probation for crimes. The periods are mandatory but the court—as under existing law—will have the power to terminate a period and discharge the defendant at any time.

A significant change proposed by this subdivision is the five-year uniform probation period for all felonies. Under existing law, the general rule is that the period of probation for a felony is coterminous with the maximum term of imprisonment that could have been imposed, unless the court fixes a shorter period. If a shorter period has been fixed, it may be extended at any time before it expires to the maximum period that could have been fixed (see App., pp. A51-52). This rule was not designed to serve the purposes of probation: it obviously arose as a corollary of the limitation placed upon the court's power to revoke a suspended sentence (see App., p. A52).

Clearly, the authorized period of probation ought to be fixed in accordance with the purposes to be served by a sentence of probation and not in accordance with the purposes to be served by a sentence of imprisonment. Moreover, in cases where the authorized term of imprisonment is fifteen or twenty-five years, for example, it is unfair to permit the court to revoke the sentence at any time during such period and then impose the authorized term of imprisonment.

The proposed law provides a five-year period of probation for all felonies. In the opinion of the Commission, this period should suffice for the court to determine whether its confidence in the defendant has been misplaced and to give probation supervision an adequate opportunity to be effective.

In this connection it might be noted that the five-year period is recommended by the American Law Institute (Model Penal Code, P.O.D. § 301.2) and is used in the Federal courts (18 U.S.C., § 3651).

Two related changes should also be mentioned. Under existing law when a person is convicted of abandonment, probation may continue until the seventeenth birthday of the youngest child, and when a child is placed on probation the period of probation may not continue beyond his minority (Code of Cr.Proc., § 933). The first rule is eliminated because the needs involved are the continuing care and support of the offender's children. It seems more appropriate to achieve these ends through the specially designed machinery of the Family Court (see Family Court Act, Arts. 3, 4). The second rule is eliminated because it is entirely arbitrary.

The three-year period proposed for a class A misdemeanor is the same as the existing period and seems quite adequate (see App., p. A51). The existing law, however, provides no distinction between grave and petty misdemeanors. In view of the nature of the class B misdemeanor, three years is an excessive period of probation. Hence, the proposed subdivision provides a one year period for class B misdemeanors. The periods of probation for unclassified misdemeanors are geared to the above distinction between class A and class B misdemeanors.

The only other significant change lies in the fact that the court—while retaining its power to terminate the sentence at any time—will have to impose the statutory period at the time it imposes the sentence. The reason for this requirement is to create a presumption in favor of continued supervision. Under existing law, the court may impose a short period and then extend it. Under proposed subdivision three the court will impose a long period and then may terminate it. The primary consideration when extending the period is the fact that the defendant behaved poorly, while a decision to terminate the period would be based upon the fact that the defendant's good conduct merited such treatment.

§ 25.05 Sentence of conditional discharge

The sentence of conditional discharge proposed in this section provides the court with an appropriate disposition in cases where it wishes to impose specific obligations upon the

defendant, but where probation supervision is unnecessary or inappropriate.

Subdivision 1. Criteria

Subdivision one sets forth the guidelines for the use of the proposed sentence of conditional discharge. These are drafted somewhat differently from the guidelines for the sentence of probation. The reason for this difference is that when choosing between probation and imprisonment the court is likely to be dealing with graver circumstances than it would be dealing with in a case where it is considering conditional discharge. The choice between probation and imprisonment arises in a situation where some sort of supervision is obviously necessary and the decision involves selection of the better way to achieve that end. When the court is considering conditional discharge the decision is more likely to involve the question of whether imprisonment or a fine is necessary to preserve standards of justice, or serve as a deterrent to others.

The proposed sentence of conditional discharge cannot be used in two situations where probation can be used: (1) When sentencing for a class B felony; and (2) when sentencing for a narcotic felony (see comments to § 25.00 subd. 1). Under the proposed sentencing structure when the conviction is of a class B felony or a narcotic felony the disposition must be either probation or imprisonment (a fine may be added in the court's discretion [see comments to § 20.00 subd. 4]). The purpose of this restriction is to assure some sort of supervision of persons who commit such crimes, irrespective of the circumstances involved. If the offender is already serving a term of imprisonment a concurrent sentence may be imposed.

The proposed subdivision requires the court to state its reasons on the record when imposing a sentence of conditional discharge for a felony. This is in accordance with the existing requirement for a suspended sentence, with or without probation (Penal Law, § 2188). The only change in the existing law is that this will not be necessary where a sentence of probation is used.

The reason for retaining this requirement is that in the case of a grievous offense, such as a felony, law enforcement officers and the public should not be left in the dark as to the reasons for discharging the defendant without a sanction or supervision. The reasons might be perfectly obvious to anyone who had read the probation report, but the report is not part of the public record or available to the prosecutor.

Subdivision 2. Sentence

Subdivision two sets forth the form in which the sentence of conditional discharge is to be imposed and provides the court with authority to alter or revoke it.

The requirement that the court specify the period and the terms and conditions as part of the sentence is even more important here than it is in connection with the sentence of probation (see comments to § 25.00 subd. 2, *supra*). Under existing law when the court suspends sentence without probation it is required to do nothing more than pronounce the words "sentence suspended." As a matter of practice this pronouncement is sometimes accompanied by a threat as to what the court will do if the defendant should give it cause to regret its decision, but the defendant is still uninformed as to the period of the suspension and the exact conditions.

The provisions of this subdivision with respect to alteration and revocation of the sentence are the same as those discussed in connection with the sentence of probation (see comments to § 25.00 subd. 2, *supra*).

Subdivision 3. Periods of conditional discharge

Subdivision three sets forth the periods during which the discharge remains conditional. These periods seem ample for the accomplishment of any reasonable condition. Apart from the differences in the length of the periods, all aspects are the same as they are for periods of probation (see comments to § 25.00 subd. 3).

§ 25.10 Conditions of probation and conditional discharge

This section provides a guide to the type of conditions that can be imposed upon persons who are placed on probation or conditionally discharged. The list of conditions is not intended to be exhaustive of the permissible conditions and, obviously, no legislative specification could enumerate all of the reasonable measures that may be appropriate in dealing with the problems involved in the rehabilitation of individual offenders.

Under existing law, the provision with respect to the conditions of probation is located in the Code of Criminal Procedure (§ 932) and not in the Penal Law. The proposed Penal Law incorporates the conditions because they constitute an integral part of the sentence.

It should be noted that both the probation and the conditional discharge statutes (§ 25.00 subd. 2, § 25.05 subd. 2) provide that commission of another offense is cause for revocation. This condition should be obvious to any offender and does not have to be specified in the sentence.

The discretionary conditions set forth in proposed subdivision two are by and large the same as those presently set forth in the Code of Criminal Procedure and recommended in the Model Penal Code (P.O.D., § 301.1).

The conditions relating to supervision set forth in subdivision three apply only to sentences of probation. These conditions are also presently set forth in the Code of Criminal Procedure (§ 932). The only change is that under existing law the conditions are discretionary, while under the proposed law they must be imposed as part of the sentence. The reason for this change is that the conditions are deemed essential to any system of probation and the defendant should be advised of them by the court at the time sentence is imposed.

In connection with the conditions of probation it should be noted that the possibility of authorizing a "split-term" (*i. e.*, a short jail sentence before supervision commences) was considered and rejected. This device was used in New York State prior to 1925, but the confusion and complications it engendered caused the Legislature to abolish it in that year (L.1925, Ch. 276). The amendment that abolished the practice was supported by all interested governmental departments and all others who wrote comments to the Governor (see bill jacket for L.1925, Ch. 276). In any event, the definite sentence conditional release procedure provided in the proposed law should serve any worthwhile purpose that could be served by a "split-term" (see § 30.40 subd. 2).

§ 25.15 Calculation of periods of probation and of conditional discharge

Subdivision 1

The subject matter of this subdivision is not covered by any existing statute; and no judicial opinion that deals directly with these matters has been found.

The provision with respect to the date of commencement is for the purpose of lending certainty to the calculation of the period. The provision that requires multiple periods to run concurrently is consistent with the objectives of the sentences involved (see comments to § 25.00 subd. 3, § 25.05 subd. 3). The latter provision, however, will not prevent a combined period which is in excess of the statutory period for a single sentence, if the second sentence is imposed after the first has commenced. The second sentence would be calculated from the date it is imposed and not from the date the first sentence was imposed.

Subdivision 2

Subdivision two provides a method of controlling the period of the sentence in the event a condition is violated. This method is, in substance, an adaptation of the declaration of delinquency device used in connection with parole violations (Correction Law, § 218).

The existing law contains vague and inadequate provisions for tolling the period of suspension or probation (Code of Cr. Proc., §§ 470-a, 933). The primary weakness in the existing law is that it does not permit the court to stop the period from running at the time the condition is breached, unless the defendant has absconded. Thus, for example, a person may be accused of a new offense committed during the period of probation and the period may expire while the court that imposed it is awaiting the outcome of the trial on the new offense; or, the court may commence a revocation proceeding for a breach of the conditions near the end of the period, and the period may expire while the proceeding is pending. See *People ex rel. Berman v. Marsden*, 3 App.Div.2d 980, 162 N.Y.S.2d 993 (4th Dept.1957). The court is then without power to revoke the sentence (see App., p. A52).

Under the proposed subdivision the court will be able to interrupt the period of the sentence by entering a declaration of delinquency that will date back to the date of the breach of condition. The procedure to be used in connection with this device, and the provisions governing the time within which the declaration must be filed, will be contained in the Commission's recommendations with respect to the Code of Criminal Procedure.

Subdivision 3

The purpose of subdivision three is to prevent duplication of supervision and to allow a person who has served his state prison or reformatory sentence to wipe the slate clean. The provision covers four situations: (1) Where a person who is on probation or under conditional discharge is sentenced to imprisonment for an additional crime; (2) Where a person is convicted of more than one offense and receives both a sentence of imprisonment and a sentence of conditional discharge; (3) Where a person who is incarcerated under a sentence of imprisonment receives a sentence of conditional discharge for some other offense; and (4) Where a person who is under parole supervision receives a sentence of conditional discharge for some other offense.

Under the proposed statute, if the court wants to revoke the sentence of probation or conditional discharge in any of the first three of the above four situations, it must act before the defendant is released on parole, conditionally released

(see 30.40 subd. 1[b], *infra*) or finally discharged, whichever occurs first. This will eliminate any possible duplication of supervision and permit the defendant to make a clean start. Moreover, it does not unduly restrict the court that imposed the sentence of probation or of conditional discharge, because if the court has grounds to revoke the sentence and wishes to do so there is ample time for that purpose. No just objective can be served by allowing the sentence to stand while the defendant is on parole or after he has completed service of the sentence of imprisonment.

The fourth situation, however, is somewhat different. Here a sentence of conditional discharge is imposed while the defendant is on parole (probation could not be used). In this case the court and the Parole Board would retain concurrent jurisdiction (not supervision) so that the court would have time to ascertain whether its confidence had been misplaced. If the conditional sentence is not revoked it will be deemed satisfied when the defendant is discharged from parole.

The provisions of this subdivision apply only when the sentence of imprisonment is a state prison sentence (indeterminate sentence) or a state reformatory sentence.

For purposes of comparison, the existing law is as follows. If a person who is under a suspended sentence commits a new crime, the period of suspension or probation is tolled during any term of imprisonment imposed for the new crime (Code of Cr.Proc., §§ 470-a, 933). If the term of imprisonment is imposed for a previous crime, the period of the suspended sentence or of probation would probably continue to run (no authority has been found on the latter point).

§ 25.20 Sentence of absolute discharge

The sentence of absolute discharge proposed in this section provides the court with an appropriate disposition where it does not have any reason to impose a condition. The sentence may be used in any case where conditional discharge can be used. It is intended for use in the type of case where the court presently suspends sentence and never really expects to see the defendant again. Instead of leaving the judgment *sub judice*, as would be the case with a suspended sentence under existing law, the court will make a final disposition. The sentence cannot be revoked or modified and is, of course, a final judgment of conviction.

As in the case of conditional discharge the court will be required to set forth its reasons, on the record, when the sentence is used for a felony.

It is relevant to note that the sentences of conditional and absolute discharge as proposed in this act are adaptations of dispositions provided in the British Criminal Justice Act of 1948. Section seven of that Act provides as follows:

"7. Absolute and conditional discharge.—(1) Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law)⁵ is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order is not appropriate, the court may make an order discharging him absolutely, or, if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding twelve months from the date of the order, as may be specified therein.

"(2) An order discharging a person subject to such a condition as aforesaid is in this Act referred to as 'an order for conditional discharge', and the period specified in any such order as 'the period of conditional discharge.'

"(3) Before making an order for conditional discharge the court shall explain to the offender in ordinary language that if he commits another offence during the period of conditional discharge he will be liable to be sentenced for the original offence.

"(4) Where, under the following provisions of this Part of this Act, a person conditionally discharged under this section is sentenced for the offence in respect of which the order for conditional discharge was made, that order shall cease to have effect."

ARTICLE 30: SENTENCES OF IMPRISONMENT

The sentences of imprisonment set forth in the proposed Penal Law are designed to serve three basic objectives: (1) deterrence; (2) incapacitation, *i. e.*, removal of dangerous or harmful persons from the community; and (3) rehabilitation of such persons. The relative importance of each of these objectives depends upon the particular type of crime involved and—when sentencing—the particular offender.

The term "deterrence" has been defined as "the preventive effect which actual or threatened punishment of offenders

⁵ Section 80 of the act defines the term "offence the sentence for which is fixed by law" as "an offence for which the court is required to sentence the offender to death or imprisonment for life or to detention during His Majesty's pleasure."

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has upon potential offenders." ⁶ The concept of deterrence has been the subject of controversy and there are some who doubt the efficacy of actual or threatened punishment as a crime prevention factor. ⁷ But even these critics are willing to concede that "for some people, no doubt, a state of moral indecision is sometimes resolved by the fear of punishment." ⁸ Modern experts recognize that not all individuals are equally deterred by the threat of the possible application of a particular sanction; that some types of crimes are not so well subject to repressive controls as others; and that the present state of knowledge in the behavioral sciences does not permit accurate measurement of the deterrent effect. However, these considerations notwithstanding, they still consider deterrence one of the fundamental objectives of the sentencing function. ⁹

Incapacitation and rehabilitation are—at least where prison sentences are concerned—closely related objectives. An offender who is likely to continue to inflict serious injury upon vital community interests cannot be allowed to remain at large in the community. Therefore, he is committed to an institution. While he is so imprisoned, it is hoped that treatment measures will redirect his attitudes and behavior, or that the experience of imprisonment will make him reluctant to commit another offense and thereby chance an additional term (this is usually called "intimidation") or, in some cases, that the drives impelling his criminal conduct will burn out or become less poignant. The controversies in this area do not involve the validity of these objectives: they involve the manner in which the principles are to be applied. In the vast majority of cases our limited knowledge and resources are such that it is extremely difficult to determine at the time of sentencing, or even at the time of parole release, whether an offender is likely to persist in criminal conduct. Moreover, it is virtually impossible for a sentencing judge to evaluate the impact that imprisonment will have upon a particular offender. Therefore, failure to impose a sentence of imprisonment involves a risk to the community, and the use of imprisonment involves the risk of destroying an individual—indeed,

⁶ John C. Ball, "The Deterrence Concept in Criminology and Law," *J. Crim. L.*, vol. 46 no. 3, p. 347; quoted in Tappan, "Crime, Justice and Correction," p. 247 (1960).

⁷ See Henry Weihofen, chapter on "Punishment and Treatment" (Ch. 18), in "The Law of Criminal Correction" by Sol Rubin (1963).

⁸ *Id.*, at p. 658.

⁹ Lloyd E. Ohlen and Frank J. Remington, "Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice," 23 *Law & Contemp. Prob.* 495, 497 (1958); James V. Bennett, "Individualizing the Sentencing Function," 27 *F.R.D.* 359, 363; Tappan, "Crime Justice and Correction" pp. 243-255 (1960); Judge John S. Palmore, "Sentencing and Correction: The Black Sheep of the Criminal Law," *Federal Probation* (Dec. 1962).

many times, a family. In cases where imprisonment is clearly necessary, the same considerations must be weighed in fixing the length of the sentence. When balancing these risks one must also weigh the harmfulness of the particular criminal conduct; the fact that the offender will have to return to the community at some time; and the tremendous cost of maintaining a prisoner.¹⁰

Because of the fact that the deterrent effect cannot be measured and the fact that neither the legislature nor the courts can predict with any degree of accuracy whether imprisonment will reform a person or how long this will take, it is difficult, if not impossible, to design a sentencing structure that will assure the accomplishment of the previously stated objectives. The best that can be done with our present knowledge and practical limitations is to construct a system that allows adequate scope for the accomplishment of these objectives.

In constructing such a system the primary question to be resolved is whether to continue our present practice of gearing the length and nature of the sentence the court is authorized to impose to the seriousness of the crime; or to adopt a system where the length and nature of the authorized sentence is based solely upon the character of the offender. The problem involved is whether to give the court authority to use its discretion in deciding whether to impose a long sentence for a serious crime, or to restrict the court by requiring proof of defendant's bad character, or that the defendant is dangerous, as a legal prerequisite to the court's authority to use its discretion to impose a long sentence.

The latter type of system was recently proposed in the "Model Sentencing Act" of the National Council on Crime and Delinquency. This act provides a five-year discretionary maximum term with no minimum period of imprisonment for all felonies, except murder in the first degree, for which a life term is provided (§§ 7, 9). The act also provides an extended term with no minimum and a discretionary maximum of thirty years for "dangerous offenders." This could be imposed if the court finds that any one of the following grounds exists (§ 5):

"(a) The defendant is being sentenced for a felony in which he inflicted or attempted to inflict serious bodily harm, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. (b) The defendant is being sentenced for a crime which seriously endangered the life or safety of another, has been pre-

¹⁰ The cost of maintaining a prisoner in state prison is approximately \$7.00 per day. The cost of supervising a person on probation is less than \$1.00 per day.

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viously convicted of one or more felonies not related to the instant crime as a single criminal episode, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. (c) The defendant is being sentenced for the crime of extortion, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics, or other felony, committed as part of a continuing criminal activity in concert with one or more persons."

Hedging slightly, the act contains an optional provision authorizing a discretionary maximum term of ten years for "atrocious crimes": *i. e.*, "murder, second degree; arson; forcible rape; robbery while armed with a deadly weapon; mayhem; bombing of an airplane, vehicle, vessel, building, or other structure." (§ 8).

The A.L.I. Model Penal Code bases the length and nature of the authorized sentences in part upon the seriousness of the felony involved and in part upon the character of the offender. That Code divides all felonies into three categories with ordinary terms as follows (§§ 6.01, 6.06):

<u>Class of Felony</u>	<u>Min. Term</u>	<u>Max. Term</u>
1st Deg.	Not less than one nor more than ten years	Life imprisonment
2nd Deg.	Not less than one nor more than three years	Ten years
3rd Deg.	Not less than one nor more than two years	Five years

In considering these terms, it should be noted that the minima are to be fixed by the court within the limits indicated and the maxima must be as provided in the statute. Also, five years must be added to each maximum term for a special parole term provided by the act (§ 6.10).

The Model Penal Code then provides extended terms that can be imposed in four different situations (§§ 6.07, 7.03). These terms are as follows (§ 6.07):

<u>Class of Felony</u>	<u>Min. Term</u>	<u>Max. Term</u>
1st Deg. ¹¹	Not less than five nor more than ten years	Life imprisonment
2nd Deg.	Not less than one nor more than five years	Not less than ten nor more than twenty years
3rd Deg.	Not less than one nor more than three years	Not less than five nor more than ten years

¹¹ Comparison of this term with the ordinary term for a 1st degree felony reveals that the court has the same discretionary authority under both. Therefore, in the case of a 1st degree felony, the extended term is significant only where the court announces that it is imposing one.

PROPOSED PENAL LAW

Of the four situations in which these "extended" sentences may be imposed, one is based upon the number of the offender's prior convictions (*i. e.*, habitual offender) and one is proposed as an alternative to consecutive sentences for multiple offenders (§ 7.03). The special problems involved in sentencing habitual and multiple offenders are discussed, *infra*, in the comments to proposed sections 30.10 and 30.30 respectively. It is submitted that these situations can be dealt with quite satisfactorily within the framework of a structure that gears the length and nature of the authorized sentence to the seriousness of the crime involved.

The other two situations set forth in the Model Penal Code as prerequisites for the extended term cover "professional criminals" and dangerous offenders. These are as follows (§ 7.03):

"(2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and:

(a) the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood;
or

(b) the defendant has substantial income or resources not explained to be derived from a source other than criminal activity.

(3) The defendant is a dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant has been subjected to a psychiatric examination resulting in the conclusions that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences; and that such condition makes him a serious danger to others."

Both of these model acts, therefore, provide two different authorized sentences for each felony. The first sentence—the ordinary term—is available to the court on the basis of the conviction itself. The second sentence—the extended term—is available if the defendant is shown to be a dangerous offender or a professional criminal. This furnishes the court with the long sentences that may be necessary in dealing with dangerous offenders or professional criminals and

deprives it of discretion to use those sentences in cases that do not fit within the statutory criteria. Thus, in theory, these systems provide protection to the public and at the same time guard against abusive and unwarranted use of long terms of imprisonment.

The primary difficulty with any such system lies in the procedure that would have to be used to establish the prerequisites for the extended terms. When the authorized ordinary maximum term for a crime is, for example, five years but the court can impose an extended term with a maximum of ten years (M.P.C.) or thirty years (M.S.A.) where certain prerequisites are found to exist, essential fairness and our Federal and State Constitutions require that the findings be based upon evidence adduced at a hearing that satisfies the requirements of due process.¹² The Commission's staff believe that in this context a due process hearing requires the right of confrontation and cross examination, and that a system which does not provide the right of confrontation and cross examination is of too doubtful validity to propose.¹³ They also think that if a full hearing is required, the system would be impractical to use because it would require disclosure of the confidential sources of information in the probation report and might well be complex and lengthy.¹⁴

The N.C.C.D. Model Sentencing Act (§ 4) grants the defendant the right of confrontation and cross examination (something which counsel for the N.C.C.D. has previously characterized as "impractical").¹⁵ However, the act does not contain any express provision to indicate whether the defend-

¹² See *People v. Rosen*, 208 N.Y. 169, 172, 101 N.E. 855 (1913); *Oyler v. Boles*, 368 U.S. 448, 452, 82 Sup.Ct. 501 (1962); *U. S. ex rel. Collins v. Claudy*, 204 F.2d 624, 628 (3d Cir. 1953) cert. denied, 343 U.S. 954.

¹³ N.Y.Const., Art. 1, § 6; see *People v. Caruso*, 249 N.Y. 302, 306, 164 N.E. 106 (1928); *People v. Sandoval*, 262 App.Div. 288, 290, 28 N.Y.S.2d 370 (1st Dept. 1940); cf. *Matter of Long*, 287 N.Y. 449, 455, 40 N.E.2d 247 (1942); see also U.S.Const.Amend. VI; cf. *Greene v. McElroy*, 360 U.S. 474, 496-497, 79 Sup.Ct. 1400 (1959).

¹⁴ Consider the tests of professionalism set forth in these codes. It would be a rare case where evidence admitted at the trial would establish, for example, that the defendant has "substantial income or resources not explained to be derived from a source other than criminal activity" (M.P.C., 7.03 [2] [b]). And, of course, if the defendant pleads guilty to the crime, the only facts before the court would be those directly admitted by the plea. See *People v. Griffin*, 7 N.Y.2d 511, 199 N.Y.S.2d 674, 166 N.E.2d 684 (1960). A hearing on this issue could well involve many complications that inhere in a prosecution for income tax evasion based upon the "net worth" theory. (The "net worth" theory problems are discussed in *Holland v. United States*, 348 U.S. 121, 75 Sup.Ct. 127 [1954].)

¹⁵ Sol Rubin, "Probation and Due Process of Law," *Focus*, vol. 31, No. 2 p. 40 at p. 41 (Mar. 1952).

ant is to be allowed to present evidence in his own behalf. The Model Penal Code attempts to solve the problem by granting the defendant a hearing on notice. This hearing would afford the defendant notice of the ground for the extended term, the right to hear and controvert the evidence against him and an opportunity to offer evidence in his own behalf. Section 7.07(6). However, under this formulation the defendant does not have to be told the sources of "confidential information" and would not have to be given an opportunity to confront and cross examine.

A majority of the Commission was sufficiently impressed by the aforesaid doubts to forgo proposal of a system under which the sentence authorized by law would depend upon formal findings as to character factors. Therefore, the proposed Penal Law does not adopt such a system. Due recognition of individual factors is, of course, essential to the exercise of sentencing discretion; but, on balance, other considerations outweigh the use of these factors as statutory limitations on the court's authority to exercise discretion.

The approach of the proposed sentencing structure is to rely upon the gravity of the offense as the legal criterion for the length and nature of the authorized sentence (except for certain recidivists), and to balance control over the sentence among the legislative, executive and judicial branches so that each of these agencies exercises authority in accordance with the individual factors that lie within its special areas of competence.

The seriousness of the crime is an indication of the public's need for protection and of the offender's need for control.¹⁶ It is also a practical limitation upon the length of the sentence that ought to be used. For example, it may well be true that a maximum sentence of one year is not sufficient to effectuate any of the basic purposes of the structure in the case of certain misdemeanants. But authorization of a longer sentence would subject the misdemeanant to a degree of control that would be out of proportion to the possible dangers to society from the particular criminal conduct.

Under the proposed structure, the Legislature expresses, in terms of sentencing limits, society's view of the gravity of particular criminal conduct. This sets the outside limits of penal discipline for particular conduct. The Legislature then distributes the authority to control the sentence, within such limits, in such fashion as to enable the court, the institutional authority and the parole board each to serve its proper

¹⁶ See, e. g. Model Penal Code commentary to § 6.01 (Tent. Draft No. 2, p. 10); Tappan, "Crime, Justice and Correction," p. 272 (1960); Henry M. Hart, Jr., "The Aims of the Criminal Law," 23 Law & Contemp. Prob. 401, 426 (Summer 1958).

purpose and, within its special sphere of competence, to individualize the sentence.

In formulating the proposed sentences of imprisonment the Commission has taken special note of the complex and difficult problems involved in determining the type of commitment that ought to be used in the case of an offender who, though legally sane, is in a gravely abnormal mental condition. This, of course, includes the so-called "sexual psychopath" who is presently liable to a "one-day to life" prison term under Chapter 525 of the Laws of 1950 (see App., pp. A12-13). The Commission has not adopted the "one-day to life" sentence and the proposed sentencing structure does not provide any other special form of commitment for these cases. The problems are presently under study and the Commission intends to submit a separate report together with separate recommendations in the near future. The report will also include recommendations on the somewhat similar problems involved in the sentencing of "mental defectives."

§ 30.00 Indeterminate sentence of imprisonment for felony

Subdivision 1. Indeterminate sentence

This subdivision describes the basic sentence of imprisonment for a felony. As under existing law it defines that sentence as an "indeterminate sentence" (Penal Law, § 2189). And, as under existing law, the subdivision provides that the court is the agency that will fix the maximum term of the sentence (App., pp. A4-5).

The primary change reflected in the subdivision relates to the manner of fixing the minimum period that must be served before the offender is eligible for parole. Under the existing law the minimum of an indeterminate sentence must be fixed by the court (App., pp. A4-5). The proposed subdivision states that the minimum shall be "as provided in subdivision three." This is to accommodate a system where the court is not obliged to fix the minimum, except for a class A felony. Another change that was made to accommodate this system and also to accommodate certain provisions with respect to multiple sentences (see comments to § 30.30, *infra*), is that the minimum is described as the "minimum period of imprisonment" rather than the "minimum term."

Subdivision 2. Maximum term of sentence

Subdivision two prescribes the maximum terms that may be imposed for the various classes of felonies. With the exception of the mandatory life term for a class A felony, the length of the term is to be fixed by the court within the applicable limits set forth. This is in accordance with present practice (see App., pp. A4-5) and is considered more de-

sirable than a system where the court imposes a statutory maximum (see *e. g.*, Model Penal Code, P.O.D., § 6.06).

A structure that vests the court with authority to fix the maximum within the statutory range is favored by the Commission because a crime that fits a single statutory definition may be committed under varying circumstances, and the court is the agency best equipped to evaluate these circumstances. Moreover, in many cases, the court has a substantial amount of information available concerning the offender's history, character and condition. Thus, the authority to fix the maximum allows the court to tailor the sentence to the many individual considerations involved in each case.

The lengths of the authorized terms are designed so as to allow the court discretion to impose long sentences where serious crimes are involved and when sentencing for crimes that are usually committed by professionals.¹⁷ For all other crimes the maxima are relatively short.

In considering the lengths of the authorized sentences it should be noted that the sentencing structure contains provisions which enable the Board of Parole and the Department of Correction to deal with a prisoner in the light of post-commitment developments. Certain new provisions with respect to the minimum period of imprisonment are designed to vest the Board of Parole with more authority than it now has (§ 30.00 subd. 3, § 30.30 subd. 1). In the event that the Board does not act, any prisoner who has lived up to the requirements set forth by the institutional authorities is eligible for mandatory parole (*i. e.*, "conditional release") after he has served two-thirds of his maximum term (§ 30.30 subd. 4, § 30.40 subd. 1 [b]).

The foregoing factors will also tend to alleviate injustices that may occur through disparity in sentencing.¹⁸

¹⁷ The crimes covered by the long-term imprisonment categories are as follows:

Class A	Class B	Class C
Murder.	Assault 1.	Burglary 2.
Kidnapping.	Burglary 1.	Grand larceny 1
	Manslaughter 1.	(by certain extortionate means).
	Rape 1.	Forgery 1.
	Sodomy 1.	Criminal possession of a
	Arson 1.	forged instrument 1.
	Robbery 1.	Promoting prostitution 1.
	Criminally selling	Manslaughter 2.
	narcotics 1.	Arson 2.
		Robbery 2.
		Criminally possessing narcotics 1.
		Criminally selling narcotics 2.

¹⁸ It should also be noted that the recently authorized sentencing institutes for judges will be of tremendous significance in developing standards for the intelligent exercise of discretion in sentencing. See Judiciary Law, § 234-a.

The provision requiring that the maximum term of an indeterminate sentence be at least three years is new. Its primary purpose is to assure that the Parole Board will have an adequate opportunity to supervise the prisoner's orderly return to the community. Under existing law the experience has been that approximately twenty per cent of all state prison sentences are for maximum terms of less than three years.¹⁹ However, when viewed in conjunction with other new requirements, the three year provision should not effect an increase in the time actually spent in prison. A person committed under a maximum term of three years will be eligible for parole after serving one year of his sentence (§ 30.00 subd. 3). If he is not paroled he can, in any event, earn conditional release after two years (§ 30.30 subd. 4). Thus, any prisoner committed under a three year maximum term who lives up to institutional requirements would not be kept in prison for more than two years.

Subdivision 3. Minimum period of imprisonment

Subdivision three provides the minimum periods of imprisonment and the manner in which those minima are to be fixed. The significance of the minimum period under the proposed law is the same as that of the minimum term under existing law: it governs the length of time the prisoner must serve before he is eligible to be considered for parole.

As under existing law (Penal Law, §§ 2183, 2189) the minimum period can in no case be less than one year. This is generally considered an institutional necessity. Moreover, release on parole in less than one year would be inconsistent with the basic purpose of the court's sentence.

When a sentence of imprisonment is imposed for a class A felony (murder or kidnapping) the minimum period of imprisonment is to be fixed by the court and specified in the sentence. This minimum cannot be less than fifteen years nor more than twenty-five years. In considering this range it should be noted that the proposed Penal Law does not grant any good behavior allowance against the minimum period of imprisonment (see comments § 30.30 subd. 4) and, hence, the fifteen to twenty-five year range is approximately the same as the existing minima for the crimes involved.

Under existing law a person convicted of murder in the first degree and not sentenced to death is subject to a forty-year minimum term which can be reduced by one-third, through good behavior allowances, to twenty-six years and eight months. In the case of murder in the second degree or kidnapping (under certain circumstances), the existing manda-

¹⁹ Computed from the reports of the State Commission of Correction for the three years 1960-1962.

tory minimum term is twenty years which can be reduced by one-third, through good behavior allowances, to thirteen years and four months (see App., pp. A4-6, 14). Under existing law the court has no power to deal with the minimum term for murder in the first degree. But the twenty-year mandatory minimum for murder in the second degree or for kidnaping may be increased by the court in its discretion to any higher figure. (However, if the court imposes a minimum of more than thirty years, the minimum will be calculated as thirty years, less good behavior allowances [Penal Law, § 1945 subd. 7].) Since the proposed Penal Law abolishes the distinction between murder in the first and second degree, the proposed range of fifteen to twenty-five years approximates the existing minima for these crimes.

The general one-year minimum and the fifteen year mandatory minimum for a class A felony are the only mandatory minima in the proposed law. (For examples of mandatory minima under existing law, see App., pp. A6-8.)

In the area of sentencing the Legislature must necessarily deal with and in terms of broad principles. It cannot, in the nature of things, anticipate and deal with all the individual circumstances of offenses and of individual offenders. Legislation that requires a court to impose a high minimum sentence without regard to the circumstances of the crime or the history, character and condition of the perpetrator calls for an arbitrary disposition, which can be more destructive than helpful. Moreover, it seems somewhat paradoxical for the law to provide—as it presently does for almost all crimes which carry mandatory minima—that a court may either suspend sentence or commit the defendant under a sentence that deprives him of parole eligibility for at least a specified number of years. If the court is to be entrusted—as it should be—with authority to decide whether to impose a sanction, it can certainly be entrusted with authority to decide whether a minimum period of imprisonment in excess of one year is necessary.

In this connection it should be noted that the question of whether there ought to be any minimum period of imprisonment in excess of one year at all—court imposed or otherwise—is the subject of considerable controversy. The Commission was however of the view that in the case of class A felonies, involving the most heinous crimes, a substantial minimum period of imprisonment is necessary, both to reassure the community and to provide a viable alternative to capital punishment. In the case of less serious felonies the need for any minimum becomes more arguable, but the Commission considers that in appropriate cases a reasonable minimum—fixed by the court at the time of sentence—may be necessary to prevent the disposition from depreciating the gravity of the

offense and thus weakening the deterrent impact of the system as a whole.

The proposed subdivision gives the court discretionary authority to fix a minimum period of imprisonment in the case of a class B, C or D felony. If the court does not fix a minimum in these cases, and in the case of any class E felony, the minimum is to be fixed by the Board of Parole.

The court's authority to fix the minimum for a class B, C or D felony is set forth in paragraph (b). This provision states that the court may fix the minimum if it is of the "opinion," after considering the various factors set forth, that a minimum period of imprisonment is necessary in order to serve the ends of justice and best interests of the public. The statute does not require proof of any fact as a prerequisite to the exercise of the court's authority to fix the minimum: it leaves the matter entirely within the court's discretion. The sole purpose of the language is to indicate that a minimum does not have to be imposed as a matter-of-course. Under existing law the minimum must be fixed by the court (Penal Law, § 2189) and the practice has been to impose a minimum in excess of one year. (Approximately 90% of the indeterminate sentences imposed have minima that are in excess of one year.)²⁰ The proposed statute is designed so as to draw attention to the fact that a court imposed minimum is not a necessary component of the sentence. However, where the court does fix a minimum, the minimum is to be specified in the sentence.

In order to aid the court in focusing upon the purpose of the minimum, and as a method of explaining the sentence to the public and the offender, the statute requires that whenever a minimum period of imprisonment is imposed for a class B, C, or D felony the court must state the reasons for its action on the record.

The extent of the court's control over the minimum, under the new provision, is approximately the same as under existing law. However, the new provision does change the court's degree of control over the ratio of the minimum to the maximum term imposed. Under existing law the court may impose a minimum not exceeding one-half of the statutory maximum (see App., p. A5). Under the proposed law the court may fix a minimum not exceeding one-third of the maximum term actually imposed.

²⁰ During the three years 1960-1962 approximately 7500 persons were committed to New York State prisons under indeterminate sentences (excluding one day to life). Of this number approximately 6950 received sentences with minima in excess of one year and approximately 5400 persons received sentences with minima of two years or more. (Computed from reports of the State Commission of Correction.)

Control over the length is approximately the same because the existing law allows the prisoner to earn a one-third reduction of his minimum term ("good time"), and the proposed law does not allow this reduction against the minimum.

Control over the ratio is different because the existing law allows the court to fix a minimum of not more than one-half of the statutory maximum. The proposed law prevents the minimum from exceeding one-third of the maximum term that is actually imposed. The reason for this change is to prevent a sentence where the minimum and maximum are so close together as to deprive the Board of Parole of an adequate opportunity to supervise the prisoner for a reasonable period.

In considering the desirability of allowing the court to retain authority to fix a minimum as high as one-third of the maximum term imposed, it might be noted that this ratio also approximates the national average for time served under imprisonment before first release on parole is granted.²¹

Paragraph (c) of subdivision three of the proposed section provides that where the court does not fix the minimum, the minimum is to be fixed by the Board of Parole, in accordance with the provisions of the Correction Law. The appropriate Correction Law provisions have not as yet been drafted. However, the Commission's intention is to provide a procedure similar to the one recently instituted by the Board of Parole for dealing with indefinite sentences (reformatory terms). Briefly stated, the Board would, within several months after a prisoner sentenced without a court-fixed minimum arrives at the institution, study all pertinent data and interview the prisoner. At that time goals could be set and the Board would fix a minimum period (this could not be less than one year). The minimum so fixed would have the same significance as a court-imposed minimum: it would determine the time at which the prisoner would be considered for parole. As with the court-imposed minimum, service of such period would not mean that the Board is required to parole the prisoner, but merely that the prisoner will be considered for parole. However, unlike the court-imposed minimum, the Board would have the authority to lower the minimum that it originally fixed.

The above-described procedure allows the Board to deal with a prisoner in accordance with his post-commitment development. It also fosters the application of uniform standards to all prisoners.

²¹ See National Prisoner Statistics, Prisoners Released from Federal and State Institutions, table 56 (1960). The average sentence to a state institution in the United States in 1960 was for a term or maximum term of approximately 7 years (81.2 months). The average time served before first release was 28.4 months, or 34.6% of the term.

§ 30.05 Alternative definite sentence for class D or E felony

This section provides the court with discretionary authority to impose a definite sentence of one year or less when sentencing for a class D or E felony. In such a case commitment would be to a county facility and not to the State Department of Correction (see comments to § 30.20). The authority herein provided is substantially the same as the authority the court has under existing law (App., pp. A5, A24-29). One change has been made. Under existing law the court may impose this sentence for any felony that has no mandatory minimum term, irrespective of the gravity of the crime (e. g., Rape 1, Assault 1, Arson 1). Under the proposed law the use of this sentence is limited to the two lowest classes of felony.

In view of the present lack of rehabilitative facilities in most county correctional institutions, the Commission was somewhat reluctant to recommend retention of a definite sentence for any felony. However, when viewed in conjunction with the new provision for supervised conditional release from county correctional institutions (§ 30.40 subd. 2, *infra*) and the provision for the establishment of regional county institutions (see comments, § 30.20 subd. 2, *infra*), a definite sentence could prove useful in the two categories mentioned above. This would be especially true in circumstances where the court feels that the maximum term of at least three years, which is required by the proposed law for any indeterminate sentence, would serve no useful purpose.

§ 30.10 Sentence of imprisonment for persistent felony offender

This section provides the court with discretionary authority to impose the sentence of imprisonment specified for a class A felony, (minimum 15-25 years, maximum life imprisonment) upon a person who commits a felony (any class) after having been incarcerated for two separate felonies, the second of which was committed subsequent to incarceration for the first. The purpose of the statute is to allow the court to use a sentence that includes extended incarceration and lifetime supervision for persons who persist in committing serious crimes after having been subjected to repeated terms of imprisonment.

Persistent-offender legislation is not new to the law and certainly not new to New York State. This state was the first in the country to have such legislation (L.1796, ch. 30). The statutory provisions, of course, vary from state to state. At the present time virtually all of the states have some provision which either requires or permits an increased sentence based upon a prior conviction or convictions, and approxi-

mately one-half of the states authorize life-sentences upon third or fourth felony convictions.

Under existing New York law when the court sentences a second or third felony offender it may either suspend sentence or impose an indeterminate sentence with a minimum that must be not less than one-half of the statutory maximum and a maximum that may be double the statutory maximum. A third narcotic felony offender must be sentenced to imprisonment with a minimum of at least fifteen years and a maximum that must be life imprisonment. A fourth felony offender (any type) must be sentenced to imprisonment with a minimum equal to the statutory maximum for the latest crime, or fifteen years, whichever is greater and a maximum that must be life imprisonment (for a detailed analysis of these provisions see App., pp. A9-11).

The primary objection to the existing New York provisions is ~~the~~ mandatory feature, which requires the court to blind itself to all relevant sentencing criteria, such as the circumstances surrounding the crime for which sentence is to be imposed, the nature and circumstances of the previous crimes, and the history, character and condition of the offender. Another major objection is that a person may have been convicted of all three previous felonies at one time and become subject to the mandatory life term upon his second encounter with correctional processes. See *People v. Taylor*, 16 App. Div.2d 944, 229 N.Y.S.2d 862 (2d Dept.1962), aff'd mem. 13 N.Y.2d 675. This, of course, is also a corollary of the mandatory aspect. An additional objection is that the ordinary terms for felonies provide adequate latitude for sentencing second offenders, and there is no reason to provide a special sentence for such offenders.

Subdivision 1. Definition of persistent felony offender

Subdivision one defines the circumstances under which the special sentence can be used. This subdivision changes existing law in the following respects.

Under the proposed provision the life-sentence may be used in the court's discretion, on the third or subsequent felony conviction (par. [a]). Existing law provides high mandatory minima for second and third offenders but not a life maximum. Under existing law third narcotic felony offenders and fourth felony offenders (any kind) must receive a life maximum.

Under the proposed provision a previous conviction is not counted unless the defendant was sentenced to imprisonment for a term in excess of one year, or received a subsequently commuted death sentence, and actually was imprisoned under the sentence (par. [b], [i], [ii]). Under existing law a con-

viction for which sentence or the execution thereof was suspended is not counted for the purpose of ascertaining whether a person is a third or fourth felony offender (see App., pp. A10-11). Therefore, this aspect is substantially the same. However, under the existing law, if any sentence at all was imposed for a prior felony (presumably even a fine), the conviction would be counted in ascertaining the number of previous convictions. In accordance with the aim of the proposed law to reserve this special sentence for only those who persist in committing serious crimes after repeated exposure to penal sanctions, paragraph (b) (i) of subdivision one provides that the previous sentence does not count unless it was for a term of imprisonment in excess of one year. The indefinite commitment for "mental defectives" will no longer count (see *People ex rel. Vischi v. Martin*, 8 N.Y.2d 63, 201 N.Y.S.2d 753, 168 N.E.2d 94 [1960]), and the indefinite reformatory period—with no minimum or maximum term—will no longer be counted.

Under the proposed provision a conviction of a "crime" in any other jurisdiction will be counted, irrespective of whether such crime would have been a felony in this state. The test would be whether the offender was actually imprisoned under a sentence with a term in excess of one year or under a commuted death sentence. Pursuant to existing law, the test is whether the crime would have been a felony in New York State. This is an extremely difficult rule to administer. It involves a myriad of complex distinctions and, moreover, it may often mandate rejection of substance for highly technical reasons (See e. g., *People v. Olah*, 300 N.Y. 96, 89 N.E.2d 329 [1949]). It is true that the proposed test permits the court to base a persistent offender sentence upon a prior out of state conviction for an act which, if committed here, would be a misdemeanor or would not even be a crime. But there is certainly nothing unjust or illogical in permitting the court to consider the prevailing norms in the jurisdiction where the act was committed (see commentary, Model Penal Code, Tent. draft No. 2, p. 47). Moreover, certain serious Federal crimes are not crimes under the laws of this State. The discretionary feature allows the court to weigh the substance of the foreign conviction and consider all of the circumstances. This will provide fairness to the offender and protection for the public.

Under the proposed law two or more prior felony convictions will count as one, unless one of the felonies was committed after imprisonment under sentence for a prior felony had commenced (subd. 1 [c]). Thus, a person who commits felony 1 and felony 2 before he is imprisoned under a sentence for either, will—after he has been imprisoned under sentence

for either or both—be considered to have only one prior felony conviction for the purposes of this section. But if he commits felony 2 at any time after commencement of imprisonment under sentence for felony 1, he will—after he has been imprisoned under sentence for felony 2—be considered to have two prior felony convictions for the purposes of this section. This is substantially different from the existing law (see App., pp. A9-10).

The only other change to be noted is one of relatively minor significance. Under existing law a prior conviction is counted even though the defendant was pardoned on the ground of innocence. *People ex rel. Prisament v. Brophy*, 287 N.Y. 132, 38 N.E.2d 468 (1941). As stated in the comments to the Model Penal Code (Tent. draft No. 2, p. 48):

“To give no weight to such an executive determination that the defendant did not commit the crime is, however, both unjust and anomalous. It should be precluded by the statute, as it now is in some states. See, *e. g.*, Cal.Pen.Code § 3045; Iowa Code § 747.7; Mass.Gen.Laws c. 279, § 25; Utah Code § 103-1-18.”

Paragraph (b) (iii) of subdivision one of the proposed section precludes consideration of a crime for which the defendant was pardoned on the ground of innocence.

Subdivision 2. Authorized sentence

Subdivision two authorizes the court, in its discretion, to impose the sentence of imprisonment for a class A felony when sentencing a persistent felony offender. This sentence may be used in lieu of the sentence of imprisonment provided for the present felony. The prerequisites for the sentence are (1) a finding that the defendant is a persistent felony offender and (2) a statement on the record of the reasons why the court is of the opinion that “extended incarceration and lifetime supervision will best serve the public interest.” The procedure for proving that the defendant is a persistent felony offender will be set forth in the proposed Code of Criminal Procedure (the existing procedure is set forth in Penal Law, § 1943). The statutory specification—in proposed subdivision two—of the other factors that should be considered, and the requirement therein that the court set forth its reasons for imposing the sentence, serve the same purposes as they do in connection with court fixed minimum periods of imprisonment (see comments to § 30.00 subd. 3, *supra*).

§ 30.15 Sentences of imprisonment for misdemeanors and violation

This section sets forth the short term or “definite” sentences for non-felonious offenses. In considering the lengths of

the terms for class A and B misdemeanors, it should be noted that the terms are based, to a large extent, upon the assumption that the Commission's proposal for "conditional release" (§ 30.40 subd. 2, *infra*) will be accepted. In the absence of a conditional release provision, the Commission would recommend much shorter terms for these crimes.

The fundamental problem in the area of short-term imprisonment is that very few county jails are equipped for any sort of rehabilitative or correctional work. Penitentiaries are somewhat better, but even these institutions find it difficult to accomplish anything meaningful with their limited and crowded facilities.²² Therefore, a short term sentence functions in the main as a deterrent and as intimidation. While such functions are not to be disregarded, there is a substantial question as to whether—in the absence of a conditional release provision—a term in excess of sixty days for a class B misdemeanor, or six months for a class A misdemeanor, would be necessary or appropriate.

The vast majority of prisoners in county jails have no work assignments, and the same is true of the largest penitentiary in the State (Rikers Island). Moreover, in the counties that do not have many prisoners, it is quite possible for a prisoner to serve out his time in solitary confinement. This is due to the necessary segregation regulations contained in the Correction Law (§ 500-c).²³

In view of these factors it is not surprising to find that less than ten per cent of all sentences to county jails are for terms of more than sixty days, notwithstanding the fact that most misdemeanors carry a maximum term of one year. Less than four per cent of county jail sentences are for terms in excess of four months. And the number of sentences for terms in excess of ten months is negligible (134 out of 65,000 during the last four years combined).²⁴

²² Including the New York City Correctional Institution (Rikers Island) there are 6 penitentiaries in this state (the legal status of a penitentiary is discussed in the appendix, pp. A24-28). The other 5 are in Albany Co., Erie Co., Monroe Co., Onondaga Co. (merged with Co. jail) and Westchester Co. Only 2 of the 6 still have room to receive prisoners under contract from other counties (see App., p. A27). On March 16, 1964, the New York City Penitentiary, which has a capacity of 2857, had 5257 prisoners.

²³ For example, on a recent visit to a certain county jail, Commission representatives saw a 19 year old youth who was serving a 9 month sentence for unlawful entry (reduced from Burglary 3). Due to the fact that he was the only convicted male minor confined therein he spent his time in solitary confinement playing solitaire and reading newspapers.

²⁴ Computed from reports of the State Commission of Correction for the four years 1960-1963. Includes all counties outside of New York City.

As might be expected, penitentiary sentences run higher. This, of course, is due in part to the fact that felons cannot be sentenced to a county jail but can be sentenced to a penitentiary for one year or less. Approximately one-third of the sentences to penitentiaries outside New York City are for terms in excess of sixty days. However, less than seven per cent of the sentences are for terms in excess of six months.²⁵

The terms of definite sentences in New York City are slightly higher than those imposed elsewhere in the State. In the City of New York approximately twenty-five per-cent of all definite sentences are for terms of more than sixty days, but only about five per-cent are for terms in excess of six months; approximately three per-cent are for terms in excess of ten months.²⁶

Therefore, the proposed provision for conditional release (§ 30.40, *infra*) is a key factor in the terms proposed for class A and class B misdemeanors.

Subdivision 1. Class A misdemeanor

The sentence authorized for a class A misdemeanor is the same as the sentence authorized for serious misdemeanors under existing law (*e. g.*, Penal Law, § 1937). It is the longest term of imprisonment that can be imposed for an offense that is tried without indictment and without the right to a common law jury (App., pp. A1-4). Where a sentence in excess of sixty days is imposed, the defendant will become eligible for conditional release after serving thirty days (§ 30.40 subd. 2, *infra*).

Subdivision 2. Class B misdemeanor

This subdivision provides a maximum term of three months for a class B misdemeanor. As in the case of a class A misdemeanor, a person sentenced to more than sixty days may be conditionally released after serving thirty days (§ 30.40, *infra*).

Subdivision 3. Unclassified misdemeanor

The purpose of this subdivision is to leave the lengths of the sentences for unclassified misdemeanors in the status quo. The reasons for this are explained in the comments to section 15.10, *supra*. However, all other provisions of the sentencing title will, of course, apply to sentences for unclassified misdemeanors.

²⁵The figures for penitentiaries include commitments in default of payment of fines, calculated at the rate of \$1. per day. Where a person has been sentenced to a term of imprisonment and a fine, the figures include a combination of the two if the fine has not been paid before imprisonment commenced.

²⁶Computed from reports of the New York City Department of Correction for the three years 1960-1962.

Subdivision 4. Violation

Subdivision four provides a uniform authorized maximum term of fifteen days for all violations defined in or outside of the Penal Law. The only exception would be where the sentence for an offense defined outside the Penal Law is specifically prescribed in the law or ordinance that defines it, and consists solely of a fine. In this case no term of imprisonment may be imposed.

The fifteen-day maximum sentence represents a substantial reduction in the terms authorized under existing law for many non-criminal offenses. However, where an offense is not deemed to be grave enough to be a crime, a sentence of imprisonment is a severe sanction. The term should be no more than a token that will serve as a deterrent in cases where a fine might be considered by the offender to be a "tax" or a "license fee." In such cases, the prospect of imprisonment for any period of time may well be viewed by the offender in an entirely different light and, hence, as a sufficient deterrent.

In view of what has been said with respect to short term imprisonment (see comments at the beginning of this section) and in view of the fact that approximately two-thirds of all county jail sentences imposed (including those imposed for misdemeanors) are for terms of twenty days or less,²⁷ the fifteen-day maximum herein proposed seems ample.

The reason for the exception with respect to violations defined outside the Penal Law and punishable by a fine alone is that an individual appraisal of these offenses has not been made. If such an appraisal were made, the Legislature might decide to convert some of the fines to civil penalties and thereby remove the offenses from the ambit of the criminal law. Therefore, it seems more advisable to leave the sanctions for such offenses in status quo than it does to add jail sentences.

§ 30.20 Place of imprisonment

Subdivision 1. Indeterminate sentence

This provision is in accordance with existing law. The form is new but the substance is not (see App., p. A2; but see pp. A26-29). The procedural matters presently covered in existing Penal Law sections 2180 and 2198 will be covered in the forthcoming revisions of the Code of Criminal Procedure and the Correction Law.

²⁷ Computed from reports of the State Commission of Correction for the years 1960, 1961, 1962 and 1963. These figures do not include sentences in the City of New York. The figures for the City show that approximately one-half of all definite sentences (penitentiary and workhouse) are for terms of twenty days or less. (Computed from reports of the New York City Department of Correction for the years 1960 and 1961.)

Subdivision 2. Definite sentence

The substance of this provision also is in accordance with existing law. The terms "county correctional institution" and "regional correctional institution" are new (existing commitment provisions are described in the Appendix, pp. A24-29).

Future Commission proposals covering other chapters of the law will define the term "county correctional institution." The term will be defined so as to include a county jail, workhouse and penitentiary.²⁸

The provisions for regional correctional institutions will be set forth in recommendations to be made by the Commission in connection with its work on the Correction Law. A regional correctional institution will be an institution built and maintained through the pooled resources of any number of counties. Its purpose would be to receive prisoners committed under definite sentences from these counties. Thus it would be used in lieu of a county jail, workhouse or penitentiary for such prisoners. This type of institution would be able to provide rehabilitative work, instruction and other forms of guidance on a much more efficient basis than a county jail (many of which have no programming at all for prisoners). Moreover, it would alleviate some of the hardships that arise through prisoner segregation regulations (*e. g.*, minors and women). Such legislation would be consistent with the modern trend toward joint county projects. See *e. g.*, Code of Cr.Proc., § 938-g (joint probation services); Mental Hygiene Law, § 190-g (joint mental health services); General Municipal Law, § 126-a (joint hospitals for municipalities in different counties).

§ 30.25 Concurrent and consecutive terms of imprisonment

Subdivision 1

This provision makes substantial changes in the law. It eliminates the existing requirements for mandatory consecutive sentences and changes the rules of construction that are to be applied in a case where the court does not specify whether sentences are to run concurrently or consecutively.

Under existing law there are two situations where the court does not have discretion to make a sentence run concurrently with any other sentence imposed by it or another court of this state. These situations are governed by statute (Penal Law, § 2190). The first situation is where a person is convicted of

²⁸ It should also be noted that the present intention of the Commission is to recommend elimination of the existing Correction Law restriction on imprisonment of a convicted felon (who receives a definite sentence) in a county jail type institution (Correction Law, § 500-a; see App. p. A28).

two or more offenses prior to the time sentence is imposed for either and the offenses were charged in separate indictments or informations not consolidated for trial. The other situation is where sentence is imposed for a felony committed while the offender is under sentence for a felony. All sentences imposed under the first situation must be consecutive to each other. The sentence imposed under the second situation must be consecutive to the sentence or sentences the defendant is serving. However, the first rule can be avoided by manipulating the time sequence—*e. g.*, plea, sentence, plea, sentence (see App., p. A35)—and both rules can be avoided by using a suspended sentence. Thus the mandatory feature of these rules is of little practical significance in limiting the discretion of the court (see App., pp. A33-35, for further discussion of these rules).

The proposed statute gives the court discretion to impose a concurrent sentence in any case, and a consecutive sentence in any case where the sentences are for different acts (see subdivision 2 of § 30.25). Thus it expands the court's authority by eliminating the requirement of mandatory consecutive sentences in the aforesaid two situations. Rules that require consecutive sentences can only be justified on the ground of arbitrary retribution. There is no sound reason why the decision as to whether a sentence imposed by the court is to run concurrently or consecutively cannot be left to the discretion of the court.

With respect to the rules of construction that are applied where the court fails to specify whether a sentence is to run concurrently or consecutively, the existing law is as follows. In cases covered by the aforesaid two statutory provisions the sentences are, of course, construed as consecutive. In cases not covered by these rules the common law presumptions are applied. Two or more sentences imposed by the same judge at the same time are presumed to be concurrent sentences, and in any other situation a sentence is presumed to be a consecutive sentence (see App., p. A34). Thus, under existing law the presumption is that a sentence was intended to be consecutive in all but a very limited class of cases.

Subdivision one of the proposed section changes these rules. Under the proposed provision, where the court fails to specify the manner in which an indeterminate sentence is to run, the sentence will run concurrently with all other sentences. A definite sentence, however, will only run concurrently with a sentence imposed at the same time and will run consecutively as to any other sentence.

The basic rationale of the proposed rules is that consecutive sentences ought to be the result of deliberate action and

not inadvertence or rote. When the court is aware of the prior sentence and does not feel strongly enough about the case to specify the manner in which the sentences are to run, the sentences should run concurrently.

The reason for the different rules with respect to indeterminate and definite sentences—when the sentences are imposed at separate times—is that a court imposing an indeterminate sentence will, or should, be aware of prior sentences due to the probation report. However, definite sentences are usually imposed without any probation investigation and, in a busy jurisdiction, the judge might not be aware of prior sentences. This is especially true in the City of New York, where a person who is under detention can appear in different parts of the criminal court, held in the same or different counties, and can be sentenced by more than one judge on the same or on consecutive days. The proposed rule for definite sentences places a burden upon the defendant to draw the court's attention to other sentences and request a specification with respect to the present sentence.

Subdivision 2

This provision is in accordance with the existing rule (see App. p. A36). It prohibits consecutive sentences in any situation where the result would be double punishment for a single act.

Subdivision 3

Subdivision three is designed to cover cases where consecutive definite sentences are imposed for offenses committed by separate acts, but perpetrated in a single incident or transaction. An example of this would be a case where a person who is driving without a license leaves the scene of an accident without reporting. Such a case would result in convictions for two class A misdemeanors (Vehicle and Traffic Law, § 501 subd. 10, § 600). The crimes are not such as would be covered by the provisions of subdivision two, *supra*, and, hence, under existing law, consecutive sentences aggregating two years could be imposed. Another example would be where a person who is trespassing upon fenced-in real property (a class B misdemeanor, § 145.10) assaults the owner (a class A misdemeanor, § 125.00) and maliciously destroys the fence (a class A misdemeanor, § 150.00). Here, although the entire transaction may have occurred in the course of five minutes or less, the aggregate sentence that could be imposed without this limitation would be two years and three months.

In view of what has been noted with respect to definite sentence imprisonment (see comments to § 30.15), the proposed subdivision limits the aggregate term of consecutive definite sentences imposed in such cases to one year. The principle is

limited to offenses perpetrated during a single incident or transaction, because its extension to unrelated offenses would be inconsistent with the use of the sentence as a deterrent.

§ 30.30 Calculation of terms of imprisonment

Subdivision 1. Indeterminate sentences

Subdivision one provides that an indeterminate sentence commences at the time the defendant is received by the State Department of Correction. There is no statutory provision to cover this under existing law, but the rule herein provided is in accordance with existing case law (see App., p. A40).

In connection with paragraphs (a) and (b) of the proposed subdivision it should be noted that the present law does not contain any cohesive set of statutory rules to govern the calculation of concurrent and consecutive terms. Therefore, references to "existing law" in describing the provisions for calculating concurrent and consecutive terms are mainly references to a synthesis of case law and practice. The few statutes that do purport to cover parts of this area are confusing and contradictory (see App. pp. A44-46).

Paragraph (a) of subdivision one makes a slight change in the method of calculating the minima of concurrent sentences. Under existing law the minimum is an actual term and is calculated in much the same fashion as the maximum. It commences when the defendant arrives at the institution. For example, under existing law, where a person who is serving an indeterminate sentence receives an additional and concurrent sentence for a previously committed felony he would have to serve at least a one-year minimum on the new sentence before he would be eligible for parole consideration, irrespective of the time already served under the first sentence. (The one-year minimum is the lowest minimum that can be fixed under both the existing and the proposed law.)

Under the proposed law the minimum is not treated as a term. It is merely a period during which the Parole Board has no discretion to act. In the case of concurrent sentences, all of the minima are credited with time served under imprisonment on any of the sentences. Thus, in the above example, if the defendant had already served the minimum of his prior sentence, and the court did not specify a minimum in the new sentence, the new sentence would not delay the parole eligibility date. If the court did specify a new minimum that period would be credited with all time served in prison under the first sentence.

The maxima of concurrent sentences will be calculated as under existing law. Each term would commence at the time the defendant arrives in the institution and the defendant would serve the term with the longest time to run.

These rules would be of particular utility in cases where the court is of the opinion that no additional sentence is necessary but does not wish to grant conditional or absolute discharge because of the chance that the other conviction might be reversed or vacated.

Paragraph (b) of subdivision one contains one of the most important changes in the proposed sentencing structure. It eliminates consecutive minima. Under existing law consecutive minimum terms imposed by the court or by various courts are added together to arrive at an aggregate minimum term (see App. pp. A44-45). Under the proposed law, when a person is serving consecutive sentences, each minimum will be calculated as if it had commenced at the time the defendant arrived in the institution and all minima will run concurrently. Thus, if a person receives consecutive sentences for any number of crimes the longest minimum to be served would be the longest minimum imposed. If a person who has served part of a sentence receives an additional and consecutive sentence the new minimum will start to run immediately and all minima will be satisfied by service of the one with the longest time to run.

The proposed method of calculating the minimum will assure that the minimum imposed for any series of crimes will never exceed the minimum imposed for the most serious crime involved. It also will assure that any minimum subsequently imposed for another crime would have to be served. For example, if a person is convicted of a class B felony and a class C felony at the same time, the court could impose consecutive sentences with a minimum of five years for the class C felony and a minimum of eight years and four months for the class B felony. But the minimum to be served would be eight years and four months. The same would be true even where consecutive sentences are imposed by courts in two or more counties. The reasoning here is that such minimum would be sufficient to serve any legitimate purpose. However, if the defendant commences service of the sentences and then is convicted of another crime—committed either before or after the above two crimes—the minimum of a new consecutive sentence must be served in full, irrespective of the time already served on the other two sentences. This will assure that some effect will be given to the opinion of the court that imposes the new sentence. It will also serve as an inducement to the defendant to cooperate with respect to previously committed crimes.

The proposed method of calculating the maxima of consecutive sentences is the same as the method used under existing law. The reason for retention of this rule is, of course, to provide sentences that can be imposed for ad-

ditional crimes. In this connection one minor change in existing law should be noted. Under existing law when a person who is serving an indeterminate sentence receives a consecutive indeterminate sentence the Board of Parole has authority to allow the maximum term of the second sentence to run concurrently with the remaining portion of the maximum term of the first sentence (see App., p. A45). This is inconsistent with the disposition made by the court. The justification for the Board's authority under existing law lies in the need for allowing the prisoner to commence service of the second minimum (the minimum and maximum commence at the same time). If the prisoner had to serve the maximum of the first sentence before commencing service of the minimum of the second, parole eligibility would be unduly delayed. Under the proposed law the minimum periods of imprisonment are entirely independent of the maximum terms and the prisoner may satisfy the requirements of any number of minima without affecting the manner in which the maximum terms are calculated. Thus, consecutive maxima will always be calculated as an aggregate of the terms imposed (except for the limitation on aggregate length provided by paragraph [c]).

Paragraph (c) sets forth another new feature. It provides limits upon the aggregate maximum term of consecutive sentences. Under existing law these maxima may aggregate any number of years and the aggregate sometimes exceeds one hundred years. The proposed law places a limit of twenty years on the aggregate maximum, unless one of the sentences was imposed for a class B felony, in which case the limit is thirty years. The limits herein provided do not affect the number or the lengths of the sentences that may be imposed by the courts: they merely serve as directions for calculating the aggregate length of those sentences. Sentences imposed for subsequently committed crimes are excluded in calculating the permissible aggregate maximum of any group of prior sentences. For example, if a person is sentenced to consecutive maxima aggregating thirty years for two class C felonies the maximum would be calculated as twenty years. If he is released on parole and receives an additional and consecutive fifteen-year sentence for a class C felony committed while he is on parole, his aggregate maximum would be calculated as thirty-five years. If he receives two additional fifteen-year consecutive sentences for crimes committed while on parole, his aggregate maximum would be calculated as forty years. Life maxima, of course, are not included in the calculation.

In considering this provision, it should be noted that under existing law the Board of Parole has the authority to

grant an absolute discharge to any prisoner who has been on unrevoked parole for at least five years (Correction Law, § 220), and similar or broader power will be proposed by the Commission in forthcoming recommendations. Therefore, in the main, these aggregate maximum terms govern the length of time that the Board may, in its discretion, continue supervision. In the event the Board does not parole the prisoner, he will be able to earn conditional release after serving two-thirds of the aggregate maximum.

Subdivision 2. Definite sentences

Subdivision two of the proposed section provides that a definite sentence commences at the time the defendant is received in the institution named in the commitment. As with indeterminate sentences, there is no existing statute to cover this. Under existing case law, the rule seems to be somewhat different than the one proposed. While it is fairly clear that the sentence cannot commence until imprisonment commences, it seems that such imprisonment does not have to be in the institution named in the commitment. In other words, if a person is sentenced to a penitentiary and remanded to the county jail pending transfer to the penitentiary, the sentence commences when the defendant is received in the county jail (see App., p. A40). The purpose of the proposed rule is to provide uniformity. It will not cause any substantial change because the prisoner will receive "jail time" credit for all time spent in detention (see subd. 3, *infra*).

Paragraph (a) of subdivision two provides the rule for calculating concurrent definite sentences. The rule in the proposed provision is the same as the rule that is presently applied.

Paragraph (b) provides the rule for calculating consecutive definite sentences. This rule too is the same as the one that is presently applied. Paragraph (b) also provides a limitation upon the aggregate term of consecutive definite sentences. Under existing law there is no limitation and a person may receive three or more consecutive one-year terms. The proposed law limits the aggregate term to two years, plus any term imposed for an offense committed while the person is under the sentences.

As in the case of the limit upon the aggregate maximum of consecutive indeterminate sentences, the limit herein provided does not affect the authority of the courts to impose multiple sentences or govern the lengths of individual sentences: it is merely a direction as to calculation. Consideration was given to limiting the aggregate term to one year, rather than two years, as in the case of related offenses (see

§ 30.25 subd. 3). This was rejected because it would leave the offender free to commit numerous separate misdemeanors with impunity. The two-year limit plus any term imposed for a new offense seems to strike a reasonable balance.

Paragraph (c) provides a rule for calculating concurrent sentences imposed by courts of different counties. Such cases might involve commitments to more than one correctional institution. The rule—which has no parallel in existing law—gives the prisoner credit against the second sentence for all time served under the first sentence subsequent to the date the second sentence is imposed. As a result, the second sentence is calculated as if it began to run immediately, which would be the case if both commitments had been to the same institution.

Paragraph (d) provides a limitation upon the aggregate of consecutive definite sentences that are to be served in more than one correctional institution. This is the same as the limitation provided in paragraph (b) above.

Subdivision 3. Jail time²⁹

The proposed jail time provision makes certain minor changes in the existing law (see App. pp. A13-14, 44, for discussion of existing law).

The new provision eliminates the enumeration of institutions contained in the existing statute (Penal Law, § 2193 subd. 1) and makes it clear that "jail time" includes time spent in "custody" no matter where the time was spent. This means that the defendant will get credit for time spent, under arrest, in a police station or state police barracks.²⁹ Such credit is presently granted in some parts of the state and not granted in others. In addition, the new provision grants credit for time spent in jail after conviction and before arrival at the institution in which the sentence is to be served. Under existing law no credit is allowed for time spent in a county jail pending transfer to state prison.²⁹

The proposed statute also grants jail time credit in a third situation where it presently would not be allowed. This involves a case where a defendant is arrested for crime A and while he is under detention for that crime a warrant or commitment is lodged for crime B. Under existing law, if the defendant is acquitted of crime A and then convicted of crime B he will get no jail time credit against the crime B sentence for any time spent in detention prior to the

²⁹ The comments to this subdivision discuss the existing law as of 1962. At the time of this writing, there is a bill pending before the Governor, passed by the 1964 Legislature, that would incorporate many of the changes herein proposed. Each reference in the text to this footnote indicates that the proposed change is covered in that bill.

acquittal. (In practice, the credit is sometimes allowed from the date the crime B warrant or commitment is lodged.) If he is convicted and sentenced for crime B prior to the acquittal on crime A and was held in the same detention facility during all of that time he might get no jail time credit at all. (Here, again, he might be credited with jail time from the date the crime B warrant or commitment was lodged.) Under the proposed statute the jail time that would have been credited against the crime A sentence will be credited against the crime B sentence.

Another new feature is the rule with respect to the manner of calculating jail time when multiple sentences are imposed. At the present time there is no rule and, consequently, the matter is left to the sheriff's discretion. As a result, different rules are applied in different counties (see App., p. A44).

It should be noted that under the proposed law jail time cannot be applied to reduce the minimum period of imprisonment under an indeterminate sentence to less than one year. This might represent a slight change in practice, since the Attorney General has expressed the opinion that the existing statute permits such reduction (see App., p. A15, footnote 22).

Subdivision 4. Good behavior time

Subdivision four provides the method of calculating good behavior time ("good time"). All aspects of good time are presently covered in the Correction Law, and any proposed revisions will be placed in that chapter. Therefore, the proposed subdivision will overlap those provisions to some extent. The aspect covered here is the manner in which the good time allowance will affect the term of imprisonment.

Paragraph (a) deals with indeterminate sentences. It makes a substantial change in existing law. At present a good time allowance not exceeding one-third of the minimum term may be applied against the minimum term and, pursuant to a 1962 law, a good-time allowance not exceeding one-sixth of the maximum term may be applied against the maximum term (see App., pp. A14-15). The effect of good time against the minimum is to accelerate the parole eligibility date, and the effect of good time against the maximum is to make parole mandatory when good time earned is equal to the time that remains to be served (*ibid.*). Under the proposed law there will be no good time allowed against the minimum, and a good time allowance not exceeding one-third of the maximum may be allowed against the maximum. The effect of this allowance will be the same as it is under the present law.

The history of the various good time provisions in this state is quite involved, and the existing provisions are the result of patchwork legislation. Therefore, in comparing the existing and the proposed provisions it is essential to test them against the purpose that is to be served. The traditional purpose of good time is to give the prisoner an incentive to lend his best efforts to the various institutional programs and for good behavior. Hence, it seems quite incongruous to allow it against the minimum, because while the prisoner is serving his minimum he is working for parole. If he does not satisfy the requirements set forth by the Department of Correction his chances for parole are poor.

Moreover, good time against the minimum is not even an effective incentive. It is of no use at all where a prisoner is returned as a parole violator; and, if the board denies parole in the first place, the good time is lost. The dissatisfaction that developed when the latter fact was finally made clear by the Court of Appeals in 1961 led to the enactment of the existing provision for good time against the maximum (see App., pp. A14-15).

Good time against the maximum serves the basic purpose of a good time allowance and also serves another important purpose. It provides a mandatory parole term for prisoners in cases where the Board has not acted. This means that the prisoner will not be ejected into the community without parole supervision. Of course it only serves the latter purpose where the prisoner has behaved well enough to earn the reduction. However, in cases where the prisoner has not even earned his good time reduction there is little reason to suspect that parole supervision would be effective.

The one-third allowance provided in the proposed statute will make for a better distribution of control between the Department of Correction and the Division of Parole than the present one-sixth allowance. Also, in cases where the maximum term is short, or where a parole violator has only a short time left to serve, the one-third allowance will be more meaningful.

It might be noted that even the one-third provision is on the conservative side. Various other jurisdictions that have good time provisions similar to the one proposed here allow more time. Under the Federal provision, for example—which works in substantially the same way as the proposed rule would—a prisoner who is serving a sentence of ten years or more can earn thirteen days per month in the first year, and fifteen days per month thereafter (see 18 U.S.C., §§ 4162-4166).

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Paragraph (b) deals with the good time allowance for definite sentences. Under existing law a prisoner can earn up to five days per month in a county jail or workhouse and up to ten days per month in a penitentiary. The effect is unconditional release when time earned equals the time that remains to be served (see App., pp. A32-33). Effective June 1, 1964 the county jail and workhouse allowance will also be ten days per month (L.1964, Ch. 271).

The reason for the existing difference between time allowed on a penitentiary sentence and time allowed on sentences in other county institutions is that penitentiaries were once used, along with state prisons, for long term imprisonment (App., pp. A24-28). Therefore, the penitentiary allowance was the same as the state prison allowance. However, penitentiaries are not presently used for long term imprisonment and there is no longer any reason for this distinction. This explains the 1964 provision, which makes the allowance uniform for all county institutions.

The proposed statute provides a five-day uniform allowance for all county institutions (one-sixth of the term). The effect of the allowance would be absolute release, as it is under existing law.

As between a five-day allowance and a ten-day allowance, five days is preferable. The reasons are as follows: (1) Definite sentences are much shorter than indeterminate sentences and there ought to be some distinction in time allowed; (2) In order to earn the ten day allowance in a state prison the inmate must render satisfactory performance measured by a number of criteria, while a county institution inmate usually receives the total allowance for sitting quietly in his cell; (3) The five-day allowance has worked satisfactorily for county institutions in the past; and (4) The five-day allowance is used for short terms in the vast majority of jurisdictions and recommended by modern penologists (see Model Penal Code, P.O.D., § 303.8).

Subdivision 5. Time served under vacated sentence

This subdivision grants credit for time served under a vacated sentence when a new sentence is imposed in its stead. The provision is in accordance with existing law (see Penal Law, § 2193 subd. 4).

Subdivision 6. Escape

Subdivision six provides the rules for calculating the sentence of a prisoner who has escaped and has been recaptured. Its provisions are substantially in accordance with existing law (see *e. g.*, Penal Law, § 1693; Correction Law, §§ 132).

§ 30.35 Merger of certain definite and indeterminate sentences

The provisions of this section are new. The purpose of the section is to eliminate unnecessary definite sentences. It permits service of an indeterminate sentence to satisfy any definite sentence of imprisonment that is imposed for an offense committed prior to the time the indeterminate sentence is imposed.

There is no sound reason to keep a person in a county correctional institution for a short term of imprisonment before transferring him to the more elaborate system of the state. This is especially clear under the proposed sentencing structure, because the maximum term of a state prison sentence must be at least three years. Therefore, it encompasses any legitimate objectives that would have been served by the definite sentence. Similarly, the law should not force a person to serve a definite sentence in a county institution, for a previously committed offense, when he is released from state prison. Having served a state prison sentence the offender should be allowed to make a fresh start. Moreover, if such release is on parole—as approximately 95% of the releases are—the definite sentence would interfere with the parole program.

The proposed section does not apply to a definite sentence imposed for an offense committed while the defendant is serving the indeterminate sentence (*e. g.*, an offense committed while on parole or during a period of conditional release). Merger of sentences in such a case would leave the courts powerless to deal with new offenses.

It should be noted that the proposed statute applies only where the defendant actually serves the indeterminate sentence. If such sentence is vacated, the definite sentence must be served. No credit is granted against either sentence for time served under the other.

§ 30.40 Release on parole; conditional release**Subdivision 1. Indeterminate sentence**

Paragraph (a) of subdivision one provides the Parole Board with discretionary authority to parole an indeterminate sentence prisoner after he has served the minimum period or periods of imprisonment that have been fixed. It also provides that the term of the prisoner's sentence will continue to run while he is on parole. These provisions are in accordance with existing law (Correction Law, §§ 212, 213, 218).

Paragraph (b) of subdivision one is basically a modification of the existing provisions for mandatory release of indeterminate sentence prisoners under parole supervision, when

good time earned against the maximum term is equal to the time that remains to be served (see App., pp. A14-15). It proposes three changes: (1) that such release would be granted only upon the request of the prisoner; (2) that the prisoner would receive no credit for time spent under parole supervision unless he successfully completes the period of supervision; and (3) that the period of parole supervision must be at least three years, irrespective of the time that remains to be served under the sentence.

The first of the aforesaid changes is relatively insignificant. It is merely a device to aid the prisoner in understanding that his conditional release is based upon an agreement that requires him to meet the obligations imposed by the Parole Board. Under existing law no request for release is necessary and the tendency is for prisoners who have earned "good time" releases to be recalcitrant parolees.

The other two changes are for the purpose of providing an adequate period of supervision and an adequate sanction in case the conditions are violated. Under existing law the sentence of a person who receives a "good time" release continues to run while he is on parole. Due to the fact that the release occurs in the latter part of the term (many of the releases are based upon good time earned in the relatively short period that remained to be served after a previous parole violation) the period of supervision is apt to be so short as to be meaningless. Under the proposed law the sentence would stop running at the time of conditional release and the person would be under parole supervision for three years, or for a period equal to the remainder of the sentence, whichever is longer. Successful completion of the parole period would terminate the sentence. But, if the conditions of release are violated during the period, the offender may be returned to prison to serve out the balance of his term, calculated from the date of release. Of course he could be reparaoled at any time and also would be able to earn another good time release at a later date.

The reason for choosing a three-year basic parole period is that less than ten per cent of the parolees who are declared delinquent violate after thirty months on parole (1962 Annual Report of the Division of Parole, Leg.Doc. [1963], No. 108 p. 96). Thus this period should serve the primary purposes of parole and it is not so long as to discourage applications for conditional release.

It might be noted that the practice of denying credit against the sentence for the time a parole violator spent on parole ("street time") is not new to this State or to the field of probation and parole. Under New York law prior to 1960

a person who was convicted of a felony while on parole had to serve out the remainder of his sentence calculated from the date he was placed on parole (Correction Law, § 219 prior to L.1960, Ch. 473). Also, all Federal parole violators lose "street time," irrespective of whether the delinquency consisted of a new crime (18 U.S.C., § 4205). Probationers, of course, never have received credit against the term of imprisonment for time spent under supervision.

Subdivision 2. Definite sentence

Subdivision two provides authority for definite sentence parole. There is no comparable provision of statewide application under existing law.

The provisions for the formation of "conditional release boards" and the various procedural aspects will be set forth in the Commission's forthcoming recommendations with respect to the Correction Law. The present intention is that the composition of the board would be the same as it is under a similar California law (Cal.Penal Code, §§ 3075-3084). In California, each county has a parole commission consisting of three members: (1) the sheriff; (2) the probation officer; and (3) a public member, who is not a public official, selected by the presiding or senior judge for a term of one year. The public member is compensated on a per diem basis. In New York this type of board could be used for county jails, variations could be used in the case of regional institutions, and the present Parole Commission could be retained in the City of New York (see Correction Law, Article 7-A).

Under the proposed law the Board would be authorized to conditionally release any county correctional institution prisoner who has a sentence or aggregate sentence of sixty days or more after the prisoner has served thirty days of the term. Release would interrupt the sentence and the maximum period of supervision would be two years. Successful completion of the parole period satisfies the remaining portion of the sentence. In the event the conditions are violated, the offender may be returned to the institution to serve out the balance of his sentence calculated from the date of release. However, the prisoner may be reparaoled at any time.

The aforesaid provisions are the same as the California provisions with two exceptions. California law does not require that the prisoner serve thirty days of the sentence, and the California board has authority to release prisoners who have terms of less than sixty days. The thirty day minimum requirement in the proposed law is to assure that the purpose of the court's sentence will be fulfilled. If the court did not believe that some period of imprisonment were needed, it would not have imposed a sentence of im-

prisonment. The sixty day provision was placed in the proposed law in order to draw a practical line of distinction between prisoners subject to parole and prisoners not subject to parole. If the board were obligated to deal with all prisoners committed to the institution it would not be able to function effectively with any. Use of the sixty-day provision cuts down the case load and enables the board to plan and supervise a more effective parole program.

Misdemeanant parole will have a salutary effect in the many cases where some form of pressure is necessary to guide the offender after his release from the institution. It is more effective as a form of correctional treatment than county jail or penitentiary imprisonment, and the cost of administering the program on a per-capita basis is far less than the per-capita cost of imprisonment (approximately \$1.00 per day for parole as against \$7.00 per day for imprisonment).

It should be noted that the proposed sentencing structure has statewide application. This would mean repeal of the special sentence set forth in Article 7-A of the Correction Law (see App., pp. A22-24).

Subdivision 3. Delinquency

Subdivision three sets forth the parole delinquency and jail time provisions that will directly affect the terms of sentences. The substance of these provisions is substantially in accordance with existing law (Correction Law, § 218; Penal Law, § 2193 subds. 2, 3). The procedural provisions will be set forth in forthcoming Commission recommendations for the Correction Law. (For a description of the declaration of delinquency device see comments to § 25.15 subd. 2, supra.)

The administrative procedures with respect to the subjects covered in this section will be placed in the Correction Law, where they are at present, and the proposed Penal Law provisions will overlap the Correction Law provisions to some extent. However, the aspects of parole and conditional release covered here directly affect calculation of the term, and it was thought best to have all such provisions in one place.

ARTICLE 35: REFORMATORY SENTENCE OF IMPRISONMENT FOR YOUNG ADULTS

The purpose of this article is to provide a special reformatory sentence which may be used by the court, in its discretion, when sentencing a person who is between sixteen and twenty-one years of age. The substance of the article is substantially the same as the existing law (see App., pp. A16-22). However, the proposed law contains one significant change.

Under existing law the maximum period of the sentence is five years where the conviction is of a felony and three years where the conviction is of a non-felonious offense. The proposed law provides a four-year uniform period, irrespective of the crime involved.

In considering this uniform period it is essential to understand that the purpose of a reformatory sentence is to provide education, moral guidance and vocational training for young offenders who are badly in need of such instruction and counsel. One-half of the persons presently confined in reformatories never attended high school, and less than one-half of one percent of the inmates have completed high school. Very few have ever received any vocational training, or have held steady jobs.

The State Department of Correction and the State Board of Parole devote specialized and concentrated resources to the task of supplying the needed education, guidance and training. Reformatories have special schools and shops. Youth camps supply more advanced training, and parole officers who work with reformatory term offenders have specialized caseloads.

In view of the aforesaid, the length of the reformatory period should be judged by the special purposes it is intended to serve. The existing distinction between the reformatory period for felonies and the reformatory period for non-felonious offenses is inappropriate when measured against these special purposes. Many persons who are sentenced to the three-year period need more extensive treatment than those who are sentenced to the five-year period. The existing law does not recognize any distinction based upon type of offense in dealing with persons adjudicated as "youthful offenders" (Code of Cr.Proc., § 913-m), and there is every reason to eliminate the distinction when dealing with convicted young offenders.

The four-year period herein proposed was selected as a reasonable and meaningful period for the purposes indicated. Under the proposed law, as under existing law, the Board of Parole will be able to release on parole, or discharge, at any time. Thus, the length of institutional treatment and the time spent under parole supervision will be tailored to individual factors.

§ 35.00 Reformatory sentence of imprisonment for young adults

Subdivision 1. Young adult

Subdivision one sets forth the age bracket for the reformatory sentence. This would change existing law by eliminating male felons between the ages of twenty-one and thirty, and female offenders (felony and lesser offenses) between the

ages of twenty-one and thirty. However, the elimination of the felony group would not have a significant impact, since the court can impose an indeterminate sentence without fixing the minimum and the Department of Correction would continue to apply existing criteria as to the actual place of confinement (see App., pp. A15-16, 20-22).

The only group that would be eliminated from State reformatory treatment by the change consists of females between the ages of twenty-one and thirty who are convicted of non-felonious offenses (see App., pp. A18-20). No reason appears why this group of adults ought to be subject to such a sentence. The sentence should be restricted to use in connection with younger offenders.

Subdivision 2. Reformatory sentence

Subdivision two provides the court's authority to impose the reformatory sentence, and the form of the sentence. As under existing law the court will merely indicate that it is imposing a reformatory sentence and will not fix any period or term.

The proposed subdivision makes one change in existing law. Under existing law a reformatory sentence can be imposed for non-criminal offenses. Under the proposed law the sentence can only be used for crimes. Where the offense is not serious enough to be deemed a crime it is clearly unfair to use this type of sentence (see comments to § 30.15 subd. 4, *supra*).

It should be noted that the provisions of the proposed law apply only to persons who are "convicted" and this does not include "wayward minors" (Code of Cr.Proc., §§ 913-a-913-dd) or "youthful offenders" (*id.*, §§ 913-e-913-r). The Commission intends to deal with these classifications in connection with its work on the Code of Criminal Procedure.

Subdivision 3. Limitations

This subdivision contains certain restrictions upon the use of the sentence.

Paragraph (a) prohibits the use of a reformatory sentence for a Class A felony. This is in accordance with existing law (see App., p. A16).

Paragraph (b) applies in situations where the court is sentencing for more than one offense. It prevents the court from imposing a reformatory sentence and a definite or an indeterminate sentence at the same time. Where a reformatory sentence is used for one offense the only other sentence of imprisonment that can be imposed by the court is a concurrent reformatory sentence (see comments to § 35.10 subd. 2, *infra*).

Paragraph (c) prevents the use of a reformatory sentence if the defendant is already under an indeterminate sentence. In this case a reformatory sentence would be purposeless.

Paragraph (d) prevents the use of a reformatory sentence for a crime committed by the defendant during incarceration in, or after parole or release from, any institution under the jurisdiction of the State Department of Correction. This is a change in existing law. The primary purpose of the provision is to prevent the use of a reformatory sentence for a misdemeanor committed after the offender has been exposed to the best efforts of the State correctional system. If the misdemeanor is committed while the defendant is on parole and the court wants to use a sanction, a definite sentence or a fine would be the appropriate disposition. If the misdemeanor is committed after the defendant has completed the reformatory sentence, it would be unfair to impose an additional four year period. Of course, if the new crime is a felony, the court can impose an indeterminate sentence with no fixed minimum (see comments to § 35.10 subd. 2 [c]).

§ 35.05 Place of imprisonment under reformatory sentence

The substance of this section is in accordance with existing law. Its purpose is merely to indicate the form of the commitment. The reception institution and the appropriate transfer provisions will be specified in the Correction Law (for existing provisions see App., pp. A20-22).

It should be noted that under existing law a person who receives a reformatory term for a felony may be transferred to a state prison (see App., p. A20). The present intention is to recommend that any such transfer be prohibited.

§ 35.10 Calculation of reformatory sentence

Subdivision 1. Commencement and termination

Subdivision one sets forth the basic rule for calculating the reformatory period. With the exception of the change in the length of the period (discussed, *supra*) this provision is in accordance with existing law.

Neither the existing law nor the proposed law grants any allowance against the period for good behavior.

Subdivision 2. Multiple sentences

Paragraph (a) provides the rule in a case where a person has received more than one reformatory sentence. This may occur when a court sentences for more than one crime at the same time or where a person who is under a reformatory sentence receives an additional reformatory sentence for a previously committed crime. Under the proposed subdivision all

such sentences would run concurrently and would expire at the time the first one expires. Thus, no combination of reformatory periods may ever exceed the uniform four year period. Under existing law consecutive reformatory periods seem to be permissible and each reformatory period is calculated as a separate unit (see App., pp. A36-39).

The reformatory period is designed to serve special purposes and its length should not depend upon the number of crimes for which the defendant has been sentenced. The proposed provision preserves the integrity of the sentence.

Paragraph (b) provides that service of a reformatory sentence satisfies any definite sentence imposed for a previously committed offense. This provision is similar to the one set forth in section 30.35, *supra*, for indeterminate sentences.

Paragraph (c) provides the rules to be applied when a person who is under a reformatory sentence receives an indeterminate sentence.

The rule set forth in subparagraph (i) of paragraph (c) is a change in existing law. Under existing law the two sentences could be made to run consecutively. Under the proposed law service of an indeterminate sentence will satisfy any reformatory sentence imposed for a misdemeanor. The sole justification for a reformatory sentence in the case of a misdemeanor is to expose the young adult to the State correctional regime. This is accomplished through the subsequently imposed indeterminate sentence. Therefore, a reformatory sentence imposed for a misdemeanor ought to merge with the indeterminate sentence in the same way as a definite sentence would have merged (see comments to § 30.35, *supra*).

The rule set forth in subparagraph (ii) of paragraph (c) is substantially in accordance with existing law. In this case there is no reason to permit merger. The basic purpose of the proposed rule is to allow discretionary transfer to a state prison. As previously indicated the Commission intends to recommend that such transfer should not be allowed in the case of a reformatory sentence (see comments to § 35.05, *supra*). However, where an indeterminate sentence is subsequently imposed, there is no reason for any such limitation. Under proposed subparagraph (ii) the minimum period of the indeterminate sentence would commence as soon as the defendant arrives in a State institution. The portion of the reformatory sentence that would have to be served would be determined by the Board of Parole, and then tacked-on to the maximum of the indeterminate sentence.

Subdivision 3. Jail time

Subdivision three provides jail time credit against the period of a reformatory sentence. This is in accordance with existing law (Penal Law, § 2193 subd. 1).

Subdivision 4. Time served under vacated sentence

This provision is in accordance with existing law (Penal Law, § 2193 subd. 4).

Subdivision 5. Escape

The escape provision is also in accordance with existing law (see Penal Law, § 1693).

§ 35.15 Parole under reformatory sentence

The provisions of this section are in accordance with the existing law (Correction Law, §§ 218, 281-283; see also comments in the introduction to this article and App., p. A17). As in the case of the parole provisions for other sentences, the proposed section will overlap certain Correction Law provisions.

ARTICLE 40: FINES

§ 40.00 Fine for felony

Under existing law, fines cannot be imposed for many felonies and in cases where fines are authorized the amounts do not vary in relation to the gravity of the crimes (see App., pp. A56-61). Thus, the existing law does not express any consistent policy with respect to the use of fines in felony cases. The policy expressed in the proposed section is that in the case of a felony, a fine should only be used when the offender has derived a pecuniary gain through the commission of the crime. The reasoning here is that a felony is a serious crime and a fine in an abstract amount is not appropriate. What is needed is a provision that forces the offender to disgorge any ill-gotten gains and to forfeit an amount which is in excess of those gains but nevertheless related to them. The amount of the fine for a felony should, therefore, be geared to a multiple of the offender's pecuniary gain. Accordingly, under the proposed section, the court may impose a fine not exceeding double the amount of such gain.

The amount of the fine would, of course, have to be based upon legal evidence of the amount of the gain, and the court would have to make a finding as to the amount of the gain. If the necessary facts are not brought out at the trial, or admitted at the time a plea is entered, or at the time sentence is imposed, the court may conduct a hearing to determine the amount of the gain.

It should be noted that the concept of gearing the amount of the fine to the defendant's pecuniary gain is employed by existing law for various crimes (see *e. g.*, Penal Law, §§ 460, 932, 934, 1302, 1864).

The procedure for collecting fines will be contained in the forthcoming proposed revision of the Code of Criminal Procedure.

The proposed Penal Law does not permit the use of a fine in the case of a class A felony, or the use of a fine as the sole sanction for any class B or narcotic felony (see § 20.00 subd. 4, *supra*).

§ 40.05 Fines for misdemeanor and violation

In the case of a misdemeanor a fine is appropriate, irrespective of whether the defendant derived a pecuniary gain from the offense. For this class of offense, a fine has significance as both a deterrent and a sanction. In the case of a violation, a fine is the normal sentence and imprisonment serves a very limited purpose (see comments to § 30.15 subd. 4).

Subdivision 1. Class A misdemeanor

Subdivision one sets forth the specific maximum fine that can be fixed for a Class A misdemeanor.

Subdivision 2. Class B misdemeanor

Subdivision two sets forth the specific maximum fine that can be imposed for a Class B misdemeanor.

Subdivision 3. Unclassified misdemeanor

The fine for any unclassified misdemeanor will remain as it is under existing law. The reason for this is the same as the one explained in connection with sentences of imprisonment for that classification (see comments to § 30.15 subd. 3). In this connection it might be noted that the unclassified misdemeanor category serves a very useful purpose where fines are concerned. Many misdemeanors defined outside the Penal Law involve business situations where very high fines are appropriate (*e. g.*, General Business Law, § 341). The Legislature will be able to continue to specify special fines for such offenses without creating specific exceptions to the Penal Law, because the offenses will automatically be deemed unclassified misdemeanors.

Subdivision 4. Violation

This subdivision provides the maximum fine for all violations defined in the Penal Law and the rule for determining the amount of the fine for violations defined outside the Penal Law.

The rule for violations defined outside the Penal Law is that where a fine is specified, the amount so specified would control. If the offense is specifically designated as a violation (*i. e.* by future legislation) and no fine is specified the Penal Law fine would apply.

§ 40.10 Fines for corporations

When a corporation is convicted of an offense the only penal sanction that can be used is a fine. Therefore, the proposed section specifies fines for all offenses.

Subdivision 1. In general

Subdivision one sets forth the fines to be used where no special corporate fine is provided by law. The existing law provides special corporate fines in higher amounts for numerous misdemeanors and some felonies. Under existing law where no special corporate fine is provided for a misdemeanor, the authorized fine for a corporation is the same as the authorized fine that could be imposed upon an individual (see App., pp. A58-61). Where the offense is a felony, the authorized fine is an amount, fixed by the court, not exceeding five thousand dollars (Penal Law, § 1935).

The fines in proposed subdivision one apply to all offenses defined in the proposed Penal Law and any offense defined outside the proposed Penal Law for which no special corporate fine is designated. The specific amounts set forth are higher than the specific amounts for individuals (see § 40.05, *supra*), and also are subordinated to the criterion of pecuniary gain when the amount of the gain can be determined (paragraph [e]). The specific amounts for unclassified misdemeanors are geared to the gravity of the offenses through the sentences of imprisonment provided in the proposed law for class A and B misdemeanors (paragraphs [b], [c]).

Subdivision 2. Exception

Subdivision two is designed so as to leave the special corporate fines for offenses defined outside the Penal Law in the status quo. The only change made by this subdivision is that under the proposed law the court will have authority to subordinate the specific amount of the fine to the criterion of pecuniary gain when the amount of the gain can be determined.

Subdivision 3. Determination of amount or value

This subdivision sets forth the requirement that where the court uses the criterion of pecuniary gain it must make a finding, based upon legal evidence, as to the amount of the gain. (See additional commentary, § 40.00, *supra*.)

ARTICLE 45: CULPABILITY

§ 45.00 Definitions of terms

See note to proposed § 45.05.

§ 45.05 Construction of statute with respect to culpability requirements

This section and the preceding one, both of which are new, formulate certain basic principles of criminal liability in an endeavor to assist in the determination of numerous mens rea problems, the judicial resolution of which is presently hampered by lack of substantial legislative guideposts.

No matter how an offense is defined, the minimal requirement for liability under the proposed sections is "conduct which includes a voluntary act or a voluntary omission." A "voluntary act" is so defined as to exclude reflex actions, bodily movements during unconsciousness, hypnosis, epileptic fugue, and the like [§ 45.05(1); see, also, § 45.00(1, 2, 3)]. If an offense as defined requires no element of culpability, it is one of "absolute liability" [§ 45.05(2)]. Such offenses are sparse in the proposed Penal Law for most must be committed with some culpable mental state.

One of the main defects of the existing New York statutes defining offenses involving culpability is their use of a host of largely undefined and frequently hazy adverbial terms, such as "intentionally," "wilfully," "designedly," "maliciously," "knowingly," "recklessly," "negligently," "with culpable negligence," "with criminal negligence," and many more. The proposed article designates only four culpable mental states, defines each, and stipulates that, unless an offense is one of absolute liability, at least one of these particular mental states is essential for commission of the offense; the four terms in question are "intentionally," "knowingly," "recklessly," and "criminal negligence" [§§ 45.00 (4-7), 45.05(3)].

"Intentionally" and "knowingly" are, of course, familiar concepts, the main distinction between them being, in one respect at least, that the first entails a conscious desire to cause a particular result by one's conduct and the second an awareness that the result "is practically certain" to follow from such conduct [§ 45.00(4, 5)]. The terms "recklessly" and "criminal negligence" (subs. 6, 7), however, are conceptually more intricate. Here, the proposed section strives especially for precision of definition in an endeavor to crystallize an area of culpability and liability long fraught with uncertainty and confusion.

The common denominators of these two terms are that the underlying conduct must, in each instance, involve (1) "a substantial and unjustifiable risk" that a result or circumstance described by a penal statute will occur or exists, as the case may be, and (2) "a gross deviation" from the standard of conduct or of care that a reasonable person would observe [§ 45.00(6, 7)]. The reckless offender is aware of that risk and "consciously disregards" it [§ 45.00(6)]. The criminally negligent offender, on the other hand, is not aware of the risk created and, hence, cannot be guilty of consciously disregarding it. His liability stems from a culpable failure to perceive the risk. His culpability, though obviously less than that of the reckless offender, is appreciably greater than that required for ordinary civil negligence by virtue of the "substantial and unjustifiable" character of the risk involved and the factor of "gross deviation" from the ordinary standard of care.

While it might be urged that "criminal negligence," as here defined, should be excluded entirely from the scope of penal liability [see Hall, in Symposium on the Model Penal Code, 63 Col.L.Rev. 632 (1963)], the Commission believes that its inclusion may serve a useful purpose in limited instances [see Wechsler, On Culpability and Crime: The Treatment of Mens Rea in the Model Penal Code, 339 Annals 24, 31 (1962)]. Accordingly, it is employed, though sparingly, being found only in the settings of homicide and assault (proposed §§ 130.10 and 125.00).

"Recklessly," on the other hand, denoting a markedly higher degree of culpability, is an important term in this proposed code. Indeed, the frequency with which it is employed to extend criminal liability beyond the bounds of "intentional" and "knowing" conduct is one of the significant distinctions between the proposed Penal Law and the existing one.

§ 45.10 Effect of intoxication on culpability

Subdivision 1 substantially restates existing Penal Law § 1220.

Subdivision 2, which is new, excepts the mental state of recklessness from the foregoing principle. Since recklessness requires an awareness and a "conscious disregard" of a risk [§ 45.00(6)], intoxication frequently might, under the doctrine of subdivision 1, be deemed to negate recklessness and to reduce the offender's culpability to that of "criminal negligence," which is based upon failure to perceive or to be aware of the risk [§ 45.00(7)]. However, the drunken driver, for example, who causes injury or fatality seems deserving of the higher culpability. His overall conduct and culpability should be appraised not alone as of the time of the accident but as of

an entire period commencing when he deliberately began to destroy his "powers of perception and of judgment" by becoming intoxicated, and continuing through his drunken driving and the accident [see Model Penal Code § 2.08, comment 3 at pp. 8-9 (Tent.Draft.No. 9, 1959); see, also, Hall, General Principles of Criminal Law, pp. 529-557 (2d ed. 1960)].

It is out of these considerations that subdivision 2 herein refuses to regard unawareness of a risk at the time of the offense as negating a charge of recklessness when the unawareness results from intoxication; and provides that recklessness may still be predicated if the offender "would have been aware of such risk had he not been intoxicated."

§ 45.15 Effect of ignorance or mistake upon culpability

This section is addressed to the traditional exculpatory doctrines of mistake of fact and mistake of law. Although there are no "mistake" provisions in the existing Penal Law, the case law does recognize such doctrines. Proposed § 45.15 enumerates and crystallizes these principles.

Subdivision 1, in essence, codifies existing case law.

Subdivision 2 is new. A person who has engaged in conduct constituting a crime cannot, as a rule, successfully claim that he did not believe his conduct criminal. This provision, after endorsing that proposition, enumerates the settings within which a person's mistaken belief of the law does constitute a defense.

ARTICLE 50: PARTIES TO OFFENSES AND LIABILITY THROUGH ACCESSORIAL CONDUCT

§ 50.00 Criminal liability for conduct of another

In essence, this section follows the theme of existing Penal Law § 2 (6th par.), defining a "principal" in a crime. The substance of the latter provision is that a person is a "principal" or criminally liable for an offense not only when he directly commits it (a common law principal in the first degree), but when he is present at and aiding in its commission (a common law principal in the second degree) and when, though not present at the scene, he procures, counsels or aids its commission by prior conduct (a common law accessory before the fact).

Unlike the existing provision, the proposed one is so phrased as to make it clear that the culpable solicitor, aider or abettor is liable for the offense involved in the active agent's conduct not only when the latter is guilty of the offense but al-

so when, although he committed the proscribed acts, he is not guilty thereof by virtue of lack of culpability, infancy or insanity.

§ 50.05 Factors not constituting exemptions or defenses

The first two subdivisions merely state collectively a proposition inherent in the preceding section (§ 50.00), namely, that the fact that the active agent has not been criminally prosecuted or convicted for the conduct in question, or that he may not be guilty of the offense involved for want of culpability or responsibility, does not constitute a defense to the causer, aider or abettor.

Subdivision 3 states a familiar but not presently codified principle which may be illustrated by reference to the crime of bribe receiving (by a public servant). The fact that that offense can be committed in an individual capacity "only by a particular class . . . of persons," namely, public servants, does not preclude liability or conviction therefor of a non-public servant who aids a public servant to obtain or receive a bribe.

§ 50.10 Factors constituting exemptions or defenses

Subdivision 1 deals with situations where the accessorial conduct consists of a correlative offense or act which is inevitably necessary or incidental to the offense aided or procured. Thus, the crime of bribe giving by A (to B) is "necessarily incidental" to the crime of bribe receiving by B; and the contracting of a bigamous marriage by A is "necessarily incidental" to the commission of bigamy by B, the other party to the marriage. In each instance, under the general doctrine of § 50.00, A would be liable for B's separate but related offense (bribe receiving and bigamy) by virtue of having encouraged, aided or caused him to commit it. Pursuant to the exception of subdivision 1 herein, however, A is not liable for B's offense in this kind of situation. If A's conduct does constitute an offense (i. e., bribe giving), he is guilty of that offense alone. If it does not, he is not guilty of any offense.

Subdivision 2 furnishes the causer, aider or abettor with an inducement to deprive his complicity of its effectiveness. A renunciation provision similar to subdivision 2 is included in the Model Penal Code's complicity formulation [§ 2.06 (6) (c)].

§ 50.15 Convictions for different degrees of offense

This section, although new, merely codifies a settled principle of law.

§ 50.20 Criminal liability of corporations

This section is new. Although the existing Penal Law designates some individual fields of corporate liability by express mention of corporations in certain penal statutes, there are no general statutory standards for determining the offenses for which a corporation may be prosecuted. Without such standards, the judiciary is left with extremely difficult problems in that regard. Although precision in this area is impossible, this section enunciates certain standards in an endeavor to provide workable guideposts.

§ 50.25 Criminal liability and punishment of individual for corporate conduct

This section, which is new, assures that one is not exempted from personal criminal liability merely because his offense is committed behind a corporate veil or for a corporation's benefit.

ARTICLE 55: AFFIRMATIVE DEFENSE**§ 55.00 Affirmative defense; definition and application**

This section codifies New York case law with respect to the concept of an affirmative defense.

ARTICLE 60: LACK OF CRIMINAL RESPONSIBILITY**§ 60.00 Infancy**

This section substantially restates existing Penal Law § 2186.

§ 60.05 Mental disease or defect

The existing insanity defense in New York (P.L. § 1120) rests on the century old McNaghten rule, which has been challenged by many as being out of step with modern psychiatric concepts. The Commission is of the opinion that a more enlightened standard is needed and, accordingly, proposes a formulation similar to that presented in the Model Penal Code. This formulation is extensively treated in the Commission's 1963 Interim Report [Leg.Doc. (1963) No. 8, pp. 16-26; reprinted herein as Appendix B]. As indicated in the Commission's 1964 Report [Leg.Doc. (1964) No. 14], however, the Commission is continuing to study certain controversial aspects of this matter with a view to submitting its final recommendation as a separate bill for action by the 1965 session of the Legislature.

ARTICLE 65: JUSTIFICATION

This Article seeks more precise and thorough codification of the pertinent principles controlling the intricate defense of justification. That defense, though applicable to a wide range of offenses, applies primarily in prosecutions for assault, homicide and other crimes of violence.

Briefly, it may be observed that, unlike the existing sections, the proposed Article seeks to distinguish carefully between situations where the use of ordinary "physical force" is justifiable and those where a person may use "deadly physical force" [defined in proposed § 10.00(5)]. Another theme running through the Article is that justification arising from the various specified factual situations is predicated upon a "reasonable belief" by the actor that such facts, situations or circumstances exist, whether or not they actually do.

§ 65.00 Justification generally

This section, which is new, is derived from similar provisions of Model Penal Code §§ 3.02, 3.03.

Subdivision 1 of proposed § 65.00 is self-explanatory.

Subdivision 2 would provide a defense of justification in rare and highly unusual circumstances. Illustrative is the burning of real property of another in order to prevent a raging forest fire from spreading into a densely populated community; or forcibly confining a person ill with a highly contagious disease for the purpose of preventing him from going to a city and possibly starting an epidemic. The provision does not justify criminal conduct, such as mercy killing, committed out of disagreement with "the morality or advisability of the law."

§ 65.05 Justifiable use of physical force generally

Compare with existing Penal Law §§ 42 and 246. Subdivision 5 is new.

§ 65.10 Justifiable use of physical force in defense of a person

Compare with existing Penal Law §§ 42, 246(3) and 1055, but note the proposed section's distinctions with respect to the use of "physical force" and "deadly physical force."

§ 65.15 Justifiable use of physical force in defense of real property

Compare with existing Penal Law § 246(3). It should be observed that this section's permission to use "deadly physical force" in real property invasion cases for the purpose of

preventing "arson" does not prohibit its use to combat deadly attacks on the person, or robbery, rape and other crimes of physical violence threatened or attempted during a criminal trespass. The right to use deadly physical force defensively under such circumstances is accorded by proposed § 65.05(2), which is specifically addressed to the use of such force "in defense of a person"—whether or not the incident occurs during an intrusion on real property.

§ 65.20 Justifiable use of physical force in defense of personal property

Compare with existing Penal Law § 246(3). Note that the use of deadly physical force to protect personal property is prohibited only with respect to threatened or attempted criminal mischief and non-violent larceny, and that, pursuant to another section [proposed § 65.05(2)], such deadly force may be used to prevent robbery.

§ 65.25 Justifiable use of physical force in resisting unlawful arrest

This section is new. It codifies, in a qualified form, the judicially established doctrine that one may employ physical force to resist an unlawful arrest [People v. Cherry, 307 N.Y. 308, 121 N.E.2d 238 (1954)]. The qualification, relating to the actor's state of mind, is that he must "believe" the arrest to be unlawful.

§ 65.30 Justifiable use of physical force in making an arrest and in preventing an escape

Compare with existing Penal Law §§ 246(1) and 1055.

ARTICLE 70: IMMUNITY

§ 70.00 Immunity; defined

This section substantially restates the definition of immunity contained in existing Penal Law § 2447(2).

§ 70.05 Immunity from prosecution

This section designates "immunity" as one of the affirmative defenses defined by Title D.

§ 70.10 Immunity; authorities competent to confer it

This section, representing a material change from the present law, would replace fifteen provisions of the existing Penal Law [§§ 81-a, 166, 381, 439, 584, 713, 996, 1256, 1472, 1752-a, 1787, 1904(6), 2038, 2052, 2097].

The procedure and mechanics for compelling evidence from a person by granting him immunity in return for abrogation

of his privilege against self-incrimination is set forth in § 2447 of the existing Penal Law, which is substantially carried over into the proposed code (§ 70.15; see, also, § 70.00). The question of when, or in what kinds of investigations and proceedings, immunity may be granted for evidentiary compulsion purposes is now determined by a host of individual statutes located both within and without the existing Penal Law. The existing Penal Law provisions permit immunity grants in investigations into bribery, gambling, conspiracy and several other selected crimes, and other non-Penal Law provisions extend the power to various kinds of civil and administrative proceedings.

Such limitation and selection is based upon the theory that the power should be closely restricted because of the danger of conferring amnesty upon witnesses who have committed crimes. The immunity device is justified, it has been said, only where, because of the nature of the crime under investigation (a serious one), the acquisition of evidence from untainted sources is especially difficult [see *Matter of Doyle*, 257 N.Y. 244, 261, 177 N.E. 489 (1931); Law Revision Commission Report, Leg.Doc. (1942) No. 65(I), pp. 46-47; Third Report of the New York State Crime Commission, Leg.Doc. (1953) No. 68, p. 15]. However valid or invalid that theory may be, the existing Penal Law's list of immunity statutes certainly does not jibe with it. Indeed, most of them apply to investigations into comparatively inconsequential and infrequently prosecuted offenses (see, e. g., existing P.L. §§ 671, 1200, 1472, 2038). Moreover, the selective process is, as a practical matter, largely negated by prolific employment of the immunity provision in conspiracy cases (existing P.L. § 584), which can be invoked in almost any instance where the criminal conduct under investigation involves at least two persons.

Proposed § 70.10 proceeds upon the premises: (1) that the present system of limitation and selection with respect to immunity statutes is both illogical and ineffective; (2) that the power to compel evidence by means of an immunity grant is a vital, salutary and fair law enforcement measure which should be available in investigations for all crimes of any real seriousness, whether felonies or misdemeanors; (3) that, by and large, the crimes defined in the proposed Penal Law are sufficiently serious to warrant the use of that power; and (4) that the same is probably not true of the thousands of misdemeanors defined in bodies other than the Penal Law, many of which are of an extremely specialized nature.

Upon these postulates, a "blanket" immunity statute is here created, authorizing immunity grants by any court, magistrate, grand jury or joint legislative committee in an inves-

tigation for "any crime" contained in the proposed Penal Law "or any felony defined in any other chapter." This leaves untouched the vast field of misdemeanors outside the Penal Law. If the Legislature deems an immunity statute appropriate with respect to investigations into any particular non-Penal Law misdemeanor, it is, of course, privileged to enact one, as it has done in the past (see Gen.Bus.Law § 345); and the same is true of any immunity provision or prospective provision dealing with the compulsion of evidence in particular civil, administrative or executive proceedings. Needless to say, the proposed immunity section (§ 70.10) would not affect the validity or status of any non-Penal Law immunity provision now on the books.

§ 70.15 Immunity; how and when conferred

This section substantially restates existing Penal Law § 2447, minus the second subdivision thereof, which is restated in proposed § 70.00.

§ 70.20 Waiver of immunity

This section carries over, with some language changes from the existing Penal Law (§ 2446), the provisions authorizing and providing procedure for the signing of a waiver of immunity by a witness called or about to give evidence in a grand jury or other criminal proceeding.

ARTICLE 75: OTHER EXEMPTIONS AND DEFENSES

§ 75.00 Duress

This section is derived from existing Penal Law § 859, but its scope has been considerably broadened. The present law is rather narrow since it requires a showing that the actor reasonably feared "instant death or grievous bodily harm." Subdivision 1 adopts a more flexible and realistic standard by gearing the degree of force used or threatened to the fact situation in which the actor finds himself. It should be noted that the present law deals with compulsion only in terms of threats of bodily harm but not the actual use thereof. The revision clarifies this ambiguous situation by specifically referring to "the use or threatened use" of force.

Subdivision 2 is new and represents a reasonable limitation upon the scope of the defense of duress.

§ 75.05 Entrapment

This section is new, since New York today does not recognize the defense of entrapment, and is probably the only state which

fails to do so. The formulation is based upon the federal standards as enunciated in *Sorrells v. United States*, 287 U.S. 435, 53 Sup.Ct. 210 (1932), and *Sherman v. United States*, 356 U.S. 369, 78 Sup.Ct. 819 (1958). This section aims to discourage the use of overzealous methods by law enforcement officials to trap the unwary innocent into commission of an offense. Thus, the main thrust of the section is against pressure methods which may cause the commission of an offense by one who is not ordinarily disposed to commit it. As a practical matter, therefore, the defense of entrapment would not be available to the person who regularly engages in illegal enterprise. It is universally recognized that certain types of offenses, such as narcotics selling, prostitution, promoting gambling, and the like, would not be prosecutable without some undercover work by law enforcement officials, since the "victims" almost never complain. So long as the undercover conduct does not overstep the bounds prescribed herein, the defense of entrapment is not available.

§ 75.10 Previous prosecution

This section deals with the principle commonly known as former or double jeopardy. The existing Penal Law contains a few provisions recognizing or establishing that doctrine as a part of New York law, but no real effort is made to codify or explain the kinds of situations that do and do not constitute double jeopardy. Proposed § 75.10 makes that endeavor.

Subdivision 1 states the general double jeopardy proposition to be that one may not be prosecuted for an offense when he has previously been prosecuted for "the same offense," namely one identical in both fact and law, or for "an offense comprising the same or substantially the same conduct." It is the latter concept, with emphasis upon the phrase "substantially the same conduct," that embodies and points up most of the intricate double jeopardy problems that have arisen in New York and other jurisdictions.

Subdivision 2 seeks to explain the meaning of "substantially the same conduct" and treats five basic kinds of situations, most of which have proved troublesome in the determination of double jeopardy problems. The formulations, in great part at least, follow the pattern of New York case law on the subject, which places the emphasis upon factual similarity and, generally speaking, bars double prosecution where the two charges in issue have a substantially common factual denominator. The following hypothetical instances will serve as illustrations of the general principles, though not of the various exceptions thereto, enunciated in the five paragraphs of subdivision 2:

(a) A man who has sexual intercourse with his fifteen year old daughter may not be separately prosecuted both for rape and incest;

(b) One who kidnaps another for purposes of ransom and who also robs him in the course of the abduction or confinement may not be separately prosecuted both for kidnapping and robbery;

(c) One who, bent upon robbery, steals a car, then commits the robbery with the aid of the car and, finally, assaults a police officer during his escape, may be separately prosecuted for the larceny of the car, the robbery, and the assault upon the officer;

(d) One who has been prosecuted for murder may not subsequently be prosecuted for the assault by which it was accomplished;

(e) One who has been prosecuted for assault resulting in fatality may not subsequently be prosecuted for murder. Note, however, that a prosecution for murder is authorized where death did not occur until after the assault prosecution if the latter resulted in a conviction.

Subdivision 3 attacks the intricate question of when a person is deemed to have been "previously prosecuted" or, in other words, when jeopardy attaches, and formulates the indicated principles upon that subject.

§ 75.15 Untimely prosecution

This section, constituting the "statute of limitations" for the commencement of criminal prosecution, is derived from six sections of the Code of Criminal Procedure (§§ 141-144-a).

Subdivision 2(a) which provides, in effect, no period of limitation for murder or kidnapping prosecutions, is the same as present Code of Criminal Procedure §§ 141 and 144-a, respectively. The limitations of five years for any other felony and two years for any misdemeanor accord with the periods prescribed for these categories in Code of Criminal Procedure § 142(1). However, subdivision 2(d) of the revision puts a one year limitation upon prosecutions for "violations," whereas present law prescribes a two year period for "offenses," which are roughly equivalent to "violations."

Subdivision 3 deals with two exceptions to the general rules set forth in the prior subdivision. Paragraph (a) concerns prosecutions for larceny committed by a fiduciary, covering the same situation as present Code of Criminal Procedure § 142(2), but differs in treatment. The revision does not distinguish between felonies and misdemeanors, as

does the present law, nor does it extend the period of limitation for as long a time. Most significantly, the revision here (and in the succeeding paragraph) places a "ceiling" on the length of the extended period, a factor absent from the present law. Paragraph (b) of this subdivision is new.

Subdivision 4(a) is derived from Code of Criminal Procedure § 143, differing from it substantively only in the respect that the revision places a five year ceiling on the extension of the period of limitation. Paragraph (b) of this subdivision is derived from Code of Criminal Procedure § 144-a, but does not include the proviso in the latter that a new prosecution shall be commenced within sixty days after the order of dismissal.

Subdivision 5 is derived from Code of Criminal Procedure § 144. The revision adds to the definition of "commencement" of prosecution under the present law, an actual arrest or the issuance of a summons.

PART TWO

SPECIFIC OFFENSES

It is pertinent to point out and explain at the beginning of this "Part" a novel technique employed in the presentation and definition of offenses divided into degrees.

A true "degree" crime is one in which the lowest degree constitutes the basic offense. When this is augmented by a given aggravating factor (e. g., a larceny committed by a taking from the person), the offense is raised a notch in degree. No matter how many aggravating factors and degrees, however, and no matter how high in the progression particular conduct may reach, the lowest degree is always committed as well as the higher one.

Bearing these principles in mind, the simple and obvious method of presenting a degree offense—and the one adopted in this proposal—is to begin with the basic or lowest degree and then to climb the ladder adding aggravating factors on the way up. Applying this system to, for example, the existing larceny offenses, petit larceny would first be predicated and defined in terms of any stealing of property (not of property valued at less than \$100). Second degree grand larceny would then be defined as a stealing of property when valued at more than \$100, or when consisting of a public record, or when involving a taking from the person (existing P.L. § 1296). And finally, first degree grand larceny would be defined as a stealing of property valued in excess of \$500, or involving a nocturnal taking from the person, and so on (existing P.L. § 1294).

In contrast to this simplicity is the extreme awkwardness and confusion of the traditional descending system. After learning that first degree grand larceny consists of thefts of property valued at more than \$500, of takings from the person at night, etc., (existing P.L. § 1294), one finds that the second degree consists of thefts between \$100 and \$500, of any taking from the person, etc., "under circumstances not amounting to grand larceny in the first degree" (existing P.L. § 1296). This puts the reader to a puzzling subtracting process; but his difficulties really begin when he finds that petit larceny consists of "every other larceny" (existing P.L. § 1298)—meaning every larceny that is not first or second degree. By a tortuous process of elimination, he finally concludes that petit larceny consists of a theft of property when the value thereof does not exceed \$100, when it does not consist of a public

record, when it is not taken from the person in either the daytime or the nighttime, and when the property, if nocturnally taken from a dwelling, vessel or railway car, is not of more than \$25 in value.

Apart from their needless complexity, these descending formulations are actually erroneous in their implication that the various degrees are mutually exclusive: for example, that a theft of more than \$100 is grand larceny and not petit larceny. If that were so, a defendant charged with grand larceny could not plead guilty to or be convicted of petit larceny, for one cannot properly be convicted of a crime which one did not commit.

The Commission realizes that persons ordinarily dislike shifting from a familiar, long-standing system, no matter how unsatisfactory, to a new one. It is believed, however, that the temporary difficulty of adjustment to the indicated ascending degree system would be far outweighed by the factors of ultimate simplicity to the Penal Law reader and of legal soundness.

Title G: Anticipatory and Accessorial Offenses

This Title deals with conduct which is aimed at or is accessorial to the commission of criminal offenses but which renders the actor only partially rather than fully liable for the offense or contemplated offense to which his conduct attaches. The existing Penal Law establishes three such criminal categories: (1) conspiracy, (2) attempt and (3) accessory after the fact. To these, proposed Title G adds two more: "criminal solicitation" (Art. 100) and "criminal facilitation" (Art. 115).

ARTICLE 100: CRIMINAL SOLICITATION

This Article presents a concept new to New York law. Solicitation to commit a felony or a "serious" misdemeanor was criminally actionable at common law and punishable as a misdemeanor. It is not an offense under the existing law of New York, but this Article would make it one irrespective of whether the crime solicited be a felony or a misdemeanor.

The nature and scope of the proposed change may be illustrated by a case where A importunes B to kill C. If B agrees to do so, both B and A are guilty of conspiracy. If B shoots at C but misses, both B and A are guilty of attempted murder; and, of course, if B kills C, both are guilty of murder. If, on the other hand, B refuses or fails to undertake the homicidal project, the conduct of A is not criminal under existing law. Under the proposed Article, it would constitute "criminal solicitation."

§ 100.00 Criminal solicitation; definitions of terms

This section, stating the explicit meanings of "crime" and comparable terms used in this Article under certain circumstances, obviates the necessity of repeating the indicated explanatory language every time such words appear in the ensuing sections, and thus simplifies and shortens the drafting of the Article as a whole.

§ 100.05 Criminal solicitation

See note to proposed Article 100.

§ 100.10 Criminal solicitation; punishment

The penalties are geared to those for the offenses solicited in a scheme similar to the conspiracy pattern (see proposed §§ 105.05, 105.20).

§ 100.15 Criminal solicitation; no defense

This section states a corollary of the general proposition that criminal liability by virtue of accessorial conduct does not depend upon the culpability or criminal responsibility of the active agent [see proposed § 50.05(2)].

§ 100.20 Criminal solicitation; exemptions and defenses

Subdivision 1 states a proposition analogous to that of proposed § 50.10(1) (see note thereto). Illustrative is a situation where A, a public servant, solicits a bribe from B. A is guilty of bribe receiving only, and not of criminally soliciting B to commit the crime of bribe giving.

Concerning subdivision 2, see note to proposed § 50.10(2).

ARTICLE 105: CONSPIRACY

This article limits the crime of conspiracy to conspiracy to commit "a crime" [existing P.L. § 580(1)], which is only one of six forms prescribed by the existing Penal Law (id., subds. 2-6). The other five forms (conspiracy to "cheat and defraud," to injure public morals, etc.), insofar as they may not require criminal objectives, provide standards that are, in the Commission's opinion, too vague and indefinite for criminal sanctions.

Varying penalties for conspiracy are here provided by a degree structure geared to the grade or seriousness of the object offense (§§ 105.05-105.20; cf. existing P.L. §§ 580, 580-a).

Proposed § 105.25 substantially restates the "overt act" rule enunciated in existing Penal Law §§ 580-a and 583, but without certain qualifications contained in those provisions.

Proposed § 105.30, which is new, prescribes several self-explanatory principles which logically apply to certain problems of jurisdiction and venue peculiar to the crime of conspiracy.

Proposed § 105.35, which is new, provides a defense in cases where the defendant prevented the accomplishment of the objective of the conspiracy under circumstances manifesting voluntary and complete renunciation of his criminal purpose.

ARTICLE 110: ATTEMPT

§ 110.00 Attempt to commit a crime

This section defines an "attempt to commit a crime" in terms of "conduct which constitutes a substantial step toward the execution or commission thereof" rather than as, in the existing Penal Law, an act "done with intent to commit a crime, and tending but failing to effect its commission" [§ 2 (last par.)]. The proposed formulation is not designed to change the present meaning or construction of "attempts," but simply seeks a greater measure of precision in the definition of this difficult concept.

§ 110.05 Attempt to commit a crime; punishment

This section establishes a penalty scheme rendering an "attempt to commit a crime" the most serious of all the inchoate and accessorial offenses of this Title. Dropping the penalty only one notch below that of the crime attempted, the section penalizes "attempts" relatively more severely than does the existing Penal Law (§ 261).

§ 110.10 Attempt to commit a crime; no defense

This section, which is new, seeks legislative crystallization of a subject upon which the American decisions are not consistent or entirely clear, namely, whether one can "attempt" to commit a crime which, by virtue of particular circumstances, is impossible of actual commission.

"Impossibility" is said to be of two kinds: factual and legal. Illustrative of factual impossibility is an attempted larceny case based upon an attempt to pick a pocket which is in fact empty. An example of legal impossibility is a "receiving" case based upon acquisition of property which one believes to be stolen but which actually is not. While the distinction between these two concepts is not always clear-cut, the case law of New York appears to be that factual impossibility of committing a crime is no defense to a prosecu-

tion for attempting to commit it, but that legal impossibility is a defense [People v. Rollino, 37 Misc.2d 14, 233 N.Y.S.2d 580 (Sup.Ct.Queens Co. 1962)].

Upon the theory that neither brand of impossibility detracts from the offender's culpability, the proposed section would change this rule by decreeing that neither constitutes a defense.

§ 110.15 Attempt to commit a crime; defense

See note to proposed § 50.10(2).

ARTICLE 115: CRIMINAL FACILITATION

This Article offers a new concept of criminal liability. "Criminal facilitation" is addressed to a kind of accessorial conduct in which the actor aids the commission of a crime with knowledge that he is doing so but without any specific intent to participate therein or to benefit therefrom. The following hypothetical cases are illustrative:

(1) F, a salesman in a store which legitimately sells guns, sells a gun to A, even though A convinces him that he intends to use it to kill B—a promise he soon fulfills. F's sole interest in the transaction is the commercial one of selling the gun.

(2) F, a night watchman for a warehouse, is paid by A not to be at a certain point outside the warehouse at a certain hour when A and his confederates enter for burglarious purposes. F has no interest in the burglary itself and his contribution consists merely of non-interference.

Such cases present difficult and debatable issues of whether or not F is criminally liable for A's offense. The theory of this proposed Article is that F's culpability, based primarily upon scienter rather than intent, is sufficient to warrant some criminal liability, but not the full liability of A and any of his genuine accomplices who attain complete accountability under proposed § 50.00 because their accessorial conduct is accompanied by a specific intent to commit the crime. The new accessorial offense of "criminal facilitation" would establish an intermediate liability and punishment for facilitating conduct of the indicated nature which provides means or opportunity for criminal activity.

§ 115.00 Criminal facilitation; definitions of terms

Concerning subdivision 1, see note to proposed § 100.00.

In defining this offense, subdivision 2, it may be noted, recognizes that the crime ultimately committed may be some-

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what different from that which the facilitator believed the perpetrators were going to commit, and declares that this factor does not relieve him from liability.

§ 115.05 Criminal facilitation in the third degree

See note to proposed § 115.15.

§ 115.10 Criminal facilitation in the second degree

See note to proposed § 115.15.

§ 115.15 Criminal facilitation in the first degree

This section and the two preceding ones gear the "facilitation" penalties to those for the main crime. Note that, when there is a difference between the crime which the facilitator believed would be committed and the one actually committed, the lesser of the two constitutes the yardstick for determining the facilitation degree and penalty.

§ 115.20 Criminal facilitation; no defense

See note to proposed § 50.05.

§ 115.25 Criminal facilitation; defense

Under the definition of proposed § 115.00(2), a victim of a crime, such as a person paying ransom to a kidnapper, might in a technical sense be guilty of facilitation. This section expressly excludes such cases.

§ 115.30 Criminal facilitation; corroboration

This section is necessary because the general accomplice corroboration rule (Code of Crim.Proc. § 399) is not applicable, since the facilitator and the actual perpetrator are not legally accomplices of each other under the formulations of this code.

ARTICLE 120: ACCESSORY AFTER THE FACT

This Article includes, but somewhat expands and clarifies, the offense of being an accessory after the fact as it is presently defined in existing Penal Law provisions (§§ 2, 1250-b, 1934). The offense is here defined in terms of rendering "criminal assistance" with a specified culpable mental state. Unlike the existing approach, the proposed statute attempts to provide guideposts by spelling out the various ways (six) in which "criminal assistance" may be rendered (proposed § 120.00).

A significant change is proposed with respect to the punishment scheme. Under the existing Penal Law, an "accessory

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to a felony" is punishable by imprisonment for not more than five years (§ 1934), except that an "accessory to kidnapping" is punishable by imprisonment for not less than five nor more than fifteen years (§ 1250-b). Under the proposed scheme, which employs a degree structure, the grade of the offense is geared to the kind and class of crime committed (see §§ 120.05, 120.10, 120.15, 120.20). This scheme seems more logical than the existing one. The present ceiling of five years is too narrow and rigid to allow for desirable distinctions between one who aids a serious offender and one who aids a minor one. Further, no good reason appears why, for example, an "accessory to murder" should not be subject to the severer penalty (five to fifteen years) expressly reserved by existing law for the "accessory to kidnapping." By placing murder on a par with kidnapping, proposed § 120.20 rectifies this imbalance in the existing law.

Finally, it should be observed that the proposed offense, by including criminal assistance to misdemeanants, goes beyond the existing law, which limits the offense to the aiding of felons.

ARTICLE 125: ASSAULT AND RELATED OFFENSES

This Article changes the pattern of "assault" offenses in two fundamental respects.

Every crime of "assault" herein requires actual "physical injury" to the victim. "Physical injury," a term defined in the General Provisions [proposed § 10.00(3)], constitutes considerably more than the common law concept of a battery, which may amount to no more than a technical touching.

There are, it is true, some types of assaultive acts deserving of criminal sanctions which involve a battery falling short of "physical injury" and, hence, are not covered by the proposed crime of assault. The most prominent of these are (1) physically uninjurious but offensive sexual acts, and (2) petty slaps, shoves, kicks and the like delivered out of hostility, meanness and similar motives. The first category is covered by another proposed offense entitled "sexual abuse" (§§ 135.60, 135.65), contained in an article devoted to sex offenses (proposed Art. 135), and the second by a minor offense entitled "harassment" [§ 250.10(2)], also contained in another article (proposed Art. 250).

The proposed assault formulation, requiring actual physical injury, places the crime of assault in the main category of offenses (robbery, larceny, perjury, etc.) which are committed only when the offender succeeds in his criminal objective.

And as with other offenses of this nature, an unsuccessful endeavor (a common law assault not resulting in a battery) constitutes an attempt. "Attempted assault," therefore, becomes a logical and meaningful offense under the proposed Article, having considerable utility in connection with certain specific intent assault crimes [§§ 125.00(1), 125.05(1, 2, 3), 125.10(2)].

The above described pattern supplies a consistency in the assault area not found in the existing law. The existing Penal Law never decides whether the crime of "assault" should require a battery or should be satisfied by a mere attempt to inflict one (the concept of "assault" at common law). As a result, some of the offenses require an actual battery or physical injury [existing P.L. §§ 240(2), 242(1, 2, 3)] and others, requiring none whatever, are satisfied by a mere attempt to inflict one [existing P.L. §§ 240(1), 242(4, 5)].

While thus narrowing the crime of assault in one respect, the proposed Article expands it in another, namely in the field of recklessness and criminal negligence. Apart from a third degree provision attaching misdemeanor liability to "culpably negligent" operation of a "vehicle" resulting in "bodily injury" [existing Penal Law § 244(2)], the present assault Article ignores reckless and negligent conduct and addresses itself solely to affirmative acts committed with assaultive intent. The proposed Article defines several offenses of the reckless and criminally negligent genus. These are, in the main, of general application and by no means confined to vehicle cases [proposed §§ 125.00(2, 3), 125.05(5), 125.10(3)]. This feature appreciably broadens the base of the crime of "assault," introducing to the assault orbit serious offenses entailing recklessness of a high degree of culpability, including conduct of omission as well as of commission.

Further expanding this general area, moreover, is a new crime, "reckless endangerment" (proposed §§ 125.20, 125.25), applicable to reckless conduct which creates a risk of, but does not result in, serious physical injury. In a sense this is analogous to attempted assault based on an unsuccessful attack made with a specific assaultive intent. Non-injurious reckless conduct, however, does not technically amount to attempted assault, for one cannot attempt to commit an act recklessly; and, hence, the crime of "reckless endangerment" is necessary to cover such conduct.

§ 125.00 Assault in the third degree

Subdivision 1 covers the most common type of assault—the intentional infliction of physical injury—which is penalized as simple or third degree assault under the existing Penal Law [§ 244(1)].

Subdivision 2 presents the lowest degree of "reckless" assault. Illustrative is the mischievous throwing of a hard object at great speed through the window of an occupied home, inflicting injury or great pain upon an occupant.

Subdivision 3 defines one of the two offenses in the proposed Penal Law (the other being defined in § 130.10) predicated upon the lowest specified form of culpability, namely, "criminal negligence" [see proposed § 45.00(7)]. The crime is limited to physical injury caused by deadly weapons, motor vehicles and mechanically propelled vessels. Its principal utility would doubtless be in motor vehicle cases of the negligence variety now prosecuted under existing Penal Law § 244(2).

§ 125.05 Assault in the second degree

Subdivision 1 presents the most familiar form of felonious assault: intentional infliction of "serious physical injury," a term defined in the General Provisions [proposed § 10.00(4)]. This offense is substantially the same as the present second degree assault crime applicable to one who "wilfully and wrongfully wounds or inflicts grievous bodily harm upon another" [existing P.L. § 242(3)]. While the latter provision does not expressly require a specific intent to accomplish the stated result, that element has been written into it by judicial construction [People v. Katz, 290 N.Y. 361, 49 N.E.2d 482 (1943)].

Subdivision 2 attaches felony liability to the intentional infliction of "physical injury," whether "serious" or otherwise, so long as it is committed with a "deadly weapon" [see proposed § 10.00(6)].

It is to be noted that the comparable provision of the existing Penal Law [§ 242(4)] differs in that, on the one hand, it requires no actual infliction of injury but, on the other, requires, by judicial construction at least, an intent to inflict "grievous" bodily harm with the weapon [People v. Katz, 290 N.Y. 361, 49 N.E.2d 482 (1943)].

Subdivision 3, suggested by a series of existing provisions [P.L. §§ 240(2), 242(1, 2), 1752], proceeds upon the premise that the unlawful, intentional causing of stupor or other physical impairment by means of drugs administered without the victim's consent merits a felony sanction regardless of whether the "physical injury" is "serious," as that term is defined in proposed § 10.00(4).

Subdivision 4 offers a new offense, the theory of which is explained in the note to proposed § 130.20(2).

Subdivision 5 raises "reckless" assault from third degree or misdemeanor liability [§ 125.00(2)] to felony liability when the resulting "physical injury" is "serious."

§ 125.10 Assault in the first degree

Subdivision 1 requires for first degree liability the classic homicidal intent plus "serious physical injury." The latter element renders this crime a more serious one than the comparable existing offense, which requires no injury at all (existing P.L. § 240); and, for the same reason, it is a more serious offense than attempted murder under both the present and the proposed Penal Laws.

For explanation of the excepting clause, see note to proposed § 130.25.

Subdivision 2 presents a more serious version of the existing Penal Law's crime of "maiming" (§ 1400), which is not defined under that label in the proposed code. The existing offense of "maiming" is satisfied by disfigurement, organic destruction, etc., committed with mere intent to "injure." Hence, for example, one who, with no intent to maim, happens to destroy an eye in the course of a routine assault is guilty of "maiming." The proposed provision requires a specific intent to achieve the mayhem result. If the intent is merely to "injure," the crime is either second or third degree assault depending upon the seriousness of the injury intended [proposed §§ 125.00(1), 125.05(1)].

Subdivision 3 defines the highest crime of "reckless" assault, entailing "serious physical injury" caused by acts committed not only "recklessly" but with an extreme kind of recklessness "evincing a depraved indifference to human life" (e. g., wantonly or mischievously firing a pistol into a crowd). This crime is the assault corollary of one form of murder [proposed § 130.25(2)].

Subdivision 4 is, in essence, an approximate assault counterpart of felony murder [proposed § 130.25(3)], although, unlike the latter, the assault occurring in the course of the underlying felony must be committed "intentionally or recklessly" and "by means of a deadly or dangerous weapon." This offense requires "serious physical injury," which distinguishes it from comparable existing "felony assault" crimes, none of which requires any injury to the victim [existing P.L. §§ 240, 242(5); see, also, § 242(2)].

§ 125.15 Menacing

This offense, by judicial construction, constitutes third degree assault under existing Penal Law § 244(1) even though the offender has no intent to injure and his gun, if such be the weapon, is unloaded; in short, the instilling of fear in the victim is sufficient [People v. Wood, 10 App.Div.2d 231, 237, 199 N.Y.S.2d 342 (3rd Dept. 1960)]. Since the absence of "physical injury" excludes "menacing" from the

assault orbit of the proposed Article, it is here proscribed as a separate offense. A fear of "imminent serious physical injury" by the victim is required in order to exclude frivolous cases which might arise under a lesser standard. "Menacing" is graded as a class B misdemeanor despite the fact that it may under some circumstances involve serious misconduct, such as threatening a person with a pistol for purposes of robbery. In such instances, the menacing conduct is invariably an element of a more serious crime. The usual case of "menacing" under this provision, would consist of a harassing or mischievous type of threat with a weapon.

§ 125.20 Reckless endangerment in the second degree

See notes to proposed Article 125 and § 125.25.

§ 125.25 Reckless endangerment in the first degree

The offense of reckless endangerment is raised to the first degree in much the same fashion as reckless assault is raised from the second degree [proposed § 125.05(5)] to the first [proposed § 125.10(3)] by the indicated extreme form of recklessness. It is worthy of note that the proposed code presents a progression of serious offenses of this nature, which may be illustrated by the case of one who, without specific intent to kill or injure, shoots into a crowd with a depraved kind of mischievousness. If death results, the crime is murder [proposed § 130.25(2)]. If serious physical injury results, the crime is first degree assault [proposed § 125.10(3)]. If no injury results, the crime is first degree reckless endangerment.

§ 125.30 Promoting a suicide attempt

This section substantially restates existing Penal Law § 2350.

§ 125.35 Promoting a suicide attempt; when prosecutable as attempt to commit murder

This section is new. See note to proposed § 130.25, containing an analogous provision with respect to aiding a successful suicide.

ARTICLE 130: HOMICIDE, ABORTION AND RELATED OFFENSES

§ 130.00 Homicide defined

This section is a more elaborate counterpart of existing Penal Law § 1042. See notes to proposed §§ 130.05, 130.15, 130.45 and 130.55.

§ 130.05 Homicide; definitions of terms

This section and the previous one indicate a reformulation of offenses of the abortion and "abortion homicide" genus. The definitions are designed to avoid prolixity in the definitions of the offenses of that area.

The last of these definitions, "unlawful abortifacient act" (subd. 4), has a controversial aspect. Under the present law, an abortion is unlawful unless necessary to preserve the life of the female aborted or of the child with which she is pregnant [existing P.L. § 80; see, also, §§ 1050(2), 1052(3)]. This standard is carried over into the proposed code with the qualification that a reasonable belief in such necessity is sufficient justification.

One school of thought regards this concept of a "lawful" abortion as too narrow and advocates a broader standard that would add other factors as justification for abortion; for example, danger of serious impairment of the mother's physical or mental health, danger of producing a physically or mentally deficient child, or the fact that pregnancy resulted from forcible rape.

The Commission is continuing to study this subject and is considering the possibility of recommending a more liberal standard.

§ 130.10 Criminally negligent homicide

This section and proposed § 125.00(3) are the only two provisions in the proposed Penal Law that predicate criminal liability upon the culpable mental state of "criminal negligence" [defined in proposed § 45.00(7)].

The existing Penal Law contains one general homicide offense of "culpable negligence," designated second degree manslaughter [1052(3)], and a host of miscellaneous homicide offenses of the negligence genus, some designated manslaughter and others separately defined, dealing with specific conduct of one sort or another [existing P.L. §§ 1052 (unnumbered pars.), 1053-a, 1053-c, 1053-e]. In these provisions, the terms "culpably negligent," "criminal negligence" and "recklessness" seem to be used interchangeably. Although the judicial construction thereof is not very precise, it would appear to be closer to this proposed code's concept of recklessness than to its concept of "criminal negligence" [see proposed § 45.00(6, 7); *People v. Angelo*, 246 N.Y. 451, 159 N.E. 394 (1927)].

The proposed crime of "criminally negligent homicide" is one of general application, and no need or desirability is seen for individual, particularized provisions or offenses addressed to fatally negligent conduct in specific areas of activity. It

is to be observed that the most utilized of the existing Penal Law's particularized sections of this nature, namely the vehicular homicide statute (§ 1053-a), was enacted in 1936 in order to provide a penalty (a term not exceeding five years) appreciably less than that for second degree manslaughter, which is of general application and, as such, also operative in vehicle cases [§ 1052(3)]. Presumably, the proposed section under discussion, carrying only a four year maximum prison term, would be used for prosecution of the vast majority of vehicle homicides, although higher crimes of "recklessness" could be used for the more heinous offenses [see proposed §§ 130.15(1), 130.25(2)].

§ 130.15 Manslaughter in the second degree

Subdivision 1 defines the ordinary form of reckless homicide which, as indicated, is a more culpable offense than "criminally negligent homicide."

Subdivision 2 is a partial restatement of an existing first degree manslaughter provision describing the familiar abortion homicide offense, which occurs upon either (1) "the death of the woman" aborted, or (2) the death "of any quick child of which she is pregnant" [§ 1050 (last par.)]. Contrary to the existing Penal Law, the proposed subdivision proceeds upon the premise that there is a considerable difference between a case where the mother dies and one where she does not; and that, while the former warrants "manslaughter" liability, an abortion, even where pregnancy has reached the "quick" or "unborn child" stage—twenty-six weeks under the definition of the proposed code [§ 135.05(2)]—calls for lesser liability. Accordingly, "manslaughter" liability is here limited to cases resulting in the mother's death. The provision at hand attaches second degree manslaughter liability to any unlawful abortion having that result, regardless of the length of pregnancy. The crime is aggravated to the first degree when the pregnancy is of more than twenty-six weeks duration [see proposed § 130.20(3)].

This does not mean that an unlawful abortion causing the death of an "unborn child" no longer amounts to homicide. That conduct is covered by a new offense, a felony of lesser grade than manslaughter, entitled "killing an unborn child" (proposed § 130.45), which is expressly classified as "homicide" (proposed § 130.00).

Subdivision 3 is a substantial restatement of an existing section defining the crime of "abetting and advising suicide," penalized as first degree manslaughter under Penal Law § 2304. See note to proposed § 130.35(1) (b) for certain ramifications of this proposed offense.

§ 130.20 Manslaughter in the first degree

Subdivision 1 is new. It defines an offense which, though requiring an intent somewhat short of homicidal, constitutes murder both at common law and under the statutes of most American jurisdictions, usually being classified as second degree murder where murder is divided into degrees. It does not constitute murder of either degree in New York (existing P.L. §§ 1044, 1046); nor, strangely enough, does it constitute manslaughter—at least where the offense is committed coldly or deliberately and not in the “heat of passion” [existing P.L. §§ 1050(2), 1052(2)]. This gap in the existing law of homicide is plugged by the instant proposed provision. With murder a degreeless crime herein, a question is posed whether this offense should be classified as murder or first degree manslaughter. The decision in favor of manslaughter is partially dictated by two factors: (1) that intent to inflict serious physical injury is less culpable than intent to kill (the murder offense); and (2) that the penalty for the proposed first degree manslaughter offense (carrying a twenty-five year maximum term) is higher than that for the existing first degree manslaughter offense [a twenty year maximum term (existing P.L. § 1051)].

Subdivision 2 also presents an offense grounded in the common law but new to New York. The common law enunciates the seemingly sound doctrine, known as voluntary manslaughter and adopted in most American jurisdictions, that murder by intentional killing is reduced to manslaughter by a mitigating factor variously termed “heat of passion,” “sudden passion,” “provocation” and the like. New York and a few other jurisdictions having similar statutory patterns evidently were vaguely aware of this doctrine but confused and destroyed it in the creation of their manslaughter provisions, all of which apply only where there is no “design to effect death” (existing P.L. §§ 1050, 1052). While, therefore, the Penal Law contains two manslaughter provisions speaking of a killing “in the heat of passion” [existing §§ 1050(2), 1052(2)], neither is applicable to intentional killings, the very basis of the whole doctrine. Instead of enunciating the traditional principle that murder by intentional killing is mitigated and reduced to manslaughter by “heat of passion,” these provisions define a narrow and rather meaningless offense which is committed by a fatal assault without homicidal intent and “in the heat of passion.” Thus, “heat of passion” is erroneously predicated not as a mitigating factor reducing a homicide from murder to manslaughter but as an affirmative element of the specified form of manslaughter.

The proposed provision eliminates this hybrid offense and replaces it with the traditional crime embracing the principle

of mitigation. In the process, the phrase, "in the heat of passion," is abandoned as the criterion of mitigation in favor of the phrase, "under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse." This standard, adopted from the equivalent manslaughter provision of the Model Penal Code [§ 210.3(b)], is, in the Commission's opinion, superior to "heat of passion" and other traditional criteria from the standpoints of both logic and general fairness (see Model Penal Code Commentary, Tentative Draft No. 9, pp. 28-29).

Subdivision 3 raises "abortion homicide," occurring upon the death of an unlawfully aborted female, from second to first degree manslaughter when the pregnancy is of more than twenty-six weeks or "unborn child" duration [cf. proposed § 130.15(2)]. Greater liability is predicated in this situation because an abortion at this stage is considerably more dangerous.

§ 130.25 Murder

The principal reason for abandonment of degrees of murder appears in connection with the first subdivision.

Subdivision 1 defines the basic crime as intentional killing, making no mention of premeditation and deliberation, which are, of course, elements of the existing first degree offense and the factors which differentiate it from second degree murder [existing P.L. §§ 1044(1), 1046]. If those words denoted planning or preparation to kill formulated over a considerable period of time, there might be validity to the distinction drawn between intentional homicides of a premeditated and of an unpremeditated character. The inherent difficulty of precise definition, however, has produced a judicial construction of "premeditation" so broad that it includes a determination to kill formed a fleeting second before the homicidal act [People v. Harris, 209 N.Y. 70, 75, 102 N.E. 546 (1913); People v. Majone, 91 N.Y. 211, 212 (1883)]. Under this formulation—almost inevitable because of the impossibility of a definition based upon length of time—the determination of whether premeditation has occurred in a particular instance frequently amounts to no more than an exercise in semantics, and a jury's decision upon a matter of life or death turns upon an issue which not even experienced attorneys truly understand. It is out of these considerations that the proposed Penal Law, in line with the recently revised Illinois and Wisconsin penal codes [Ill.Crim.Code (1961) § 9-1; Wisc.Crim.Code § 940.01], eliminates the elements of premeditation and deliberation and predicates homicidal intent alone as the mens rea for murder of the common law type.

Concerning the excepting clauses of this proposed subdivision, paragraph (a) expressly excludes from the murder category those intentional killings which are reduced to first degree manslaughter by virtue of the killer's "extreme emotional disturbance," thus guaranteeing not only that such conduct constitutes manslaughter [proposed § 130.20(2)] but also that it does not constitute murder.

Paragraph (b) similarly excludes from the murder orbit some cases of causing or aiding a suicide, an offense which constitutes second degree manslaughter herein [proposed § 130.15(3)] but which, absent the clause at hand, would also constitute murder in many instances. The exclusion is not a blanket one, however, for one who induces or aids another to commit suicide by use of "force, duress or deception" may still be prosecuted for murder as well as for manslaughter. This limitation is designed to differentiate between the more sympathetic cases (e. g., suicide pacts, assistance rendered at the request of a person tortured by painful disease, and the like), and cases where the culprit causes or aids a suicide by aggressive or devious means and for purely selfish motives.

Subdivision 2, presenting the highest crime of reckless homicide, is substantially a restatement of a similar crime defined as first degree murder in the existing Penal Law [§ 1044(2)].

Subdivision 3, the felony murder provision, would change the existing law [§ 1044(2)] in several respects.

Though not in reality a change of substance, it may first be noted that this provision expressly imposes murder liability not only upon the killer but upon the non-killer accomplice in the underlying felony. The existing provision [§ 1044(2)] penalizes only the killer; the liability of the non-killer accomplices has been engrafted upon the felony murder doctrine by case law [People v. Giro, 197 N.Y. 152, 157-158, 90 N.E. 432 (1910)].

Secondly, the crime is broadened to cover killings committed during "immediate flight" from the underlying felony. The existing law, strictly limiting felony murder to homicides perpetrated in the course of the commission of the felony, is, in the Commission's opinion, unduly restrictive.

Thirdly, the scope of the crime is narrowed by (1) predicated a selective list of specified felonies as the only ones which may form a foundation for felony murder, and (2) requiring that the homicidal act be of a sort that is "inherently dangerous to human life." The effect of these changes probably would not be very marked, since felony murders are almost invariably committed in the course of one or another of the specified felonies, and almost invariably by an act in-

herently dangerous to human life. The purpose of the indicated limitations is to exclude rare instances of accidental or not reasonably foreseeable fatality, and especially those which might happen to occur in a most unlikely manner in the course of a non-violent felony. It should be observed that, currently, the vast majority of American felony murder statutes limit the capital crime by a selective list of felonies comparable to that here proposed, and that New York is one of a very few jurisdictions that does not.

Finally, the most novel change appears in the exception extending a defendant an opportunity to fight his way out of a felony murder charge by persuading a jury, by way of affirmative defense, that he not only had nothing to do with the killing itself but was unarmed and had no idea that any of his confederates was armed or intended to engage in any conduct dangerous to life. This phase of the provision is based upon the theory that the felony murder doctrine, in its rigid automatic envelopment of all participants in the underlying felony, may be unduly harsh in particular instances; and that some cases do arise, rare though they may be, where it would be just and desirable to allow a non-killer defendant of relatively minor culpability a chance of extricating himself from liability for murder—though not, of course, from liability for the underlying felony.

§ 130.30 Murder; punishment; plea of guilty

This section is virtually identical with existing Penal Law § 1045, which, together with the immediately ensuing section (§ 1045-a), was enacted in 1963 as a result of legislation submitted by this Commission [see Leg.Doc. (1963) No. 8, pp. 13-16].

§ 130.35 Murder; proceeding to determine sentence; appeal

This section is virtually identical with existing Penal Law § 1045-a. See note to proposed § 130.30.

§ 130.40 Abortion

This section substantially restates existing Penal Law § 80.

§ 130.45 Killing an unborn child

This section, in substance, defines a higher degree of abortion. The aggravating factor is the "unborn child," or a pregnancy of more than twenty-six weeks duration, rendering the operation considerably more dangerous than at an earlier stage. While the section and the offense as entitled are new, the proscribed conduct constitutes first degree manslaughter under the existing Penal Law [§ 1050(3)]. In effect, this crime, though still classified as "homicide" (proposed § 130-

00), has been extracted from "manslaughter" and reduced in grade. The reasons therefor are treated in the note to proposed § 130.15(2).

§ 130.50 Self-abortion

This section substantially restates existing Penal Law § 81, downgrading the offense, however, from a minor felony to a misdemeanor.

§ 130.55 Filicide of an unborn child

This section defines what is, in substance, a higher degree of the crime of "self-abortion" (proposed § 130.50). As with "abortion" (proposed § 130.40) and "killing an unborn child" (proposed § 130.45), the offense is aggravated by the fact of a pregnancy of more than twenty-six weeks.

The proposed offense constitutes manslaughter in the second degree under the existing Penal Law [§ 1052 (first unnumbered par.)]. It is here defined as a separate offense and classified a misdemeanor. By express definition, however, it still constitutes "homicide" (§ 130.00). For further discussion of this general subject, see notes to proposed §§ 130.15 and 130.45.

§ 130.60 Issuing abortifacient articles

This section substantially restates existing Penal Law § 82.

ARTICLE 135: SEX OFFENSES

This proposed Article gathers together provisions in existing Penal Law Article 44, "Children"; Article 66, "Crime against nature"; and Article 180, "Rape." In the main, the revision does not work a major substantive change in the existing law. The material, however, has been completely reorganized with a view to promoting clarity. This is not to say that it constitutes merely a restatement of existing law, since a number of important changes have been made in structuring the crimes and in the adoption of fresh approaches to some of the troublesome areas. The first four sections of the Article deal with definitions and matters of general applicability; the balance of the Article describes five crimes, some in multiple degrees.

§ 135.00 Sex offenses; definitions of terms

This section is new, although the definitions of "sexual intercourse" and "deviate sexual intercourse" are generally derived from existing Penal Law §§ 2011 and 691, respectively.

§ 135.05 Sex offenses; lack of consent

This section is new. It contains in the one section a basic element common to all sex offenses defined in this Article, i. e., lack of consent. Subdivision 3 sets forth the instances in which the law deems a person incapable of consenting to a sexual act. Whereas the age of consent under existing law is eighteen years (P.L. §§ 2010, 690), under proposed subdivision 3 such age has been lowered to seventeen years. At best, fixing the statutory age of consent in sexual matters is a difficult decision, but, when considered within the framework of modern American culture, seventeen is a more realistic age of consent than eighteen.

It may be noted that of the American jurisdictions having "age" legislation of this nature, only fourteen others set the limit at under eighteen years. Some thirty jurisdictions have lower age limits and the vast majority of them fix the age at under sixteen.

§ 135.10 Sex offenses; defenses and exceptions

Subdivision 1 provides a defense, in the instances specified therein, when the defendant was unaware of the facts responsible for the victim's legal incapacity to consent. However, under subdivision 2, a defendant's ignorance of the fact that the victim was under the age of consent is never a defense.

§ 135.15 Sex offenses; corroboration

This section is new although, with respect to the crime of rape, it resembles existing Penal Law § 2013. The problem of corroboration in sex offenses—its scope and limits—is a complex one, and the Commission intends to give it further study and consideration with a view to formulating a more precise standard.

§ 135.20 Sexual misconduct

This section represents the basic crimes of rape (subd. 1) and sodomy (subd. 2), and includes all of the higher degrees of each of these crimes. In addition, it covers a fact situation not included within any of the higher degrees; namely, when the victim is over fourteen but under seventeen years of age and the defendant is under twenty-one years of age. At present, that fact situation constitutes "statutory rape" [existing P.L. § 2010 (last par.)] or "statutory sodomy" [existing P.L. § 690 (last par.)]. The young defendant here does not force the victim into committing the act, nor is the victim suffering from any physical or mental infirmity. In fact, the defendant may well have been persuaded by the "victim" to commit the act. Therefore, it appears unnecessarily harsh to have one convicted of this crime bear a criminal record labeling him a

rapist or sodomist. Denominating this crime "sexual misconduct" eliminates the undesirable stigma.

§ 135.25 **Rape in the third degree**

See note to proposed § 135.35.

§ 135.30 **Rape in the second degree**

See note to proposed § 135.35.

§ 135.35 **Rape in the first degree**

Sections 135.25, 135.30 and 135.35 are derived from existing Penal Law § 2010. Although substantively the crime of rape has not been changed, the revision attempts a more equitable formulation of the elements of each degree with a consonant equity of punishment. Whereas rape in the existing law consists of two stated degrees and one implied degree (statutory rape), the revision divides the crime into four degrees [including proposed § 135.20(1)]. This eliminates some incongruities, such as the fact that a twenty year old male commits a misdemeanor whereas a twenty-one year old who does the same act commits a felony punishable by a maximum of ten years imprisonment. Under proposed § 135.25(2), the latter conduct would result in a maximum imprisonment of four years. Also, existing § 2010(1) predicates liability on lack of consent due to "immaturity." The ambiguity inherent in that term is resolved in the revision by grading the offense with respect to the age of the victim. Thus, intercourse with a female under fourteen years of age is second degree rape, but if the female is less than eleven years old it is first degree rape.

§ 135.40 **Sodomy in the third degree**

See note to proposed § 135.50.

§ 135.45 **Sodomy in the second degree**

See note to proposed § 135.50.

§ 135.50 **Sodomy in the first degree**

Sections 135.40, 135.45 and 135.50 are derived from existing Penal Law § 690. The structure of all three parallels that of the three proposed degrees of rape as, generally, existing Penal Law § 690 parallels the rape provisions of existing Penal Law § 2010. However, there is one significant difference. Under existing law (§ 690, last par.), deviate sexual acts between consenting adults constitute a crime under all circumstances. A majority of the Commission is of the opinion that, in the light of modern sociological and psychiatric principles, criminal prosecution of homosexual acts privately

and discreetly engaged in between competent consenting adults, serves no salutary purpose. This follows the approach adopted both by the Model Penal Code and by the 1961 revision of the Illinois Criminal Code. Of course, such conduct is subject to prosecution when it constitutes disorderly conduct [proposed § 250.05(4)] or loitering [proposed § 250.15(3)].

§ 135.55 Bestiality

This section is derived from existing Penal Law § 690(5). The subject is treated separately here for two reasons: (a) the revision defines deviate sexual activity with reference to such conduct only between people; and (b) more importantly, under existing law sexual connection with an animal or corpse subjects the offender to a twenty year maximum or one day to life sentence. Here, too, the Commission is of the opinion that the offender is a sick individual who injures himself more than he does the public. Therefore, misdemeanor punishment is more than adequate for this crime.

§ 135.60 Sexual abuse in the second degree

See note to proposed § 135.65.

§ 135.65 Sexual abuse in the first degree

Sections 135.60 and 135.65 are derived, insofar as they relate to children as victims, from existing Penal Law §§ 483-a and 483-b; and their application to adult victims is new. Under existing law, the proscribed behavior, when committed upon an adult, is generally prosecuted as a third degree assault (P.L. § 244). However, under the revision, "assault" requires that actual physical injury be inflicted and, since the acts contemplated by these two sections—"sexual contact"—seldom result in physical injury, a hiatus would exist. Note that "lack of consent" as used in these sections is broader than "forcible compulsion" or "incapacity to consent," and includes the victim's failure to acquiesce by word or deed [see proposed § 135.05(2) (c)].

ARTICLE 140: KIDNAPPING, COERCION AND RELATED OFFENSES

Although kidnapping (or its equivalent) was a relatively innocuous offense at common law (a misdemeanor), it has become one of the most serious crimes, reaching the status of a capital offense in some thirty-seven American jurisdictions, including New York (existing P.L. § 1250). The New York definition of the offense is inordinately broad, encom-

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passing, for example, ordinary robberies and rapes in the course of which the victim happens to be moved a few feet from one room to another; and it also subjects to severe "kidnapping" penalties the parent or relative of a child who violates civil custodial rights by taking or enticing the child from its authorized custodian.

The proposed "kidnapping" scheme may be described in terms of the three separate offenses which the Article creates: kidnapping (§§ 140.15-140.25); false imprisonment (§§ 140.05, 140.10); and custodial interference (§§ 140.35, 140.40). Proposed § 140.00, in defining such key terms as "remove," "confine," and "restrain," provides the common and consistent backdrop against which each such offense is defined.

An attempt has been made to limit the crime of kidnapping to what are commonly conceived to be genuine "kidnapping" cases. The proposed Article seeks to accomplish this by expressing the offense in terms of two distinct elements: (1) removing a person a substantial distance, or confining him for a substantial period in a place of isolation, etc.; and (2) with the "intent" to hold him for ransom, or to use him as a shield or hostage, etc. Other and lesser forms of unlawful removals or restraints are covered by the proposed lesser offenses of "false imprisonment" and "custodial interference," which are self-explanatory (§§ 140.05, 140.10, 140.35, 140.40).

Proposed §§ 140.20 and 140.25, dealing with the punishment for kidnapping and the proceeding to determine punishment, substantially restate existing Penal Law § 1250 (A, in part, B, C and D), the cited portions of which were enacted in 1963 upon the recommendation of this Commission.

Section 140.45 substantially restates existing Penal Law § 923 but realistically limits the offense to instances where the "child" is less than one year old.

The crime of coercion, as defined in proposed § 140.50, differs considerably from the existing Penal Law version (§ 530; see, also, §§ 853, 860, 1328, 1324, 1327, 1454).

Fundamentally, coercion, consisting of compelling a person by intimidation to commit or refrain from committing an act, includes extortion. In brief, extortion is basically a form of coercion in which the act compelled is the payment of money. The existing Penal Law, however, draws these two offenses apart by (1) defining them in somewhat different terms; (2) making the scope of extortion broader than that of coercion from the standpoint of the kinds of threats that suffice; and (3) making a mere threat or "attempt" at compulsion sufficient for coercion while requiring successful

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intimidation (actual payment of money or property) for the crime of extortion (cf. existing P.L. § 530 and §§ 850, 851). The proposed sections pull the two crimes together by eliminating those three differentiating factors.

First, coercion (proposed § 140.50) and extortion—or “larceny by extortion” as it is designated in this proposed code [§ 160.05(2) (e)]—are defined in very similar terms. Secondly, coercion is conformed to larceny by extortion in the sense that successful intimidation is required for the completed crime—an unsuccessful threat, which previously constituted coercion, being relegated to the level of “attempted coercion.” And thirdly, the kinds of threats or intimidation supporting each offense are made virtually coextensive [proposed §§ 140.50, 160.05(2) (e)].

In the last connection, it is noteworthy that, while the existing coercion section specifies three kinds of threats (P.L. § 530) and the existing extortion section six kinds (§ 851), the proposed coercion and extortionate larceny sections each specify nine kinds [§§ 140.50, 160.05(2) (e)]. Of the three new kinds added, the general formulation in the last subdivision is the most significant [proposed §§ 140.50(9), 160.05(2) (e) (ix)]. This is added because of the impossibility of comprehensively defining coercive or extortionate conduct by a list of more specific threats. The provision in question would encompass such otherwise unpenalized conduct as, for example, the achievement of an objective by a property owner’s threat to grow ragweed adjacent to his allergic neighbor’s house.

Unlike the existing Penal Law (§ 530), the proposed sections divide coercion into two degrees. The basic second degree offense, a misdemeanor, (proposed § 140.50), is raised to the first degree, a felony (proposed § 140.55), by either of two kinds of aggravating factors entailing greater than average culpability: one involving the kind of threat made (to inflict physical injury or property damage), and the other involving the kind of act which the victim is compelled to commit (criminal conduct, assault or official corruption).

The “affirmative defense” predicated by proposed § 140.60 is adopted from a similar provision of the Model Penal Code [§ 212.5(1)].

ARTICLE 145: BURGLARY AND RELATED OFFENSES

At common law, burglary was regarded as a crime against the security of the habitation. It was defined as the breaking and entering of a dwelling of another, at night, with intent to commit a felony therein. Each element of the offense has been subjected to many decisional and statutory refinements in the course of its development. Legislation has extended the scope of the offense beyond that of the "dwelling." New York's provisions include any "building," and this term is defined so as to include, inter alia, a railway car, inclosed motor truck and inclosed ginseng garden (existing P.L. § 400).

In New York, burglary is divided into three degrees. The essential elements for each degree are "breaking and entering with intent to commit a crime." The two higher degrees (existing P.L. §§ 402, 403) have relevancy only to a dwelling in which a person is actually present. The lowest degree (existing § 404) is applicable to a non-occupied dwelling, and to any non-dwelling structure whether or not a person is present. The misdemeanor of "unlawful entry" (existing § 405) is defined as the entering of any building, with intent to commit a crime, but under circumstances not constituting burglary, i. e., absent the "breaking" element. Hence, the presence or absence of this technical element of "breaking" results in essentially similar conduct being subject to substantially different penalties.

In the early stages of its development, the "breaking" requirement probably contemplated violence. In time, the application of any force, however minimal, was sufficient, so that the requirement became more symbolic than real. Many American jurisdictions have abolished the archaic "breaking" element in their burglary statutes. The continued necessity in New York for proving a "break" has needlessly complicated burglary prosecutions [see, e. g., *People v. Krevoff*, 11 A.D. 2d 1053, 206 N.Y.S.2d 290 (2d Dept. 1960)]. The proposed Penal Law, accordingly, eliminates the requirement of a "breaking," and presents four degrees of burglary. This scheme will have the incidental effect of abolishing the "breaking out" rule, which is here regarded as illogical and indefensible [*People v. Toland*, 217 N.Y. 187, 111 N.E. 760 (1916)].

The two essential elements of the proposed burglary formulation (§§ 145.20-145.35) are (1) entering or remaining unlawfully in a building, and (2) with intent to commit a crime therein. The term "enter or remain unlawfully," as

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defined in proposed § 145.00(5), will have the effect of rejecting decisions such as *People v. Sine*, 277 App.Div. 908, 98 N.Y.S.2d 588 (2d Dept.1950) which hold that a non-trespassory entry may constitute burglary [cf. *People v. Kelley*, 253 App.Div. 430 (3d Dept.1938); see Comment, 36 Cornell L.Q. 565 (1951)]. The proposed sections, like the existing law of burglary, do not require that the intended crime be committed.

When a person enters a building unlawfully, but with no intent to commit a crime therein, or there is no evidence of such intent, the offense of burglary is not established. In cases where it is not provable that an intruder entered with the requisite intent, appropriate criminal sanctions should be available. The trespass provisions in the existing Penal Law [§§ 1425(9), 2036], however, are at best ill-defined and narrow in scope [*People v. Stevens*, 109 N.Y. 159, 16 N.E. 53 (1888)]. The proposed Penal Law corrects these deficiencies by presenting in three degrees a new definition of the offense of "criminal trespass" (§§ 145.05, 145.10, 145.15).

Under existing Penal Law § 408, a burglar's tool is described as one "adapted, designed or commonly used for the commission of burglary, larceny or other crime." Proposed § 145.40 realistically limits such underlying offenses to those "involving unlawful entry into premises or offenses involving forcible breaking of safes or other containers or depositories of property."

ARTICLE 150: CRIMINAL MISCHIEF

This proposed Article, consisting of three concise sections, is designed to replace the multiplicity of detail found in the twenty-five sections of the Malicious Mischief Article of the existing Penal Law (Art. 134). Most of the existing provisions do no more than penalize the unjustified and intentional physical destruction of or damage to the tangible property of another.

The detailed enumeration in the existing Article of particular kinds of property and of particular methods of destruction or damage creates the erroneous impression that property not specifically listed does not fall within the protection of the Article, with prosecutions sometimes failing because of this scheme [see, e. g., *People v. Knatt*, 156 N.Y. 302, 50 N.E. 835 (1893); *People v. Costello*, 305 N.Y. 63, 110 N.E.2d 880 (1953)].

The proposed Article is designed to punish persons who intentionally or recklessly damage or tamper with tangible property of another, i. e., all forms of malevolence ranging

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from mere defacement to total destruction. The proposed Article, which grades the crime into three categories of relative seriousness, may be described briefly in terms of its highlights:

(1) Reckless behavior resulting in damage to tangible property of another is denominated criminal mischief in the third degree, regardless of the amount of pecuniary harm (proposed § 150.00).

(2) Tampering with tangible property of another in a manner which endangers property is similarly treated as criminal mischief in the third degree.

(3) The traditional kind of malicious mischief is treated in the first subdivision of each of the three new sections. These sections grade the offense by the amount of damage.

(4) Damaging or tampering with property of a public utility, with intent to cause an interruption or impairment of service rendered to the public, is treated in proposed §§ 150.05 (2) and 150.10(2).

The proposed Penal Law does not include the treble damage provision contained in existing Penal Law § 1433. This civil remedy has been the target of frequent criticism [see for discussion of this subject, *Hazak v. Robertson Goetz Building Co.*, 289 N.Y. 478, 46 N.E.2d 893 (1943); Law Revision Commission Reports, Leg.Doc. (1944) No. 65(J), pp. 5-6].

ARTICLE 155: ARSON

This Article substantially changes the existing offenses and general structure of arson (existing P.L. §§ 220-227).

Under the existing statutes, arson requires a "burning" of a building, structure or vehicle. This does not mean destruction or even substantial damage, for the slightest damage is sufficient.

As in the proposed Article, arson is presently divided into three degrees. The lowest deals generally with burning of structures and vehicles, and of personal property having a value of more than \$25 (existing P.L. § 223). The second degree stresses such aggravating factors as "dwelling house" and "nighttime," and, in some instances, the presence of a human being in the burned structure or vehicle (existing P.L. § 222). The main first degree offense, chiefly concerned with danger of personal injury or fatality, penalizes the nocturnal burning of a dwelling in which a human being is present [existing P.L. § 221(1)].

A peculiar feature of these crimes relates to the element of intent. By judicial construction at least, third degree arson

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demands a specific intent to destroy the building burned but the two higher degrees do not. Under a theory derived from the common law, all they require is an intent to start a fire which turns out to be destructive [People v. Fanshawe, 137 N.Y. 68, 73, 75, 32 N.E. 1102 (1893); existing P.L. § 225]. Thus, while the lowest and presumably least culpable offense requires the highly culpable intent to destroy, the two most serious crimes are satisfied by what is in effect mere reckless conduct.

This incongruous situation is reversed by the proposed Article. Here, it is the two higher degrees—distinguished from each other by the relative danger of personal injury—that require “intent to destroy or damage a building” (proposed §§ 155.10, 155.15), and it is the third degree that is satisfied by recklessness (proposed § 155.05). The latter requires that the fire be started intentionally, but the essence of the crime is that the offender commit that act under circumstances involving a “conscious disregard” of a “substantial and unjustifiable risk” that the actually ensuing damage may occur; in other words, “recklessly” [see proposed § 45.00(6)]. This crime is augmented by a similar, lesser offense, “reckless burning” (a misdemeanor), which predicates liability even though no property damage actually occurs (proposed § 155.20). Based solely upon the creation of the risk, it is a corollary to the proposed crime of “reckless endangerment,” applicable to the creation of risks of personal injury or death (proposed §§ 125.20, 125.25).

ARTICLE 160: LARCENY

This Article, broadly speaking, follows the pattern of the existing Penal Law Larceny Article (Art. 122), which is the product of a considerable revisional amendment in 1942. Prior to 1942, larceny was defined in terms of the common law forms of theft: larceny by trespassory taking, larceny by trick, embezzlement and false pretenses. The effect was to require the prosecutor to select, plead, and prove a particular theory of larceny in each case, and to permit the defendant-thief to escape conviction and punishment if the chosen theory turned out to be incorrect. Since the distinctions among the forms of theft are quite fine in many instances, many “thieves” slipped through the fingers of the law by virtue of sophistic technicalities [see People v. Noblett, 244 N.Y. 355, 359-360, 368, 155 N.E. 670 (1927); People v. Miller, 169 N.Y. 339, 351-352, 62 N.E. 418 (1902); Smith v. People, 53 N.Y. 111, 113-114 (1873)]. That situation was rectified by the 1942 legislation, which eliminated the “distinctions which have

hitherto differentiated one sort of theft from another" (Laws 1942, ch. 732, § 1) and permitted conviction upon pleading and proof charging and establishing "larceny" in its broadly defined form regardless of the basic common law offense underlying the particular case (see existing P.L. §§ 1290, 1290-a).

Although following the theory of the existing Article, the proposed Article works a number of changes of substance.

§ 160.00 Larceny; definitions of terms

This section is designed to clarify several terms employed in the definition of larceny, and to permit briefer definition of the crime [see proposed § 160.05(1)]. The term "property," it may be observed, is expanded to include "real property" (subd. 1). Considered in conjunction with the term "obtain" (subd. 2), a theft of real property becomes perfectly plausible.

§ 160.05 Larceny; defined

Subdivision 1, enunciating the general definition of larceny, substantially restates existing Penal Law § 1290 (1st par.).

Subdivision 2, which is new, expands the scope of larceny in at least two important respects.

Paragraph (a) thereof merely assures that larceny includes, as at present, the four common law forms of theft [cf. existing P.L. § 1290-a(1)].

Paragraph (b) expressly includes within the definition of larceny an offense substantially the same as the existing Penal Law's "Appropriating lost property" (§ 1300), which, though quite clearly a form of larceny, is presently defined as a separate offense.

Paragraph (c) stamps as larceny the acquisition of property through commission of the crime of "issuing a bad check" (proposed § 195.05)—a proposition presently asserted in the existing bad check section itself (P.L. § 1292-a). Although this provision may be largely unnecessary in that such conduct probably constitutes larceny by false pretenses in most instances, it is expressly inserted to remove any doubt of the matter.

Paragraph (d) expands the existing scope of larceny to encompass acquisitions of property through fraudulent promises made without any intention of performance. While some such frauds may presently be prosecutable as larceny by trick—a little understood offense of limited application—the main form of larceny applicable to deception cases is false

pretenses, which requires misrepresentation of an "existing fact." Since many flagrant swindles are perpetrated by obviously fraudulent promises—that is, by false representations of "intent" rather than of "fact"—many a grandiose swindler goes scot free for want of a provision such as the one at hand. The Commission is not unmindful of the risk that an unqualified enlargement of scope might result in an avalanche of criminal prosecutions based upon conduct essentially civil in character and constituting little more than breach of contract. For that reason, extremely strict requirements of proof have been predicated, providing that non-performance of a promise means nothing in itself and that fraudulent intent must be established by evidence rendering that conclusion a "moral certainty."

Paragraph (e) works another marked expansion of sorts by bringing extortion within the scope and concept of larceny. This is a logical if somewhat novel arrangement, for extortion in its true sense is nothing more than a wrongful acquisition of property (by intimidation) with larcenous intent (cf. existing P.L. § 850). In thus meshing extortion with larceny, the proposed Article does not ignore the principle that the intimidation aspect of extortion renders it a crime generally more serious than a theft of the same property by conventional larcenous means. This is recognized in the grading or degree structure of larceny, where the degree of a larceny by extortion is determined not alone by the value of the property obtained but also by the fact of intimidation and the kind of threat employed [proposed §§ 160.35(4), 160.45].

The kinds of threats underlying "larceny by extortion" as here formulated include those forming a basis for extortion as presently defined (existing P.L. § 851; see note to proposed § 140.60).

§ 160.10 Larceny; no defense

This section substantially restates existing Penal Law § 1290 (last 4 pars.).

§ 160.15 Larceny; defense

Subdivision 1 substantially restates existing Penal Law § 1306.

Subdivision 2, which is new, provides a comparable defense to certain kinds of prosecutions for larceny by extortion.

§ 160.20 Larceny; pleading and proof

With one significant omission, this section substantially restates existing Penal Law § 1290-a. The omission relates to the present requirement that, where the defendant "made

use of" false representations in "accomplishing" the theft, evidence thereof is inadmissible unless at least one of them is alleged in the indictment or information [existing P.L. § 1290-a(1)]. The effect of that provision is to single out this particular kind of prosecution as one requiring an evidential statement in the charge of the means by which the offense was committed—a principle not applicable to prosecutions for other offenses. Since the logic of that requirement is not discernible to the Commission, and since it appears to represent merely a vestige of tradition, it is here eliminated.

§ 160.25 Larceny; value of stolen property, how ascertained

With a few minor changes of substance, this section substantially restates and clarifies the standards for evaluating stolen property contained in existing Penal Law §§ 1303, 1304, and 1305.

§ 160.30 Petit larceny

See note to proposed § 160.45.

§ 160.35 Grand larceny in the third degree

See note to proposed § 160.45.

§ 160.40 Grand larceny in the second degree

See note to proposed § 160.45.

§ 160.45 Grand larceny in the first degree

This section and the three preceding ones present a four degree larceny structure differing in several respects from the existing three degree format (P.L. §§ 1294, 1296, 1298).

Momentarily disregarding the proposed first degree offense, the other three are comparable to the three existing ones, although the property value denomination lines have been changed because of changing times and other considerations. The line between petit and grand larceny is changed from \$100 to \$250, and the line between the two lower grand larceny or felony offenses is changed from \$500 to \$1500.

The proposed third degree grand larceny offense (§ 160.35) follows the pattern of the existing second degree offense (P.L. § 1296) in that the crime is raised from petit to grand larceny by property value (\$250 in one case and \$100 in the other); by the fact that the property, regardless of value, consists of a public record; and by a taking from the person. In addition, however, the proposed section draws into the grand larceny ambit most cases of theft by extortion regardless of the value of the property involved [§ 160.35(4)].

The proposed second degree crime (§ 160.40)—roughly comparable to the existing first degree offense (P.L. § 1294)—requires, as indicated, a theft of \$1500 rather than \$500. It does not include two other criteria of aggravation found in the existing first degree provision, namely a nocturnal theft from the person and a nocturnal theft of property of more than \$25 in value from “any dwelling-house, vessel, or railway car” [P.L. § 1294(1, 2)].

The proposed first degree crime (§ 160.45) is new. It is exclusively an offense of larceny by extortion, being raised to the highest degree by the employment of the most heinous of the specified extortionate threats, namely to cause physical injury or property damage.

ARTICLE 165: ROBBERY

The definition of robbery in this proposed Article is substantially the same as the one collectively enunciated in four existing Penal Law provisions (§§ 2120-2123). Since robbery is larceny of the trespassory taking brand committed by the use of force or fear, it is here defined in terms of larceny, involving “intent to deprive,” or “appropriate,” and so on [cf. proposed § 160.05(1)].

Sections 165.10, 165.15 and 165.20 present robbery in a three degree format which resembles the existing structure in some respects but differs from it in others (existing P.L. §§ 2124, 2126, 2128).

The existing third degree offense (§ 2128) is meaningless and has no utility other than as a pleading device. The existing second degree provision (§ 2126) covers the basic crime of robbery without any aggravating factors and is the equivalent of the proposed third degree section (§ 165.10), which does the same. The existing first degree offense (§ 2124) requires any of four aggravating factors: (1) being armed with a dangerous weapon; (2) being aided by an accomplice actually present; (3) use of an automobile; or (4) infliction of grievous bodily harm.

Two of these criteria—being armed and causing serious physical injury—are also aggravating factors in the proposed first degree offense (§ 165.20). Another—accomplice assistance—is a less serious factor and is made the basis for the proposed second degree crime (§ 165.15). The other criterion—use of an automobile—is eliminated as an aggravating factor in the proposed structure. The use of a car in a solo robbery does not appear as a highly significant item; and if it be regarded as such in a setting involving a group of bandits,

the robbery is in any event raised to the second degree by virtue of the accomplice factor (proposed § 165.15).

ARTICLE 170: OTHER OFFENSES RELATING TO THEFT

§ 170.00 Misapplication of property

Subdivision 1 of this section substantially restates existing Penal Law § 941. The specified loaning, leasing and encumbering activity, it should be noted, does not reach the stature of larceny because it does not necessarily entail an intent to "deprive" or "appropriate" [see proposed §§ 160.00 (3, 4), 160.05(1)].

Subdivision 2 exempts the defendant-encumberer who undoes any possible damage by regaining possession of the property and restoring the situation to status quo ante without loss to the owner.

§ 170.05 Unauthorized use of a propelled vehicle; definition of term

See note to proposed § 170.10.

§ 170.10 Unauthorized use of a propelled vehicle

This section is derived from existing Penal Law § 1293-a, defining the offense commonly known as "joy riding," which does not legally amount to larceny because the intent is of a "borrowing" rather than of a "depriving" or "appropriating" nature. The proposed section is drafted to encompass certain offenses analogous to embezzlement and larceny by trespassory taking.

Subdivision 1 covers the ordinary taking of a propelled vehicle, and also the situation where two or more persons who may or may not have originally taken it are found riding in it. In the latter type of case, all the occupants sometimes express innocent ignorance of any illegal taking or lack of authorization, and the indicated presumption is inserted in order to minimize the effectiveness of such convenient and dubious defenses.

Subdivisions 2 and 3 define offenses of the embezzlement genus, involving excessive misuse or withholding of a vehicle by a person who originally obtained possession or custody thereof legally. In order to exclude frivolous charges, this type of offense has been limited to two kinds of situations. The first (subd. 2) is exemplified by a garage attendant who unauthorizedly uses a patron's car to go on a spree. The second (subd. 3) is illustrated by a person who borrows a car in New York for an afternoon and drives it to Florida,

keeping it there for six months. In each type of case, the conduct must constitute a "gross deviation" from the agreement or the agreed purpose of the bailment.

This offense is classified a misdemeanor. In a sense, that represents a down-grading from the existing law which, penalizing such conduct by the larceny standard, gears the punishment to the value of the vehicle (P.L. § 1293-a). That, it is submitted, is not a logical penalty system for a "borrowing" type of crime. Under the proposed code, genuine theft cases would, of course, be prosecutable as larceny with the penalty depending upon the value of the vehicle.

§ 170.15 Theft of services; definitions of terms

This section is new. The term definitions are in explanation of proposed § 170.20.

§ 170.20 Theft of services

This section is entirely new in form and substantially new in substance.

Since "services" are not "property," "theft" of a service does not constitute larceny; and, if any such conduct is to be proscribed, it must be by special statute. The existing Penal Law defines few offenses of that nature (see §§ 927, 967, 1431, 1432, 1432-a). It is not necessary, however, to go to the other extreme of equating services with property and of predicating, wherever possible (mainly in the area of deception), "theft of service" offenses to those involving thefts of property, or larcenies. Legislation of that character would doubtless lead to hosts of "criminal" charges of a basically civil nature. Proposed § 170.20 steers a middle course by defining seven specific offenses, most involving theft or attempted theft of certain kinds of services.

Subdivision 1, dealing with spurious or otherwise invalid credit cards, defines a new offense. It applies generally to all services obtained in the indicated fraudulent manner. Expansion of this provision to cover similar thefts of property is unnecessary since such conduct constitutes larceny (by false pretenses).

Subdivision 2 restates the proscriptions of existing Penal Law § 925 but expands the offense to include thefts and payment-avoidance of restaurant services as well as of those provided by hotels, inns and the like.

Subdivision 3 includes certain existing offenses [P.L. §§ 1990 (1, 2), 1990-b] but broadens the overall crime to encompass improper acquisition or fee-avoidance of all forms of "public transportation service" rather than of the limited kinds presently specified.

Subdivision 4 substantially restates existing Penal Law § 967 (see, also, existing P.L. § 1293-c).

Subdivision 5 substantially restates certain phases of three existing sections dealing in part with fraudulent tampering with gas, electric, steam and water meters (P.L. §§ 1431, 1431-a, 1432). The offense is broadened, however, to include meter tampering and similar chicanery relating to any sort of public or private service measured by a meter, whether of the indicated public utility kinds or otherwise.

Subdivision 6 embodies other phases of existing Penal Law §§ 1431 and 1432, addressed to the acquisition of gas, electric, steam and water service without the supplier's consent. This offense does not necessarily require intent to avoid payment for the service improperly obtained. It would apply, for example, to one who, having had his gas turned off, succeeds in regaining the service by unauthorized tampering, regardless of whether he intends to pay for the gas thus obtained.

Subdivision 7 is new. This offense is prescribed for the purpose of plugging an apparent gap in the present law pointed up by the decision in *People v. Ashworth*, 220 App.Div. 498, 222 N.Y.S. 24 (4th Dept.1927). The defendants therein, a mill superintendent and his brother, were convicted of grand larceny as a result of having made unauthorized and personally profitable use of the mill's machinery, facilities and labor to spin a substantial quantity of wool for a certain company. The judgment was reversed on the ground that the corrupt use of the mill's facilities and labor did not constitute a theft of "property" and, hence, could not be the subject of larceny. Subdivision 7 of proposed § 170.20 renders such conduct a "theft of services."

§ 170.25 Fraudulently obtaining a signature

This section, which is a substantial restatement of existing law, is designed to replace a variety of existing Penal Law provisions directed at those who fraudulently procure the signature of another to a written instrument (§§ 932, 934, 935, 937, 937-a, 938).

§ 170.30 Fortune telling

This section is new, although, under existing law, one who engages in some of the conduct described herein is a "disorderly person" [see Code of Crim.Proc., § 899(3)]. It is directed at a prevalent species of fraud whereby its practitioners, by preying on the fears of the ignorant or the gullible, annually bilk citizens of many millions of dollars.

§ 170.35 Criminal possession of stolen property; definition of term

This definition is new and is the same as that of Model Penal Code § 223.6(2). Existing Penal Law § 1308 refers only to dealers in specific goods or services (e. g., junk, metals, second-hand books, linen rental).

§ 170.40 Criminal possession of stolen property in the third degree

See note to proposed § 170.50.

§ 170.45 Criminal possession of stolen property in the second degree

See note to proposed § 170.50.

§ 170.50 Criminal possession of stolen property in the first degree

Sections 170.40, 170.45 and 170.50 are largely derived from existing Penal Law § 1308. The major change here is a conceptual one. At present, the basic crime—generally referred to as receiving stolen property—consists of buying, receiving, concealing or withholding stolen property. Upon analysis, it becomes apparent that the essence of each of these acts is “possessing” stolen property. Therefore, this is the mold in which the crime, in three degrees, has been cast. The term “possess” is defined in proposed § 10.00(2) as meaning “to have physical possession or otherwise to exercise dominion or control over tangible, movable property.” It should not matter that possession resulted from buying or receiving or that it led to concealing or withholding; the gravamen of the crime is the illegal possession. It should be noted that the definition of “possess” encompasses constructive as well as actual possession, thereby establishing a rule which, as the Court of Appeals has indicated, could only be promulgated by the Legislature [People v. Fein, 292 N.Y. 10, 53 N.E. 2d 374 (1944)]. To predicate liability solely on physical possession is to perpetuate an anachronism in this age of instant communication and speedy transportation.

Criminal possession of stolen property has been structured in three degrees. Any knowing possession of stolen property is third degree (proposed § 170.40). The two higher degrees, constituting aggravated situations, are both felonies, the principal distinction being in the value of the stolen property. The punishments accord with those for larceny involving the same amounts [see proposed §§ 160.35(1) and 160.40]. Another factor which aggravates the basic crime is the fact that the actor is a “dealer” [proposed § 170.45(2)], so that even if the value of the property possessed is less than \$250, the crime is nevertheless a felony. This distinction follows present law, although “dealer” is defined more broadly in the revision than in existing Penal Law § 1308(1).

§ 170.55 Criminal possession of stolen property; presumptions

Subdivision 1 is new; the requisite criminal intent is presumed from the mere knowing possession of stolen property. This presumption, which applies to any person is, of course, rebuttable [see *People v. Hartwell*, 166 N.Y. 361, 59 N.E. 929 (1901)].

Subdivision 2 is derived without substantive change from existing Penal Law § 1308(3). It differs from subdivision 1 in that (a) it applies only to a dealer, and (b) it presumes knowledge that the property was stolen, not criminal intent to possess it.

§ 170.60 Criminal possession of stolen property; liability and proof

Subdivision 1 is derived from existing Penal Law § 1309. "Larceny and criminally receiving stolen property are distinct and independent crimes" [*People v. Spivak*, 237 N.Y. 460, 143 N.E. 255 (1924)].

Subdivision 2 is new. Changing the present crime of receiving, concealing or withholding to one of possession, works a change in prevailing case law. Under present principles, a thief may not be convicted of receiving, etc., the property which he stole [see, e. g., *People v. Daghita*, 301 N.Y. 223, 93 N.E.2d 649 (1950)]. Under the revision, however, there is no inconsistency in convicting a thief of "possession" of the same property; and this proposition is expressly stated. But conviction of both larceny and criminal possession of the same property is not permitted.

Subdivision 3 is new, merely extending the requirement of corroboration (Code of Crim.Proc. § 399) which would be present were the defendant also charged with larceny.

Subdivision 4 is derived from Penal Law § 1308-a, without substantive change.

§ 170.65 Obscuring identity of a machine in the second degree

See note to proposed § 170.75.

§ 170.70 Obscuring identity of a machine in the first degree

See note to proposed § 170.75'

§ 170.75 Obscuring identity of a machine; presumptions and defenses

Sections 170.65 and 170.70 are both derived from existing Penal Law § 436-a, without substantive change. The degree structure creates a true included crime situation, which should be useful for pleading purposes. The presumptions and defense set forth in proposed § 170.75 are new.

ARTICLE 175: FORGERY AND RELATED OFFENSES

This Article completely reformulates the existing Penal Law Forgery Article (Art. 84, §§ 880-895), dealing with offenses of forgery, uttering forged instruments, false book entries and a variety of other related crimes.

§ 175.00 Forgery; definitions of terms

This section attempts to define the crime of forgery with greater detail than do existing Penal Law provisions (cf. P.L. § 880). Some of the principal features are the following:

The term "written instrument" (the subject of forgery) is broadly defined. It covers every kind of document and other item deemed susceptible of deceitful use in a "forgery" sense, the main requirement being only that it be "capable of being used to the advantage or disadvantage of some person" (subd. 1).

An important distinction is made between a "complete written instrument" and an "incomplete" one (subds. 2, 3).

The key terms of the section are "falsely make," "falsely complete" and "falsely alter" (subds. 4, 5, 6), which collectively constitute the crime of forgery. In a sense, these comprise five concepts rather than three, for "making" and "altering" have slightly different connotations with respect to "complete" instruments on the one hand and "incomplete" ones on the other. In brief, one commits forgery by committing any of the following acts:

- (1) falsely making a complete written instrument;
- (2) falsely making an incomplete written instrument;
- (3) falsely completing an incomplete written instrument;
- (4) falsely altering a complete written instrument;
- (5) falsely altering an incomplete written instrument.

The meanings of these five concepts may be partially illustrated by observing their operation with respect to a hypothetical situation. Assume that salary checks of a corporation are drawn by T, the treasurer, though not signed by him; and that each employee customarily obtains his check from T in that form and then takes it to P, the president, for his essential signature as drawer.

Assume further:

- (1) E, an employee, simulating the handwriting of both T and P and not having the authority of either, draws up in its entirety a purportedly authentic corporate check payable to himself and tries to cash it.

E has falsely made a complete written instrument.

(2) E, simulating T's handwriting, draws an uncompleted check payable to himself in T's customary manner, and, impliedly representing it as T's act, presents it to P for his signature as drawer.

E has falsely made an incomplete written instrument.

(3) E properly obtains his uncompleted salary check from T but, fearing that P will not sign it, himself writes in P's purported signature as drawer and tries to cash the check.

E has falsely completed an incomplete written instrument.

(4) E properly obtains his uncompleted check from T and properly obtains P's signature as drawer, but thereafter raises the amount of the check and tries to cash it.

E has falsely altered a complete written instrument.

(5) E properly obtains his uncompleted check from T but then raises the amount and presents it to P for his signature as drawer.

E has falsely altered an incomplete written instrument.

Although not fully evident from the foregoing illustration, it is submitted that the five indicated concepts or kinds of acts embrace every true form of forgery. Accordingly, the crime of forgery is defined in terms of falsely making, completing or altering a written instrument (see proposed §§ 175.05, 175.10, 175.15).

§ 175.05 Forgery in the third degree

See note to proposed § 175.15.

§ 175.10 Forgery in the second degree

See note to proposed § 175.15.

§ 175.15 Forgery in the first degree

This section and the two preceding ones present the crime of forgery in a genuine degree or included crime structure. This is not the case under the existing Forgery Article where numerous scattered offenses are inserted and strung together in three sections which are given "degree" labels but which are "degree" crimes in name only (existing P.L. §§ 884, 887, 889).

The proposed third degree section (§ 175.05) defines the basic offense of forgery, covering the false making, completion or alteration, "with intent to defraud," of any "written instrument"—meaning any instrument from a relatively innocuous forged letter up to counterfeit currency. Second degree forgery (proposed § 175.10) is committed when the forged

instrument falls into any of four specified classifications, which include certain commercial instruments, public records, symbols of value, etc. The first degree offense (proposed § 175.15) requires counterfeiting of money, stamps and comparable government issued instruments, or of corporate stock certificates, bonds and the like. Examination of the three sections will disclose that the third degree offense, a misdemeanor, is necessarily committed upon every first and second degree violation, and that the second degree offense (a class D felony) is necessarily committed upon every commission of the first degree (a class C felony).

§ 175.20 Criminal possession of a forged instrument in the third degree

See note to proposed § 175.30.

§ 175.25 Criminal possession of a forged instrument in the second degree

See note to proposed § 175.30.

§ 175.30 Criminal possession of a forged instrument in the first degree

This section and the two preceding ones attach the same sanctions to fraudulent utterance and possession of forged instruments as proposed §§ 175.05, 175.10, and 175.15 attach to actual forgery thereof. The degree and penalty progressions rest upon precisely the same factors as do those of the forgery offenses, namely the kinds of instruments forged as specified in the forgery statutes. The existing Penal Law adopts the same scheme, also equating fraudulent uttering and possession to its forgery offenses [§ 881; see, also, §§ 662, 887(4), 889(3, 4), 889-b, 891, 892, 894].

§ 175.35 Forgery and criminal possession of a forged instrument; persons liable

This section is new. It simply assures that the forger of an instrument who criminally possesses it thereafter may not be convicted of both offenses.

§ 175.40 Criminal possession of forgery devices

This section, by the use of more general language, condenses the substance of several existing provisions penalizing the manufacture and possession of specified apparatus, equipment, devices, etc., designed for or adaptable to counterfeiting and other forgery purposes [existing P.L. §§ 881, 887(3, 5)]. The proposed section adopts a policy, frequently followed in connection with offenses involving possession of contraband [cf. proposed § 270.05(1, 2, 3, 8)] of designating the manu-

facture or possession of articles or materials specifically designed for criminal use as criminal per se, and of requiring an intent to use unlawfully with respect to items designed for legitimate use but adaptable to criminal purposes. Thus, subdivision 1 herein penalizes manufacture or possession of devices "specifically designed or adapted" for forgery purposes (e. g., a plate for counterfeiting currency), and subdivision 2 penalizes manufacture or possession of devices "capable of or adaptable to such use" (e. g., a printing press) only when accompanied by an intent to use for forgery purposes.

§ 175.45 Criminal simulation

This section, addressed to fraudulent misrepresentation and simulation of antiques, objets d'art, rare books and comparable matter, substantially adopts a similar provision of the Model Penal Code (§ 224.2). The only offense of this nature in the existing Penal Law is one limited to "Reproduction or forgery of archeological objects" (P.L. § 959).

§ 175.50 Unlawfully using slugs; definitions of terms

See note to proposed § 175.60.

§ 175.55 Unlawfully using slugs in the second degree

See note to proposed § 175.60.

§ 175.60 Unlawfully using slugs in the first degree

This section and the two preceding ones substantially restate existing Penal Law § 1293-d.

ARTICLE 180: OFFENSES INVOLVING FALSE WRITTEN STATEMENTS

It is a general rule that the making of a false statement in writing, even though knowing and intentional, does not in itself constitute a criminal offense; and that if the making of any particular kind of false writing is to be placed in the criminal category, such must be accomplished by legislation specifically addressed to the conduct in question. This Article defines and collates a number of such offenses.

§ 180.00 Falsifying business records; definitions of terms

See note to proposed § 180.10.

§ 180.05 Falsifying business records in the second degree

See note to proposed § 180.10.

§ 180.10 Falsifying business records in the first degree

The proposed offense of "falsifying business records" embraces and somewhat expands offenses defined by existing Penal Law § 889 and other scattered provisions [§§ 665(2, 3, 4), 887(2), 1865(2, 3)].

The existing Penal Law crimes relating to false book entries, omitting to make true entries, etc., are classified as "forgery in the third degree" (§ 889). In a true sense, these are not "forgery" offenses, for they do not involve deceit concerning the authenticity of written instruments—the essence of forgery—but simply the "falsity" of records made by known authors. Accordingly, the proposed crime is not classified as "forgery" but is given a different label and placed in a different and more appropriate Article: "Offenses Involving False Written Statements."

The scope of existing Penal Law § 889's false bookkeeping offenses is quite hazy, especially with respect to criminal intent. Some of these offenses require "intent to defraud or to conceal any larceny" (Part B). Another uses, in part, the words "unlawfully and corruptly" [Part A(1)], which apparently denotes something less than fraudulent intent, although how much less or of precisely what nature is not clear [see *People v. Anderson*, 210 App.Div. 59, 205 N.Y.S. 668 (1st Dept. 1924), aff'd, 239 N.Y. 534]. Despite the difference in mens rea, no distinction in penalty is drawn.

The proposed sections offer the crime in two degrees. The basic or second degree offense, graded a misdemeanor, requires an "intent to defraud" (proposed § 180.05), on the theory that any lesser culpability in this area does not merit criminal sanction. The crime is raised to the first degree, a felony of the lowest classification, when the fraudulent intent "includes an intent to commit another crime or to aid or conceal the commission thereof" (proposed § 180.10). This would allow for misdemeanor convictions in cases of relatively minor culpability and still provide felony liability for the more serious cases.

It may be noted that while the present crime is limited in part at least to falsification of business records of private enterprises [existing P.L. § 889(A1)], the proposed offense is of broad application in this respect and covers all records of public or government agencies as well [§ 180.00(1)].

§ 180.15 Falsifying business records; defense

This section substantially restates the last clause of existing Penal Law § 889.

§ 180.20 Tampering with public records in the second degree

See note to proposed § 180.25.

§ 180.25 Tampering with public records in the first degree

Existing Penal Law § 2050 is directed at "a person who wilfully and unlawfully removes, mutilates, destroys, conceals or obliterates" any public record "or other thing" legally filed in a public office or with a public officer. No mention is made of "falsification" of public records, but another section makes it a felony for a "ministerial officer" to mutilate, destroy, etc., or to falsify "any record or paper appertaining to his office" (existing P.L. § 1838, subd. 1). In somewhat broader form, the substance of these provisions is incorporated in proposed §§ 180.20 and 180.25.

The existing Penal Law does not require any intent for the crime applicable to the "ministerial officer" (§ 1838); the word "wilfully" is used in defining the crime of more general application (§ 2050). Although each of these offenses is a felony, one requires nothing more than a knowing or intentional act and the other is a crime of absolute liability. Thus, a person who tears up some insignificant public record in anger is subject to the same serious penalty as one who calculatingly removes or destroys an important public document as part of a fraudulent scheme for great personal gain.

The proposed sections distinguish between such situations. The basic offense is committed by a mere knowing removal, destruction, falsification, etc., and is graded a class A misdemeanor (proposed § 180.20). The crime is raised to a class D felony when committed with "intent to defraud" (proposed § 180.25).

§ 180.30 Offering a false instrument for filing in the second degree

See note to proposed § 180.35.

§ 180.35 Offering a false instrument for filing in the first degree

This section and § 180.30 carry over into the proposed law part of the existing Penal Law provision making a person guilty of a felony "who knowingly procures or offers any false or forged instrument to be filed, registered or recorded in any public office . . ." (§ 2051; see, also, §§ 1872, 1872-a).

The proposed offense is narrower than the existing one in that it applies only to instruments containing "a false statement or false information" (§§ 180.30, 180.35), and not to a "forged instrument" (existing P.L. § 2051). Crimes of this character involving forged instruments, doubtless more serious than those involving false ones, are covered by the

sections defining the generally higher graded offenses of forgery and possession of forged instruments (proposed §§ 175.05, 175.20).

As with the above treated offense of "Tampering with public records" (proposed §§ 180.20, 180.25), the culpability inherent in this crime of "Offering a false instrument for filing" would seem to vary considerably in relation to the intent involved. The comparable existing section (P.L. § 2051) takes no account of that factor, flatly making the crime a felony so long as it is "knowingly" committed, regardless of the offender's purpose or the significance of his conduct. Thus, it attaches equal culpability to a person who, out of vanity, "knowingly" falsifies his age in a license application, and one who corruptly defrauds the state out of huge sums through false documents submitted in connection with a building contract.

Here again, the proposed sections make a penalty distinction on the basis of culpability considerations, by means of a degree structure. The basic or second degree offense is satisfied by a knowing commission thereof, and is graded a class A misdemeanor (proposed § 180.30). It is raised to the first degree, a class E felony, when committed "with intent to defraud the state or any political subdivision thereof" (proposed § 180.35).

§ 180.40 Issuing a false certificate

The conduct here dealt with is also covered by proposed § 200.00 ("Official misconduct"). However, this offense is sufficiently serious to warrant treatment as a class E felony (see existing P.L. §§ 1860, 1861).

§ 180.45 Issuing a false financial statement; definitions of terms

This section is new. It defines two terms used in proposed § 180.50.

§ 180.50 Issuing a false financial statement

This section substantially restates existing Penal Law § 1293-b.

§ 180.55 Presenting a false insurance claim

This section substantially restates existing Penal Law § 1202.

ARTICLE 185: BRIBERY NOT INVOLVING PUBLIC SERVANTS, AND RELATED OFFENSES

This Article contains a series of provisions dealing with bribery involving employees, labor officials, and sports participants.

Sections 185.00 and 185.05, directed at so-called "commercial bribery," substantially restate existing Penal Law § 439. These sections, however, do not incorporate those provisions in § 439 which penalize a purchasing agent who receives a gift from a seller and a seller who gives such a gift. The proposed sections require, instead, that the gift be given or received with an intent or understanding that it will influence the employee's conduct in relation to his employer's affairs.

Sections 185.10, 185.15 and 185.20 concerned with bribery of, and bribe receiving by, a labor official, substantially restate existing Penal Law § 380.

Sections 185.25, 185.30 and 185.35, dealing with sports bribery, are designed to protect the integrity of sports contests. These three sections substantially restate existing Penal Law § 382.

Section 185.40 expands present law on corrupt interference with sporting contests (see existing P.L. § 190-a). Included within the scope of this proposed section are such forms of corrupt interference as unlawfully administering stimulants to a race horse or to an athlete.

Section 185.45, dealing with excessive rental charges, substantially restates existing Penal Law § 965.

ARTICLE 190: FRAUDS ON CREDITORS**§ 190.00 Fraud in insolvency**

This section, proscribing certain conduct that may prejudice unsecured creditors, is designed to replace the existing Penal Law provisions covering this area. The existing law (P.L. §§ 1170-1173) is derived from the early revised statutes and has remained essentially unchanged for over one hundred years. The proposed section, similar to a formulation in the Model Penal Code (§ 224.11), requires the defendant to know that an "administrator" has been or is about to be appointed, or that a composition agreement has been or is about to be made.

§ 190.05 Fraud involving a security interest

This section is derived from existing Penal Law § 940-a (added by Laws 1962, ch. 552, § 37, effective September 27, 1964). The felony-misdemeanor delineation in existing § 940-a is rejected (see Model Penal Code, Tent. Draft No. 11, p. 99).

§ 190.10 Fraudulent disposition of mortgaged property

This section substantially restates existing Penal Law §§ 940(1) and 1291(2).

§ 190.15 Fraudulent disposition of property subject to a conditional sale contract

This section substantially restates existing Penal Law § 940(2) (added by Laws 1962, ch. 552, § 35, effective September 27, 1964).

ARTICLE 195: OTHER FRAUDS**§ 195.00 Issuing a bad check; definitions of terms**

See note to proposed § 195.15.

§ 195.05 Issuing a bad check

See note to proposed § 195.15.

§ 195.10 Issuing a bad check; presumptions

See note to proposed § 195.15.

§ 195.15 Issuing a bad check; defenses

These four proposed sections dealing with the offense of "Issuing a bad check" (§§ 195.00-195.15) include most of the features of existing Penal Law § 1292-a, but introduce certain changes of substance.

It may be observed that the mens rea required by existing § 1292-a is an "intent to defraud," an undefined term treated rather nebulously in the decisions but apparently meaning in the average case simply an intent that the issued check will be dishonored by the drawee upon presentation [see *People v. Weiss*, 263 N.Y. 537, 538, 189 N.E. 686 (1933); *People v. Nibur*, 238 App.Div. 233, 234, 264 N.Y.S. 148 (1st Dept. 1933)]. Proposed § 195.05 defines the requisite intent in those terms.

Unlike the existing provisions, the proposed sections take cognizance of certain distinctions between the utterance of a check by the drawer thereof and the utterance or "passing" of a check by a payee or other holder (see proposed § 195.05,

defining these two facets separately). Certain presumptions as to knowledge of the status of the drawer's account at the time of utterance, and of intent or belief partly based upon that knowledge that a check will ultimately be dishonored by the drawee, may be fairly drawn with respect to the drawer himself. The same is not true as to the "passer," who may not even know the drawer, and cannot fairly be presumed to be familiar with his bank account. Accordingly, such presumptions are here imposed upon the drawer but not upon the "passer" [see proposed § 195.10(1, 2)].

A further refinement in the presumptive area appears in a distinction made between the drawer who had "no account" and one who had "insufficient funds" with the drawee at the time of utterance. The former is presumed to have intended or believed that dishonor would occur; the latter, only when the check is presented for payment within thirty days and dishonored for a still insufficient account [proposed § 195.10(2)].

Another new feature, born of realistic considerations, permits a defendant to avoid prosecution or conviction by making good the check within ten days after dishonor [proposed § 195.15(1)].

Finally, the proposed offense is strictly a "bad check" crime, with a class B misdemeanor grading, regardless of the nature of the transaction involved. Unlike the existing statute (P.L. § 1292-a), no mention is here made of larceny liability when property is obtained on the basis of the check. The theory is that the crime of larceny should not be needlessly expanded by miscellaneous provisions within and without the Penal Law, but that it should be comprehensively defined; and that, if there is any doubt whether particular conduct intended to be included within the larceny ambit does in fact constitute larceny, it should be expressly stamped such in the definitive provisions of the Larceny Article itself. That Article does specifically include as larceny the acquisition of property through commission of the "bad check" crime [proposed § 160.05(2) (c)].

§ 195.20 False advertising

Subdivision 1 is derived from existing Penal Law § 421, without substantive change. The phrase "any advertisement" replaces the detailed listing of media in the existing section and obviates the necessity of amending the statute whenever a new medium for advertising, such as television, appears. Subdivision 2 is new and was adopted from Model Penal Code § 224.7. Present law imposes absolute liability, placing in pari delicto one who acts venally and one whose carelessness does not amount to reckless behavior. This sub-

division affords a defendant an opportunity to prove that he acted without culpability.

§ 195.25 **Criminal impersonation**

This section, which is a substantial restatement of present law, is designed to replace a variety of existing Penal Law provisions which prohibit the impersonation of public officers (§§ 854, 931, 936-b, 1846) and private persons (§§ 928, 930, 942, 1278).

§ 195.30 **Concealing a will**

This section substantially restates existing Penal Law § 2052.

§ 195.35 **Misconduct by corporate director**

This section substantially restates existing Penal Law § 664.

§ 195.40 **Misconduct at corporate election**

This section substantially restates existing Penal Law § 668.

**ARTICLE 200: OFFICIAL MISCONDUCT AND
OBSTRUCTION OF PUBLIC SERVANTS
GENERALLY**

§ 200.00 **Official misconduct**

This section replaces some thirty existing Penal Law provisions defining misdemeanor offenses of misfeasance and non-feasance by public servants (see Table I). Most of the crimes are very narrow ones of commission and omission involving violations of specific duties by specified public officers. In the main, they are virtually crimes of absolute liability; little is required in the way of criminal intent, a "willful" commission of a proscribed act or a neglect of an official duty ordinarily being sufficient. While one such provision, applying to "public officers" generally, appears to define an offense of general application, it is expressly limited to violations of duty not covered by any of the more specific sections (existing P.L. § 1841).

Proposed § 200.00 condenses this general area of official misconduct into one offense. Subdivision 1 covers conduct of commission, and subdivision 2 conduct of omission. A specific mens rea is predicated: criminal liability attaches only when the offender intends to benefit himself or another or "wrongfully to injure or deprive another person of a benefit."

This excludes unauthorized conduct or neglect of duty, which, though possibly a proper basis for removal or disciplinary action in some instances, does not seem a fair basis for the automatic imposition of criminal sanctions.

§ 200.05 Obstructing governmental administration

The existing Penal Law contains a variety of provisions which punish specific conduct that in some manner obstructs or hampers governmental functions (§§ 196, 490, 1320, 1322, 1824, 1825, 1851). There is no comprehensive provision directed at such conduct generally. The proposed section is designed to fill this gap.

§ 200.10 Refusing to aid a peace officer

This section substantially restates existing Penal Law § 1848, except that the civil provisions of the latter, applicable to a person who is injured while assisting a peace officer, have been transferred to the General Municipal Law.

§ 200.15 Obstructing firefighting operations

This section substantially restates existing Penal Law § 1901.

ARTICLE 205: BRIBERY INVOLVING PUBLIC SERVANTS AND RELATED OFFENSES

This article draws together numerous sections scattered throughout the existing Penal Law which deal with various types of conduct, involving public and quasi-public servants, which amount to bribery or near bribery. Many of the present provisions are repetitive or unnecessarily narrow in scope and applicability. The revision makes no major substantive changes in existing law but attempts, by a largely formal restatement, to simplify and clarify. The term "public servant," used throughout this Article, is defined in proposed § 10.00(8).

§ 205.00 Bribery

See note to proposed § 205.05.

§ 205.05 Bribe receiving

Sections 205.00 and 205.05 represent the distillation of about sixteen separate sections in the existing Penal Law (see Table I). They contain proscriptions on both sides of the bribe situation, punishing equally the giver and taker of a bribe. The term "benefit" is intended to connote any gain or

advantage to the public servant involved, whether pecuniary or otherwise.

§ 205.10 **Bribery; no defense**

This section is new. It is intended to cover those situations in which the public servant has colorable authority to act in a particular manner though the result sought is not strictly within the scope of his authority [People v. Chapman, 13 N.Y. 2d 97, 242 N.Y.S.2d 200, 192 N.E.2d 160 (1963)].

§ 205.15 **Rewarding official misconduct**

See note to proposed § 205.20.

§ 205.20 **Receiving reward for official misconduct**

Sections 205.15 and 205.20 are intended to fill a gap in existing law. Whereas proposed §§ 205.00 and 205.05 contemplate an act to be performed in the future, §§ 205.15 and 205.20 cover the situation where the improper act has already been accomplished by the public servant.

§ 205.25 **Giving unlawful gratuities**

See note to proposed § 205.30.

§ 205.30 **Receiving unlawful gratuities**

Section 205.30 is derived from existing Penal Law §§ 855, 1826 and 1831, without substantial substantive change. Present law, however, has no counterpart provision for the giver of the unlawful gratuity who, generally, is as culpable as the receiver thereof. Proposed § 205.25 is intended to fill that gap.

§ 205.35 **Bribe giving and bribe receiving for public office; definition of term**

See note to proposed § 205.45.

§ 205.40 **Bribe giving for public office**

See note to proposed § 205.45.

§ 205.45 **Bribe receiving for public office**

Sections 205.40 and 205.45 are derived from existing Penal Law § 1832. Proposed § 205.35, defining "party officer," is new, being similar to the definition in Election Law § 2(9). The revision limits the "consideration" to "money or other property," but broadens the scope of illegal activity to include "nomination as a candidate."

**ARTICLE 210: ESCAPE AND OTHER OFFENSES
RELATING TO CUSTODY**

Section 210.00 defines four terms that are used throughout proposed Article 210. The definition of "detention facility" in subdivision 1 substantially restates existing Penal Law § 1690. The other defined terms in this section are new.

Sections 210.05, 210.10 and 210.15 substantially restate the escape provisions of existing Penal Law §§ 1692, 1694, 1696 and 1697. The factor that distinguishes the three proposed degrees is the seriousness of the underlying offense with which the prisoner was charged or for which he was committed.

Sections 210.20 and 210.25 (harboring an escapee) substantially restate existing Penal Law § 1698.

Section 210.30 relates to "prison contraband." Subdivision 1 of this section substantially restates existing Penal Law §§ 489, 1691(1, 2), 1791, 1796, and 1828-a(1). Subdivision 2 is new.

Section 210.35 deals with "dangerous prison contraband." Subdivision 1 of this section substantially restates existing Penal Law §§ 1691(3), 1796, and 1828-a(2). Subdivision 2 is new.

Sections 210.40 and 210.45 substantially restate existing Penal Law §§ 242(5) and 1825, with one significant change. In order for the actor's conduct to constitute a violation of § 210.45, his resistance must create a risk of injury to the arresting officer, or justify the use of substantial force by the officer.

Sections 210.50 and 210.55 are derived from existing Penal Law §§ 1694-a and 1694-b. By referring to a person who has been "released from custody, with or without bail, by court order or by other lawful authority," the proposed sections encompass all persons enumerated in the existing Penal Law sections. The "thirty day" provision in the existing law has been eliminated; but the proposed sections provide a defense to one whose failure to appear on time was lawfully excusable.

ARTICLE 215: PERJURY AND RELATED OFFENSES**§ 215.00 Perjury and related offenses; definitions of terms**

The key term defined in this section is "swear falsely" (subd. 5), which, taken in conjunction with some of the other terms, amounts to an overall definition of perjury approximating that of the existing Penal Law (§ 1620; see, also, §§ 1622, 1625, 1626).

§ 215.05 Perjury in the third degree

See note to proposed § 215.15.

§ 215.10 Perjury in the second degree

See note to proposed § 215.15.

§ 215.15 Perjury in the first degree

This section and the two preceding ones offer a degree system differing substantially from the existing two degree structure.

The only element of distinction between the present two degrees of perjury is the element of "materiality," which, of course, aggravates the crime from the second to the first degree (existing P.L. §§ 1620-a, 1620-b). The proposed sections also use materiality as a degree-raising element, but not as the only one. A distinction is made between false swearing in "testimony," on the one hand, and in written instruments on the other. Upon the theory that, realistically, perjury committed during testimony is generally more culpable than that committed in an affidavit—especially one prepared by an attorney or a person other than the affiant—the testimonial character of a false statement is treated, along with materiality, as a factor of aggravation.

The proposed third degree provision (§ 215.05), like the present second degree section (existing P.L. § 1620-b), describes the basic crime of perjury (a misdemeanor), covering all forms, whether the false statement relates to a material or an immaterial matter, and whether it is testimonial or written.

The second degree offense, (proposed § 215.10), a felony, applies only to written instruments. If the instrument is of such kind that "an oath is required by law" to give it efficacy, if the false statement therein is material to the matter involved, and if it is made "with intent to mislead a public servant in the performance of his official functions," the perjury is raised from the third to the second degree. Illustrat-

tive is a license application required to be sworn to in which the subscriber, knowing previous good character to be a qualification for the license, lies about his criminal record.

The proposed first degree crime (§ 215.15), a higher felony, parallels the existing one (P.L. § 1620-a) insofar as it requires materiality. In addition, however, it requires testimonial perjury. False statements in sworn written instruments, even though of a material nature, are relegated to one or the other of the two lower degrees depending upon above-treated factors.

§ 215.20 Perjury; pleading and proof where inconsistent statements involved

This section seeks to clarify an area treated by existing Penal Law § 1627-a, permitting conviction for "second degree" perjury upon a showing of two contradictory sworn statements without proof of which is false. The proposed section expands that rule by applying it to all prosecutions for perjury, of whatever degree. This necessitates the third subdivision, explaining the degrees of which the defendant may be accused and convicted under varying circumstances.

Since conviction may occur without resolution of which statement is false, it would seem essential to a valid judgment that both should have been made within the jurisdiction of New York and that the period of limitation for prosecution should be determined with reference to the statement involving the shorter period. These matters, which are not mentioned in the existing section (P.L. § 1627-a), are expressly enunciated in the proposed provision.

§ 215.25 Perjury; defense

This section codifies a principle established by New York case law [People v. Ezaugi, 2 N.Y.2d 439, 443, 161 N.Y.S.2d 75, 141 N.E.2d 580 (1957)].

§ 215.30 Perjury; no defense

This section substantially restates the provisions of existing Penal Law §§ 1621(1, 2), 1623 and 1624.

§ 215.35 Making an apparently sworn false statement in the second degree

See note to proposed § 215.40.

§ 215.40 Making an apparently sworn false statement in the first degree

This section and the preceding one create a new offense. Perjury prosecutions based upon notarized instruments fre-

quently fail because the notary called to establish the oath testifies that, his jurat notwithstanding, he did not administer an oath or that he does not recall the matter. In view of the prevalent looseness of notarial practices, such testimony is doubtless true in many instances. Thus, countless falsifying defendants who have knowingly issued "apparently sworn" affidavits and depositions with the full intention of benefiting from the authoritative jurat—promising perjury liability in case of falsity—have escaped that liability when finally called to account for their falsifications. The proposed sections (§§ 215.35, 215.40) close this escape hatch by rendering such conduct an offense equivalent to perjury (cf. proposed §§ 215.05, 215.10). They are so worded as to cover only those subscribers who issue such instruments with a jurat affixed thereto or who subscribe them with the intent or belief that they will be issued in that form. No liability attaches when the jurat is affixed without the subscriber's knowledge or consent.

§ 215.45 Making a punishable false written statement

This section, which is borrowed from the Model Penal Code [§ 241.3(2)], is new to the Penal Law. It should provide administrative and other government agencies with a convenient method, in connection with applications and other documents submitted to them, of demanding the truth upon pain of criminal sanctions without resort to the cumbersome procedure of requiring oaths before notaries (see Tax Law §§ 373, 376).

§ 215.50 Perjury, making an apparently sworn false written statement, and making a punishable false written statement; requirement of corroboration

This section, which is new, codifies the judicially established requirement of corroboration in perjury cases [People v. Doody, 172 N.Y. 165, 172, 64 N.E. 807 (1902)], and extends it to the other two specified offenses of comparable nature.

§ 215.55 Subornation of perjury in the third degree

See note to proposed § 215.65.

§ 215.60 Subornation of perjury in the second degree

See note to proposed § 215.65.

§ 215.65 Subornation of perjury in the first degree

This section and the two preceding ones follow the existing Penal Law pattern (§§ 1632, 1632-a, 1633) of setting the punishment for subornation of perjury at precisely the same level as that established for the degree of perjury committed

by the person suborned. The requisite intent, however, consists only of an intent to cause false swearing in some form, and it is not necessary that the suborner intend commission of perjury of the specific degree ultimately committed.

ARTICLE 220: OTHER OFFENSES RELATING TO JUDICIAL AND OTHER PROCEEDINGS

§ 220.00 Bribing a witness

This section is designed to replace existing Penal Law § 2440. Under this existing provision it is questionable whether it is a violation to bribe a witness to leave the jurisdiction in order to avoid testifying [People v. Maynard, 151 App.Div. 790, 794, 137 N.Y.S. 19 (3rd Dept. 1912)]. The proposed section expressly covers such conduct.

§ 220.05 Bribe receiving by a witness

This section is designed to replace existing Penal Law § 379. The word "influenced," as used in this section and proposed § 220.00, contemplates not only the giving of false testimony, but also the withholding of testimony.

§ 220.10 Tampering with a witness

This section substantially restates existing Penal Law §§ 814, 2441 and 2442. The conduct proscribed in paragraph (a) of the proposed section is only partially covered in existing § 2441, i. e., the latter section applies only when the subject witness has been "duly summoned or subpoenaed." The proposed section, on the other hand, applies even though the subject witness is not yet under process. Paragraph (b) of the proposed section replaces what may be regarded as the overlapping provisions of existing Penal Law §§ 814 and 2442.

§ 220.15 Bribing a juror

This section substantially restates existing Penal Law § 371. The term "juror" is defined in proposed § 10.00(9).

§ 220.20 Bribe receiving by a juror

This section substantially restates existing Penal Law § 374.

§ 220.25 Tampering with a juror

This section is designed to replace existing Penal Law § 376-a. The latter section is directed at a person who unlawfully communicates with a juror in respect to the issues or merits of a pending cause. No specific intent is required. Unlike this existing provision, the proposed section penalizes a person who unlawfully communicates with a juror only "when

he does so with intent to influence the outcome of an action or proceeding.”

§ 220.30 Misconduct by a juror

This section substantially restates existing Penal Law § 373 (1). This proposed provision is relevant to cases where the proof discloses only a corrupt agreement by a juror to render a particular decision, i. e., there is no evidence of any benefit to the juror. Of course, if benefit to the juror could be proved, proposed §§ 220.15, 220.20 would be applicable.

§ 220.35 Tampering with physical evidence; definitions of terms

This section defines two terms applicable to proposed § 220.40 (cf. existing P.L. §§ 810, 811, 812 and 814).

§ 220.40 Tampering with physical evidence

Subdivision 1 substantially restates existing Penal Law §§ 810 and 811.

Subdivision 2 substantially restates existing Penal Law §§ 812 and 814, adding, however, an act of “concealment” [see *People v. DeFelice*, 282 App.Div. 514, 516, 124 N.Y.S.2d 80 (4th Dept. 1953)].

§ 220.45 Compounding a crime

Compounding a crime is, essentially, an agreement by the victim of a crime not to prosecute the offender in return for some reward. Since the criminal, in effect, attempts to bargain his way out of a prosecution, the offense constitutes an obstruction or perversion of justice (see, for discussion, Model Penal Code, Tent. Draft No. 9, Comment, pp. 203-211).

Article 52 of the existing Penal Law (§§ 570-571) punishes a person who takes a reward to compound a crime; but the person who pays the reward is not criminally liable. The misdemeanor-felony distinction turns on the grade of the crime compounded.

The proposed section, unlike the existing law, is directed at both the person who takes the reward and the one who pays. The offense constitutes a class A misdemeanor regardless of the underlying crime.

Subdivision 2 is new. It realistically provides a defense to a person who accepts a benefit upon a reasonable belief that such benefit is due as restitution or indemnification for harm caused by the crime. It should be noted that the present Code of Criminal Procedure (§§ 663-666) authorizes judicial compromise of certain offenses.

§ 220.50 Criminal contempt

This section is derived from existing Penal Law § 600 with but minor substantive changes. The revision omits, as unnecessary, § 600(2) and (3, in part), which refer to contemptuous behavior committed before a "referee" or a "sitting jury" and equate it with like behavior committed before a "court." Contempt committed before a jury is committed in the presence of the court, since, by established law, the former is part of the latter [see, *People v. Barrett*, 56 Hun 351, 9 N.Y.S. 321 (1890), *aff'd* without opinion, 121 N.Y. 678]. The same principle should, logically, extend to referees appointed by the court. Subdivision 5, which corresponds to existing Penal Law § 600(7), adds the element of mental culpability by requiring that a false report of a court's proceedings be "knowingly" published.

§ 220.55 Criminal contempt; prosecution and punishment

This section integrates existing Penal Law §§ 601 and 602 without substantive change, though some verbal changes have been made for clarification purposes. Thus, "adjudication" is used instead of "punishment," since otherwise one adjudged in contempt under the Judiciary Law but not yet "punished" thereunder might not be amenable to prosecution under the Penal Law. Also, "prosecution" is used in place of "indictment," to avoid an ambiguity, because this crime, being a misdemeanor, could be tried on an information rather than an indictment.

§ 220.60 Criminal contempt of the legislature

This section is derived from, and combines the provisions of, existing Penal Law §§ 1329 and 1330.

§ 220.65 Criminal contempt of a temporary state commission

This section substantially restates existing Penal Law § 2448.

§ 220.70 Unlawful grand jury disclosure

This section is derived, in part, from existing Penal Law §§ 1783, 1783-a and 1784. These sections, while directed at certain persons who have specific duties concerning the functioning of the grand jury, fail to include other public servants who may assist at grand jury proceedings and who should also be included within the proscription of the statute. The proposed section includes all those mentioned in the three existing sections, but adds public prosecutors, clerks, attendants and wardens, and includes the catchall phrase "other public servant."

§ 220.75 Unlawful disclosure of an indictment

This section is derived from existing Penal Law § 1782 without substantive change.

ARTICLE 225: NARCOTICS OFFENSES

Legislation in the field of narcotics, including its criminal aspects, is an extremely intricate subject which has been given much study in recent years. In 1959, a "Joint Legislative Committee on Narcotic Study," which had been exploring narcotic problems for three years, issued an extensive report containing many recommendations, including the elimination of mandatory minimum sentences for first narcotic felony offenders [Leg.Doc. (1959) No. 7, pp. 123-128]—an approach which, it may be noted, has been followed in the proposed Penal Law with respect to virtually all crimes, narcotics offenses included. In 1962, elaborate legislation relating to narcotics problems was enacted by amendment to the Mental Hygiene Law (§§ 200-216). Upon the premise that addicts are ill persons rather than criminals, this legislation, among other matters, established a Council on Drug Addiction (id. § 201) and provided machinery whereby arrested narcotics offenders may, in some instances, be civilly committed to hospitals instead of being prosecuted criminally (id. §§ 208-214). The Council on Drug Addiction is currently studying the operation of this and other provisions of the act in question.

In view of the foregoing, the Commission does not consider itself the appropriate agency to make an "in depth" re-evaluation of the existing narcotics laws, criminal or otherwise. Accordingly, this Article defines most of the narcotics offenses in the existing Penal Law (§§ 1751, 1751-a), with considerable change of form but few changes of substance. Section 225.00, which is new, defines four terms used in this Article and thereby provides a basis for more concise enunciation of the ensuing substantive offenses.

Although more briefly phrased, the proposed "sale" offenses (§§ 225.25, 225.30), carrying very high penalties, are identical in substance with the existing ones [P.L. § 1751(1)].

The proposed "possession offenses" (§§ 225.05, 225.10, 225.15) include one change worthy of comment, explanation of which requires some analysis of the present law.

Existing Penal Law § 1751 contains two lists of specific kinds and amounts of narcotic drugs, which will here be referred to as the "large" quantity [see § 1751(3)] and the "huge" quantity [see id. (2)]. In what is equivalent to a three degree structure of offenses, though not so labeled, the

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lowest or "third degree" offense, a misdemeanor, is committed by unlawful possession of "any" quantity of narcotics [§ 1751-a(1)]. The intermediate or "second degree" offense, a felony, consists of possession of the "large" quantity [§ 1751(3)]. The "first degree" offense, a higher felony, consists of possession with intent to sell; and intent to sell is "presumptively established" by possession of the "huge" quantity [§ 1751(2)].

This last and most severe offense is satisfactory enough as applied to the tycoons of the trade whose "intent to sell" is based upon possession of the "huge" quantity. Other "intent to sell" cases, however, may encompass small "pushers" bent upon peddling a few marijuana cigarettes, who, while certainly culpable, are far from the tycoon category.

It is this phase of the "possession" structure that the proposed Article changes. As under the existing law, the third degree or misdemeanor offense (addressed to the addict) consists of possession of "any" quantity (proposed § 225.05). Also, as under the existing law, the intermediate or second degree offense (clearly aimed at small and average sellers) may be committed by possession of the "large" quantity [proposed § 225.10(2)]. Further included in this section, however, is possession "with intent to sell" [id. (1)], but such intent is no longer presumed from possession of the "huge" quantity. In this form, the offense is primarily aimed at the small and average seller and is no longer the crime covering the tycoon. The first degree offense applicable to him is possession of the "huge" quantity (proposed § 225.15)—such possession becoming the crime itself rather than, as presently, the basis for a presumption of intent to sell.

It should be noted that proposed § 225.20, relating to a presumption when narcotic drugs are found in an automobile, substantially restates existing Penal Law § 1751(4).

ARTICLE 230: GAMBLING OFFENSES

With few actual changes of substance, but with considerable revision with respect to form, this Article overhauls the existing Penal Law's "Gambling" and "Lotteries" Articles (Arts. 88, 130), comprising fifty-four sections, and presents a single article containing but seven sections.

The existing gambling statutes are addressed to five basic forms of gambling, involving (1) ordinary games of chance, (2) lottery, (3) policy (a form of lottery), (4) betting on future contingent events, and (5) slot machines and comparable devices. The principal sections treat these individual

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forms in great detail, specifying numerous ways in which one commits lottery offenses, bookmaking and so on. The substance of this entire area of legislation, however, is that, no matter what form of gambling is involved, the mere player, contestant or bettor is not criminally liable, but that anyone who, in some capacity other than as a player, operates, promotes or advances any gambling enterprise or activity is guilty of a crime.

Accepting that postulate, the proposed Article proceeds upon the premise that, generally speaking, it is unnecessary to distinguish between the various forms of gambling or to enumerate the kinds of promotional conduct that render a person guilty of each particular form. The basic questions in each instance are (1) whether the game or scheme in issue constitutes gambling, and (2) if so, whether the defendant's conduct is of the indicated promotional character rather than that of a "player." If both questions are answered in the affirmative, a crime is committed regardless of the kind of scheme and regardless of the precise nature of the promotional activity; otherwise, no offense is committed.

Upon this principle, the proposed Article first sets forth a series of term definitions (§ 230.00) that define "gambling" and distinguish between gambling activity of a player and that of a promoter, entrepreneur or other person who, in some role other than as a player, advances a gambling project (see subds. 2-5). With this foundation, a basic offense covering almost the entire spectrum of gambling crimes is created. Entitled "promoting gambling" (§ 230.05), and graded a misdemeanor, it encompasses all forms of promotional conduct and concomitantly excludes from criminality bare "gambling" or "player" activity. This general, fundamental section is augmented by a few narrower ones which carry over from the present Penal Law certain specific offenses not necessarily included within its scope, such as possession of policy slips and other gambling paraphernalia, and specialized kinds of bookmaking and policy activity which constitute a felony.

One effect of this revision should be greatly to simplify the framing and lodging of charges in gambling cases. Under the existing pattern, it is necessary to search out the particular statute dealing with the particular form of gambling involved and to select the particular clause thereof applicable to the particular kind of promotional conduct in issue. This process sometimes produces fatal mistakes, especially in connection with the more prolix sections such as those defining policy and bookmaking offenses (existing P.L. §§ 974, 986). Under the proposed Article, it would be sufficient to charge, in the language of the blanket statute (§ 230.05, "promoting gambling"), that the defendant "knowingly advanced and

profited from gambling activity," and to follow this assertion with whatever factual allegations fit the particular case.

§ 230.00 Gambling offenses; definitions of terms

See note to proposed Article 230.

§ 230.05 Promoting gambling

See note to proposed Article 230.

§ 230.10 Feloniously promoting gambling

Subdivision 1 of this section substantially restates existing Penal Law § 986-c.

Subdivision 2 substantially restates existing Penal Law § 974-a.

§ 230.15 Possession of gambling records

This section substantially embraces the offenses defined in existing Penal Law §§ 975 and 986-b.

§ 230.20 Possession of gambling devices

This section embraces offenses defined in three existing sections [P.L. §§ 870-a, 870-b, 982(1, 3)] dealing with manufacture, sale, transportation, possession and other activity pertaining to slot machines and to gambling devices and paraphernalia in general.

Under the proposed section, a "slot machine" [defined in proposed § 230.00(7)] is regarded as a device necessarily designed for an illegal purpose, or as inherently contraband, and hence, manufacture, possession, etc., thereof is made criminal per se (subd. 1). As to other devices and paraphernalia which are merely "usable for or adapted to gambling purposes," knowledge or expectation of such use is required (subd. 2).

§ 230.25 Lottery offenses; no defense

This section substantially restates existing Penal Law § 1382.

§ 230.30 Gambling offenses; presumptions

Subdivision 1 attaches a general presumption of culpable knowledge to possession of gambling records, devices and paraphernalia, knowledgeable possession of which is rendered criminal by proposed §§ 230.15 and 230.20. The existing Penal Law establishes such a presumption with respect to policy and lottery articles (§§ 975, 986-b).

Subdivision 2 substantially restates existing Penal Law § 986-a.

**ARTICLE 235: PROSTITUTION AND RELATED
OFFENSES**

This Article revises the whole area of prostitution offenses. It begins by defining the basic offense of prostitution—new to the Penal Law but presently dealt with in the Code of Criminal Procedure as a form of vagrancy [§ 887(4)]—and then proceeds to the promotional and exploitative aspects of prostitution.

In the existing Penal Law, offenses involving procuring, operation of bawdy houses and other promotional conduct with respect to prostitution are defined in a section entitled "Prostitution of women" (§ 2460) and in several other scattered statutes pertaining or partially pertaining to the subject [existing P.L. §§ 70(1, 2, 4), 1090, 1146, 1148; see also, Code of Cr.Proc. § 887(4)].

The proposed Article approaches this field with certain term definitions that delineate the entire area of promotional conduct deserving of felony sanctions (§ 235.05). Upon this foundation, it predicates the single crime of "promoting prostitution," which is divided into degrees differentiated upon the basis of different kinds of promotional activity and the relative seriousness thereof (proposed §§ 235.10, 235.15, 235.20).

Section 235.00 defines "prostitution" as a generic offense rather than as a form of vagrancy [see Code of Cr.Proc. § 887(4)]. While it is not entirely clear under the present law whether compensated homosexual and other deviate acts are punishable, the proposed section expressly includes such within the definition of prostitution.

Sections 235.10, 235.15 and 235.20 provide a degree structure in which the lowest or third degree constitutes the basic offense (proposed § 235.10). The crime is aggravated to the second degree by any promotional conduct involving exploitation of more than one prostitute (proposed § 235.15); and to the first degree when prostitution is compelled by force or intimidation, or when a person under the age of seventeen is exploited (proposed § 235.20).

Section 235.25 substantially restates existing Penal Law § 1146 (3rd unnumbered par.). The proscribed conduct might, in some instances, constitute the crime of "promoting prostitution" [see proposed § 235.05(1)]. In general, however, such conduct, being of a "facilitating" nature [see proposed § 115.00(2)], appears less culpable and more suited to the lesser penalty here prescribed.

ARTICLE 240: OBSCENITY AND RELATED OFFENSES

This Article replaces a number of sections in Articles 44 and 106 of the existing Penal Law. It deals with two distinct problems: obscenity, generally, in its variety of manifestations (proposed §§ 240.00, 240.05, 240.10 and 240.15); and the more specific problem of the dissemination of indecent material to minors (proposed §§ 240.20, 240.25 and 240.30). A number of administrative provisions in the present law are found in Part Three of the revision (proposed Article 405).

§ 240.00 Obscenity; definition of terms

This section is new. The definitions of "material," "performance" and "promote," by stating the various forms these terms may assume, serve to promote conciseness in the following three sections.

The definition of "obscenity" (subd. 1), which is the key to the law on the subject, is substantially the same as the definition adopted in the Model Penal Code [§ 251.4(1)]. It constitutes the federal standards of "appeal to prurient interest," as expressed in *Roth v. United States*, 354 U.S. 476, 77 Sup. Ct. 1304 (1957) and the "patent offensiveness" test of *Manual Enterprises v. Day*, 370 U.S. 478, 82 Sup.Ct. 1432 (1962).

After the *Roth* case, the New York Court of Appeals—in a 4 to 3 decision—adopted a strict interpretation of existing Penal Law § 1141, declaring that it applied only to "hard-core pornography" [*People v. Richmond County News, Inc.*, 9 N.Y.2d 578, 216 N.Y.S.2d 369, 175 N.E.2d 681 (1961)]. Again, in a 4 to 3 decision, in *People v. Fritch*, 13 N.Y.2d 119, 243 N.Y.S.2d 1, 192 N.E.2d 713 (1963), the Court applied the "hard-core pornography" interpretation of the *Richmond County News* case. The definition of obscenity in this proposed Penal Law, by adopting the federal standards, is intended to be more flexible than the current New York standard as set forth in the aforementioned cases.

§ 240.05 Obscenity

Subdivision 1 is derived from existing Penal Law §§ 1141, 1141-a, 1141-b and 1143; and subdivision 2 is derived from existing Penal Law §§ 1140, 1140-a and 1140-b. By utilizing the terms defined in proposed § 240.00, this section sets forth succinctly the proscribed activities constituting obscenity. Knowledge of the content and character of obscene material or of an obscene performance is a stated element of the crime. Existing law does not expressly require such knowledge, but it has been so construed that a conviction without

proof of scienter will not stand [People v. Finkelstein, 9 N.Y.2d 342, 214 N.Y.S.2d 363, 174 N.E.2d 470 (1961)].

§ 240.10 Obscenity; presumptions

Subdivision 1 is new and is similar to the provision found in Model Penal Code § 251.4(2). Subdivision 2 is derived, without substantive change, from existing Penal Law § 1141(4).

§ 240.15 Obscenity; defenses

This section is new and is similar to provisions found in Model Penal Code § 251.4(3). These defenses place the main thrust of the obscenity statutes in proper perspective; namely, that the real evil to be policed and prosecuted is the commercial exploitation of filth.

§ 240.20 Disseminating indecent material to minors

See note to proposed § 240.30.

§ 240.25 Disseminating indecent comic books

See note to proposed § 240.30.

§ 240.30 Failing to identify a comic book publication

Proposed sections 240.20, 240.25 and 240.30 are derived from existing Penal Law §§ 484-h, 484-f and 484-g, respectively. Except for the formal change of conforming the punishment to the scheme of this revision, the language of these sections is identical with the present law. The subject matter was thoroughly investigated over a period of years by the New York State Joint Legislative Committee to Study the Publication and Dissemination of Offensive and Obscene Material. As a result of that committee's work, these sections were enacted in 1963. Therefore, no changes have been suggested here, although stylistically those sections differ from this revision.

**ARTICLE 245: RIOT, UNLAWFUL ASSEMBLY AND
CRIMINAL ANARCHY**

§ 245.00 Riot

This section substantially restates existing Penal Law § 2090, with certain innovations suggested by the offense of riot as defined in Model Penal Code § 250.1.

§ 245.05 Unlawful assembly

This section covers approximately the same ground as two existing Penal Law provisions (§§ 2092, 2094) but defines

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the offense of unlawful assembly more in terms of conspiring to commit the crime of riot.

§ 245.10 Criminal anarchy

This section substantially restates one phase of the existing Penal Law's principal "criminal anarchy" provisions (§§ 160, 161; see, also, §§ 162, 163). These penalize the advocacy of forcible overthrow of "organized government," a term which embraces both the federal and state governments. Insofar as they apply to advocating the overthrow of the federal government, these sections were clearly superseded by the federal Smith Act of 1940, whereby Congress preempted that field [Pennsylvania v. Nelson, 350 U.S. 497, 499, 76 Sup.Ct. 477 (1955)]. The proposed section, therefore, is limited to anarchy with respect to the government of New York State—concededly an offense of limited utility.

ARTICLE 250: DISORDERLY CONDUCT, HARASSMENT AND RELATED OFFENSES

The existing Penal Law and Code of Criminal Procedure define a vast number of minor offenses, most not amounting to "crimes," penalizing miscellaneous types of conduct tending to create public disorder, offensive conditions and petty annoyances to individuals. Most of these are found in three multi-subdivided statutes bearing the labels of disorderly conduct (P.L. § 722), vagrancy (Code of Cr.Proc. § 887) and disorderly persons (id., § 899). Among the kinds of conduct proscribed are fighting, shouting and other tumultuous behavior in public, begging and gambling in public places, jostling persons in public places, and loitering in public places for sexual and other unsavory purposes. Many of the provisions are distinctly archaic from the standpoint of both phraseology and substance, and some define status offenses, such as that of being a drunkard or a pauper, which are constitutionally dubious. Various offenses of this nature are distributed among the three aforementioned statutes in a rather loose and often repetitious manner, some falling into sections in which they do not really belong. Thus, the disorderly conduct statute includes "jostling," begging and sexual loitering offenses [existing P.L. § 722 (6, 7, 8)]. Since none of those acts normally tends to provoke public disorder or a breach of the peace—an element of disorderly conduct—proper and successful prosecution therefor becomes extremely difficult if not legally impossible in many instances.

Upon the theory that this entire area requires thorough-going revision, the proposed Penal Law reconstructs it in this

Article. Three basic offenses or categories of offenses are prescribed. One of these is, as before, "Disorderly conduct" (§ 250.05), which here includes only the kind of conduct having some genuine tendency to cause public disorder or alarm (e. g., fighting in public, making loud noise, etc). A second offense, entitled "harassment" (proposed § 250.10), encompasses a variety of conduct of a public or semi-public nature of a sort that annoys or "harasses" individuals rather than the public in general (e. g., jostling, following a person about in public places, making annoying telephone calls). The third section of this group creates the offense of "loitering" (proposed § 250.15). Requiring no intent to cause either public or individual alarm, it collates a group of acts, such as begging and gambling in public, hanging around school buildings under suspicious circumstances, and the like, deemed generally unwholesome from a social viewpoint.

In addition to the three aforementioned sections the Article defines other offenses of a similar nature, chief of which are "public intoxication" (proposed § 250.20) and "criminal nuisance" (proposed § 250.25).

§ 250.00 Disorderly conduct, harassment and related offenses; definitions of terms

This section, which is new, defines three terms employed in the four ensuing sections (§§ 250.05-250.20).

§ 250.05 Disorderly conduct

This section, as indicated in the note to proposed Article 250, is designed to proscribe only that type of conduct which has a real tendency to provoke public disorder. The intent clause of the existing disorderly conduct section—"intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned" (existing P.L. § 722)—is here replaced by the clause "intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof" (cf. Model Penal Code § 250.2).

Subdivision 1 of the section parallels some phases of existing Penal Law § 722(1).

Subdivision 2 covers the same ground as existing Penal Law § 722 [1 (in part), 5].

Subdivision 3 covers the same ground as existing Penal Law § 722 [1 (in part), 10].

Subdivision 4 makes the offense of indecent exposure or "exposure of person" (existing P.L. § 1140)—which must be committed in a public place—a form of disorderly conduct when committed with the prescribed mens rea involving public disorder [see, also, proposed § 250.10(4)].

Subdivision 5 designates as disorderly conduct three existing, individually defined offenses of the disorderly conduct genus dealing with disturbance of lawful meetings (existing P.L. §§ 1321, 1470, 2071).

Subdivision 6 restates existing Penal Law § 722(3) (see, also, existing P.L. § 2090).

Subdivision 7 defines a genuine disorderly conduct offense found in a more limited form in existing provisions dealing with false bomb scares and fire alarms (existing P.L. §§ 727, 1424).

Subdivision 8 is a catchall provision, along the lines of existing Penal Law § 722(2), which is necessary because of the impossibility of compiling a comprehensive list of acts properly punishable as disorderly conduct [cf. Model Penal Code § 250.2(1c)].

§ 250.10 Harassment

This section is new. It does not require any intent or likelihood of public disorder, as in disorderly conduct, but an intent to "harass, annoy or alarm" an individual.

Subdivision 1 is derived from the Model Penal Code [§ 250.4(b)].

Subdivision 2 is especially important because it covers an area of minor assaultive conduct which presently constitutes simple assault [existing P.L. § 244(1)] but which does not constitute assault of any kind or degree under the formulations of the proposed Penal Law (see note to proposed Article 125).

Subdivision 3, identical in language with subdivision 3 of the proposed disorderly conduct section (§ 250.05), renders the indicated conduct criminal when it is designed or likely to harass an individual rather than to cause public disorder or alarm.

Subdivision 4 similarly penalizes indecent exposure designed or likely to cause individual rather than public annoyance or alarm [cf. proposed § 250.05(4)].

Subdivision 5 is new in all respects.

Subdivision 6 places the "jostling" offense (directed at the pickpocket) in the "harassment" instead of the "disorderly conduct" category, where it is presently located [existing P.L. § 722(6)]. As disorderly conduct, "jostling" is frequently impossible of prosecution because of both lack of intention and unlikelihood that public disorder will result [People v. Harrison, 11 Misc.2d 445, 448, 173 N.Y.S.2d 128 (N.Y.C.Mag.Ct. 1958)]. This is ordinarily a "harassing" type of offense and should be readily prosecutable as such.

Subdivision 7, for the same reasons, classifies accosting for confidence game purposes as "harassment" rather than "disorderly conduct" [cf. existing P.L. § 722(6)].

Subdivision 8 embraces two existing Penal Law offenses (§§ 551, 555). The proposed offense, however, is substantially broader than the collective existing pair.

Subdivision 9 embraces an offense defined in existing Penal Law § 1423(6)—tying up business telephone lines by repeated calls—but is substantially broader in that it also covers the presently unpenalized practice of driving a person to distraction by repeatedly dialing his number.

Subdivision 10, dealing with the giving of false information to law enforcement authorities, proscribes an area of "harassing" conduct which, prior to 1964, was limited to kidnapping cases [P.L. § 1250-b(3)]. At the 1964 legislative session a new § 728 was added to the existing Penal Law (Laws 1964, ch. 445). This section is substantially similar to proposed subdivision 10.

Subdivision 11 substantially restates existing Penal Law § 1030.

§ 250.15 Loitering

Subdivision 1 makes begging a "loitering" offense rather than one of "disorderly conduct," as is presently the case [existing P.L. § 722(7); see, also, Code of Cr.Proc. § 887(5)] despite the fact that begging seldom tends to provoke public disorder.

Subdivision 2 substantially restates Code of Criminal Procedure § 899(8).

Subdivision 3 places in the "loitering" category conduct presently included in the "disorderly conduct" statute [existing P.L. § 722(8)] despite the lack of any genuine tendency to provoke public disorder.

Subdivision 4 substantially restates existing Penal Law §§ 710 and 711.

Subdivision 5 substantially restates existing Penal Law § 722-b.

Subdivision 6 is new. This provision, dealing with a controversial area of legislation, defines an offense similar to one appearing in the Model Penal Code § 250.6 (see Laws 1964, ch. 86).

Subdivisions 7 and 8 restate in slightly broader form offenses defined in existing Penal Law §§ 150 and 1990-a.

§ 250.20 Public intoxication

This section replaces a comparable existing statute which enunciates no standard of intoxication, which contains many obsolete procedural provisions and which is not applicable to New York City (existing P.L. § 1221). The proposed provision is state-wide in application and extends the offense to cover persons under the influence of "narcotics or other drug" as well as those under the influence of alcohol.

§ 250.25 Criminal nuisance

This section deals with a troublesome area treated chiefly by existing Penal Law §§ 1530 and 1533.

The offense of "nuisance," in some phases at least, resembles disorderly conduct in its requirement that the proscribed conduct annoy, alarm or inconvenience the public or "a considerable number of persons" [existing P.L. § 1530(1, 4)]. Generally speaking, however, disorderly conduct relates to a specific act or acts of brief duration while nuisance involves the creation or maintenance of a continuing condition. In practical application, most criminal nuisance cases fall into two categories: (1) the maintenance of manufacturing plants, entertainment resorts and the like, which, by virtue of excessive noise, noxious gases, etc., annoy or offend groups or areas of the community; and (2) the conduct of resorts where people gather for illegal or immoral purposes.

Subdivision 1 of the proposed section deals with the first category, presently covered by a provision penalizing one who "annoys, injures or endangers the comfort, repose, health or safety of any considerable number of persons" [existing P.L. § 1530(1)]. One difficulty with this offense is that, frequently entailing fine questions concerning the relative rights of plant operators or business people on the one hand and residents of the vicinity on the other, prosecutions therefor often boil down to issues having a distinctly civil flavor. This problem is accentuated by the fact that "public nuisance," as presently defined and construed, requires little if any criminal intent, being virtually a crime of absolute liability satisfied by unlawful or improper conduct having an injurious effect on the public [existing P.L. § 1530; *Bohan v. Port Jervis Gas-Light Co.*, 122 N.Y. 18, 32-33, 25 N.E. 246 (1890); *People v. High Ground Dairy Co.*, 166 App.Div. 81, 82, 151 N.Y.S. 710 (2d Dept. 1915)]. The proposed provision demands greater culpability and injects greater criminal dimension by requiring that the proscribed condition be created or maintained "knowingly or recklessly", that is, with full awareness and a conscious disregard of the injurious conditions created or of the risk thereof.

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Subdivision 2 deals with the illegal or immoral resort phase of nuisance, now mainly covered by a provision penalizing conduct of that nature which "offends public decency" [existing P.L. § 1530(2); see, also, § 1533, addressed to narcotics resorts]. Since the maintenance of such a resort almost invariably involves the commission of another and more specific offense (e. g., promoting gambling, promoting prostitution, selling narcotics), the necessity for a "nuisance" provision in this area appears debatable. The theory of this kind of nuisance is, however, that it penalizes "inducing vice, rather than the vice itself" and, hence, is "independent of any crime which may be committed" in conjunction therewith [People v. Vandewater, 250 N.Y. 83, 93, 164 N.E. 864 (1928)].

Assuming its necessity and validity, this crime should be strictly confined within its traditional boundaries. It has, however, been loosely extended beyond the illegal or immoral resort concept to include premises where abortions are performed, where indecent shows are presented, and where almost any sort of offense occurs with some degree of regularity [see People v. Curtis, 152 App.Div. 372, 136 N.Y.S. 582 (4th Dept. 1912), aff'd 206 N.Y. 747; People v. Doris, 14 App.Div. 117, 43 N.Y.S. 571 (1st Dept. 1897)]. The proposed provision seeks to exclude such situations and to restrict the offense to its generic scope by limiting the kinds of resorts prohibited to those where persons gather for purposes of "engaging in" unlawful conduct.

§ 250.30 Offensive exhibition

This section collects and substantially restates a series of existing provisions defining narrow offenses which, though very seldom giving rise to prosecutions, doubtless have utility from a deterrent standpoint (existing P.L. §§ 831, 832, 833, 834).

§ 250.35 Cruelty to animals

This section restates a variety of overlapping Penal Law provisions proscribing cruelty to animals.

Subdivision 1 substantially restates existing Penal Law §§ 185, 187, 189, 191 and 194. The comprehensive term "cruel mistreatment," as used in this subdivision, is designed to embrace every conceivable type of cruelty.

Subdivisions 2 and 3 substantially restate existing Penal Law §§ 185 and 190.

Subdivision 4 substantially restates existing Penal Law §§ 185 and 186.

Subdivision 5 substantially restates existing Penal Law §§ 181 and 182.

The final paragraph of this proposed section restates without change the second paragraph of existing Penal Law § 185.

ARTICLE 255: OFFENSES AGAINST PRIVACY OF COMMUNICATIONS

§ 255.00 Eavesdropping; definitions of terms

This section is new. It also includes some of the "exemptions" in existing Penal Law § 739.

§ 255.05 Eavesdropping

This section substantially restates existing Penal Law § 738.

§ 255.10 Possession of eavesdropping devices

This section substantially restates existing Penal Law § 742.

§ 255.15 Failure to report wiretapping

This section substantially restates existing Penal Law § 744.

§ 255.20 Divulging an eavesdropping order

This section substantially restates existing Penal Law § 745.

§ 255.25 Tampering with private communications

Subdivisions 1 and 2 substantially restate existing Penal Law § 553 (1-4). Subdivisions 2 and 3 are substantial restatements of part of existing Penal Law § 743(1).

§ 255.30 Tampering with private communications; defenses

This section is new. With respect to subdivision 3, this defense is inherent in the concomitant duty of communications company employees, both in the revision and under existing law, to withhold certain communications from their addressees and to inform the proper authorities thereof [see proposed § 255.35 and existing P.L. § 743(1) (part)].

§ 255.35 Failing to report criminal communications

This section substantially restates the latter part of existing Penal Law § 743(1).

**ARTICLE 260: OFFENSES AFFECTING THE MARITAL
RELATIONSHIP**

This Article collects a number of crimes scattered through the existing Penal Law all of which deal with marriage. However, one such crime in the existing law, "Adultery" (P.L. §§ 100-103), is omitted from the revision. A majority of the Commission is of the opinion that the basic problem is one of private rather than public morals, and that its inclusion in a criminal code neither protects the public nor acts as a deterrent. In fact, it may well be said that proscribing conduct which is almost universally overlooked by law enforcement agencies tends to weaken the fabric of the whole penal law.

§ 260.00 Unlawfully solemnizing a marriage

This section substantially restates existing Penal Law § 1450.

§ 260.05 Unlawfully issuing a dissolution decree

This section substantially restates existing Penal Law § 1451.

§ 260.10 Unlawfully procuring a marriage license

Subdivision 1 substantially restates existing Penal Law § 1453; but subdivision 2 is new. Present law punishes the consort of a bigamous marriage (existing P.L. § 343), but makes no comparable provision for a person who, though himself eligible to marry, obtains a license to marry one who is already married. Subdivision 2 so provides and thereby makes this crime parallel to bigamy.

§ 260.15 Bigamy

This section substantially restates existing law. Subdivision 1 is derived from existing Penal Law § 340, and subdivision 2 states the "consort" equivalent of existing Penal Law § 343.

§ 260.20 Unlawfully procuring a marriage license; bigamy; defenses

This section is new and applies to the two preceding sections. It should be noted that proposed §§ 260.10 and 260.15, on their faces, appear as crimes of absolute liability. This section ameliorates those provisions by furnishing a defense to one who, though engaging in the proscribed conduct, reasonably believed that both he and the other party to the marriage were in a position to marry.

§ 260.25 Incest

This section is derived from existing Penal Law § 1110, without substantive change. The formal change, however, of listing the prohibited degrees of consanguinity, obviates the necessity of searching the law to obtain the information (see Domestic Relations Law § 5).

§ 260.30 Incest; corroboration

This section is new and accords with this revision's policy of requiring corroboration in crimes of a sexual nature (see note to proposed § 135.15).

ARTICLE 265; OFFENSES RELATING TO CHILDREN AND INCOMPETENTS

Existing Penal Law Article 44, "Children," contains twenty-five sections, some of which are archaic or otherwise unnecessary and some of which properly belong in other bodies of law (see Table II following text of proposed law, for disposition of individual sections). Since this revision groups offenses by subject matter, existing Penal Law §§ 483-a and 483-b, dealing with carnal abuse of children, are treated in proposed Article 130, "Sex Offenses"; and existing Penal Law §§ 484-e through 484-h, on comic books and pornography, are included in proposed Article 240, "Obscenity and Related Offenses." The balance of existing Article 44 has been condensed into four sections (proposed §§ 265.00 through 265.15).

§ 265.00 Abandonment of a child

See note to proposed § 265.05.

§ 265.05 Non-support of a child

Ideally, the problems of abandonment and non-support of children should not be in a penal code at all. The primary objective of legislation in this area should be to compel recalcitrant parents and guardians to recognize and fulfill their legal and moral obligations of care and support. Since this is difficult to achieve by imprisoning offenders, the optimum solution is a judicial and administrative framework such as is found in the Family Court Act. However, practical experience has shown that penal sanctions serve a necessary function in this area as a deterrent and, occasionally, are the only effective means of dealing with the situation.

This revision, therefore, continues some of the provisions of existing law. Proposed § 265.00, "Abandonment of a child," is derived from existing Penal Law § 481; the only

change being to reduce the punishment from a seven year maximum to a four year maximum. Proposed § 265.05, dealing with non-support, is derived from existing Penal Law § 482(1), with one clarifying change; where the present provision ambiguously refers to "a minor," the revised section specifies "a child less than sixteen years old." Existing Penal Law § 480, which was seemingly intended to be a separate and distinct crime, requiring proof of both abandonment and non-support, is here omitted. There is no reason why a defendant who has both abandoned a child and refused to support him cannot be charged in the one prosecution with separate counts under proposed §§ 265.00 and 265.05.

§ 265.10 Endangering the welfare of a child

Subdivision 1 of the section is derived from existing Penal Law § 483 and subdivision 2 from existing Penal Law § 494. As noted above with respect to abandonment and non-support, the problems of the neglect of children and juvenile delinquency and the acts of adults which cause or foster these conditions are not usually soluble by the imposition of stringent sanctions. The better course is the one charted in the Family Court Act, which deals specifically and in detail with these problems. However, where the processes of the Family Court may be inappropriate in a particular instance, the proceedings can be referred to a criminal court. Subdivision 2 of this section, therefore, complements and supplements the Family Court proceedings, and to promote uniformity, the definitions of "neglected child," "juvenile delinquent" and "person in need of supervision" are here defined by cross-reference to the Family Court Act [see Family Court Act §§ 312 and 712(a) and (b)].

§ 265.15 Unlawfully dealing with a child

This section is derived from existing Penal Law §§ 484 and 483-c. Of the seven subdivisions of § 484, two (subds. 4 and 6) are transferred to the General Business Law and one (subd. 5-a) is omitted as unnecessary. The remaining four subdivisions plus existing Penal Law § 483-c, dealing with tattooing of a child, are retained in the revision.

Subdivision 1 expresses the pertinent provisions of existing Penal Law § 484(1). Present §§ 484-a and 484-b state limitations on the applicability of § 484(1) as, in fact, do other provisions outside the Penal Law (e. g., General City Law § 18-b and General Municipal Law § 121-b). It is recommended that §§ 484-a and 484-b be transferred to the General Business Law. Therefore, paragraph (c) of proposed subdivision 1 constitutes a broad exception to the ap-

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plicability of the subdivision in those instances where the prohibited conduct is "otherwise permitted by law."

Subdivision 2 is derived from existing Penal Law § 484(2) and subdivision 3 from existing Penal Law § 484-c. In each instance the age of the child involved, presently set at sixteen years, is increased here to eighteen years.

Subdivisions 4 and 5 are derived from existing Penal Law § 484(3) and (5), respectively. The revision limits the scope of the offenses to selling alcoholic beverages or tobacco to a child, whereas present law also encompasses giving these articles away or furnishing them to a child. The reason for this limitation is to avoid the possibility of prosecution of a parent who gives his seventeen year old child a glass of beer or a cigarette.

§ 265.20 Endangering the welfare of an incompetent person

This section is derived from existing Penal Law §§ 1121 and 1123. The latter refers to a person who is incompetent to care for himself "from any cause." As the legislative intent is not clear, nor is there any reported judicial decision construing it, the revision attempts to clarify the situation by limiting incompetency to one unable to care for himself "because of mental disease or defect."

ARTICLE 270: FIREARMS AND OTHER DANGEROUS WEAPONS

This Article carries over from the existing Penal Law a series of provisions (existing P.L. §§ 1896-1904) which are the product of some four years of study resulting in legislation sponsored by the "Joint Legislative Committee on Firearms and Ammunition," which is currently continuing its endeavors in that field. Under the circumstances, the existing provisions are here restated verbatim except for certain technical changes of language necessary to conform them to the pattern and sentencing structure of the proposed Penal Law (see Table I following text of proposed law, for derivation). Owing to time factors, however, the proposed Article does not contain certain amendments enacted at the 1964 legislative session.

**ARTICLE 275: OTHER OFFENSES RELATING TO
PUBLIC SAFETY**

§ 275.00 Unlawfully dealing with fireworks

This section states the provisions of existing Penal Law § 1894-a(1-a, 2, 6, 7).

§ 275.05 Unlawfully possessing noxious material

This section substantially restates existing Penal Law § 726.

§ 275.10 Creating a hazard

This section substantially restates existing Penal Law §§ 1920, 1923.

§ 275.15 Unlawfully refusing to yield a party line

This section substantially restates existing Penal Law § 1424-a(1, 2). Subdivision 3 of § 1424-a is transferred to the General Business Law.

Staff Comments on the Proposed Penal Law 1964 (5 of 5)

PART THREE
ADMINISTRATIVE AND CIVIL
PROVISIONS

This Part, consisting of proposed §§ 400.00-435.00, collates and restates verbatim twenty-four provisions of the existing Penal Law which are not penal in character but are of an administrative and civil nature (see Table I following text of proposed law, for derivation). Interspersed with substantive provisions, they tend to dilute the substance and impair the continuity of the existing Penal Law. For that reason, they are here collected, grouped and classified in this specially created "Part Three." The Commission intends to undertake a study of these administrative provisions, and, where necessary, to propose formulations that will adequately meet modern public needs.

*

APPENDIX A

SURVEY OF THE NEW YORK STATE SENTENCING STRUCTURE AS OF 1963

A. STATE PRISON

Offenses Punishable by Imprisonment in State Prison

In New York State crimes are classified as either felonies or misdemeanors. Only felonies are punishable by imprisonment in a state prison. Penal Law, § 2. And the answer to whether a crime is a felony depends upon the length of the term of imprisonment the court is authorized to impose for the crime. See *People v. Kaminsky*, 208 N.Y. 389, 394, 102 N.E. 515 (1913). Thus, in order to know which crimes are punishable by imprisonment in a state prison or, indeed, to understand anything about the sentencing structure it is important that one be familiar with the length of the term that makes a crime a felony rather than a misdemeanor.

The starting point in understanding the felony-misdemeanor system of classification as it is used in this state lies in our constitutional principle that infamous punishment cannot be inflicted unless the accused has been prosecuted in a proceeding that includes indictment (N.Y. Const., Art. 1, § 6) and the right to a common law jury (*id.*, Art. 1, § 2). However, except for a reference in Article 1, section 6 to "capital or otherwise infamous crime"—which establishes the obvious: that a capital crime is an infamous crime—the definition of infamous crime is not found in the Constitution. The definition must be sought in the interpretations accorded this concept throughout the history of our state. In this connection, the Court of Appeals has pointed out that during the years of our statehood it has been fairly well understood that a crime is infamous if the punishment which might be inflicted is death, imprisonment in a state prison or imprisonment in any prison for a term longer than one year. *People v. Erickson*, 302 N.Y. 461, 466, 99 N.E.2d 240 (1951); *People v. Bellinger*, 269 N.Y. 265, 199 N.E. 213 (1935); *People ex rel. Cosgriff v. Craig*, 195 N.Y. 190, 196, 88 N.E. 38 (1909).

The present statutory outline of the dividing line between felony and misdemeanor indicates that this system of classification represents the legislature's manner of distinguishing between infamous and petty crimes.

The initial point of reference in the statutory outline is Section 2 of the Penal Law, which provides in pertinent part:

"Division of crime. A crime is:

1. A felony; or,
2. A misdemeanor.

Felony. A 'felony' is a crime which is or may be punishable by:

1. Death; or,
2. Imprisonment in a state prison.

Misdemeanor. Any other crime is a 'misdemeanor.'

Section 2 does not, however, provide any information as to when a crime is punishable by imprisonment in a state prison. This information is found in other sections of the Penal Law, but, as we shall see, there still are some areas of doubt.

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Section 2183 of the Penal Law provides that imprisonment in a state prison is mandatory if the term imposed exceeds one year¹ and section 2182 subd. 2 prohibits imprisonment in a state prison if the term or minimum term is less than one year.² Thus it appears that crimes punishable by imprisonment for a term exceeding one year are punishable by terms long enough to make them felonies and crimes punishable by imprisonment for a maximum term of less than one year are misdemeanors.

Crimes punishable by imprisonment for a maximum term of exactly one year present a more difficult problem. Subdivision 1 of section 2182 provides:

"1. Where a person is convicted of a crime, for which the punishment inflicted is imprisonment for a *term of one year*, he may be sentenced to, and the imprisonment may be inflicted by, confinement either in a county jail, or in a penitentiary or *state prison*." (Emphasis supplied.)

This section, on its face, appears to permit punishment for such crimes to be inflicted by imprisonment in a state prison. Thus crimes punishable by imprisonment for not more than one year seem to come within the definition of "felony" in Penal Law, section 2 and there is at least one crime in the Penal Law which the legislature has characterized as a felony and made punishable by imprisonment for not more than one year (see Penal Law, § 954).³

Of course, in a case where a crime is punishable by imprisonment for not more than one year and the legislature has specified that such imprisonment be in a penitentiary or county jail, the crime is a misdemeanor and there is no problem. Also, it has been held that where the legislature has not specified the place of imprisonment but labeled a crime punishable by imprisonment for not more than one year as a misdemeanor, the crime is not punishable by imprisonment in a state prison. *People ex rel. Jaffe v. Henderson*, 245 App.Div. 169, 281 N.Y.Supp. 87 (4th Dept. 1935) aff'd mem. 270 N.Y. 638. In reaching its decision, the Court dealt with the possibility of imprisonment in a state prison by drawing attention to the provision requiring that certain sentences to

¹ Section 2183 contains an exception applicable "where special provision is made by statute as to the punishment for any particular offense or class of offenses or offenders." This exception appears to cover cases where penitentiary imprisonment for more than one year is authorized as an alternative to state prison imprisonment (discussed, infra, part "D" of this study). Since penitentiary imprisonment is an alternative, this exception does not alter the rule as to when crimes may be punishable by imprisonment in a state prison.

It might be noted that there is one offense punishable by imprisonment for a term in excess of one year where the place of imprisonment is limited to a place other than a state prison. Penal Law section 1221, subdivision h authorizes a penitentiary sentence of not less than one nor more than three years for a person convicted of intoxication in a public place, if such person has previously been committed to the custody of a board of inebriety and

the board has applied to be released of its custodial duties. However, the provisions authorizing the operation of such boards (Gen.Mun.Law §§ 136-139-b) were repealed in 1952 as obsolete (L.1952, ch. 133) and, therefore, the prerequisite for the sentence cannot be met.

² Section 2182 subd. 2, prohibiting a sentence of imprisonment in a state prison where the minimum term is less than one year does not apply to indeterminate sentences of one day to life. *People ex rel. Schapp v. Martin*, 6 N.Y.2d 371, 189 N.Y.S.2d 884 (1959). Since such a sentence is only an alternative sentence for crimes otherwise punishable as felonies it does not affect the definition.

³ Also, the Uniform Criminal Extradition Act contains a crime characterized as a "felony" which is punishable by "imprisonment in a state prison or penitentiary for the term of one year" (Code of Cr.Proc., § 839).

state prison be indeterminate (Penal Law, § 2189), and stated (245 App.Div. 172-173):⁴

"It should be noted that the salutary provisions of the law with reference to indeterminate sentences by its terms exclude the imposition of a sentence to imprisonment in a state prison for a violation of this statute. To make up such a sentence there must be a maximum and minimum. The minimum cannot be less than one year, and although the law does not prescribe the shortest period that may be between the maximum and minimum of an indeterminate sentence, it is obvious that it must be at least more than an instant, else the purpose of the statute would be impossible of attainment. Nowhere in the Penal Law can there be found a crime designated as a felony for which the maximum penalty prescribed is one year [The Court evidently overlooked section 954]. The only sentence that could be pronounced in this case would be one of not less than one year nor more than one year. Validity of such a sentence is excluded by a contemplation of the objects of the statute as well as by its terms."

The above reasoning might well be applied to offenses not specifically labeled as felony or misdemeanor and punishable by imprisonment not exceeding one year with no place of imprisonment specified, but no case has been found in which a court has done so. However, the First Department has had occasion to pass upon the question of whether such an offense is punishable by imprisonment in a state prison and hence a felony. *Mairs v. Baltimore & Ohio R. R. Co.*, 73 App.Div. 265, 272-273, 76 N.Y.Supp. 838 (1902). The Court held that the crime was a felony and upon appeal, the Court of Appeals—although able to decide the case without passing on the question—indicated that an offense so punishable may well be a felony (175 N.Y. 409, 413, 67 N.E. 901).

The section under consideration in the *Mairs* case (then Penal Code, § 633 and presently Penal Law, § 365) was then as it is now, one of a number of sections dealing with bills of lading and one of these sections (then Penal Code, § 629, now Penal Law, § 360) provided that a violation would be a misdemeanor while the others (then Penal Code, §§ 631, 632, 633, now Penal Law, §§ 363, 364, 365, respectively) did not specify the character of the offense. Each of these sections was and is "punishable by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars or by both." The Appellate Division stated that the legislature's "omission to define the grade of the offense in this section [present Penal Law, § 365] is peculiarly significant," and evidently took this as an expression of the legislature's intention to make the offense punishable by imprisonment in a state prison.

In another case dealing with this question (*People v. Kelly*, 97 N.Y. 212 [1884]), the Court of Appeals had under consideration the statute prescribing the punishment for assault in the third degree (then Penal Code, § 222, now Penal Law, § 245). Assault in the third degree has never been labeled by the legislature as either felony or misdemeanor and was then, as it is now, "punishable by imprisonment for not more than one year or by a fine of not more than five hundred dollars, or both." The relator in the *Kelly* case had been convicted of this offense and sentenced to imprisonment in a state prison for the term of one year. Although there was no majority opinion in the Court below (3rd Dept., 32 Hun 536), all concurred in the view that assault in the third degree is not punishable by imprisonment in a state prison. But neither of the two justices who wrote opinions in the court below was will-

⁴ It is interesting to note that the Court, although dealing with a crime the legislature had specifically labeled "misdemeanor," stated that "the case turns upon the question of whether a violation of the section . . . is a felony" (245 App.Div. 170).

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ing to say that the relator could be sentenced at all under the aforesaid section. Mr. Justice Boeckes remarked that the punishment specified for assault in the third degree is identical with the punishment specified in the catch-all section of the Penal Law (then Penal Code, § 15; now Penal Law, § 1937) applicable to misdemeanors for which no other punishment is expressly prescribed; noted that this section provides for imprisonment only in a penitentiary or county jail; and held that sentence should have been pronounced under that section (32 Hun 540). The Court of Appeals had only this to say (97 N.Y. 215):

"The court below was of the opinion that the sentence was without authority of law and void, that the offense was a misdemeanor and punishable by imprisonment in a penitentiary or county jail for not more than one year or by a fine of not more than \$500, or by both, as provided by section 15 of the Penal Code [now Penal Law, § 1937]. In this conclusion we concur."

It is submitted that if the punishment for assault in the third degree had included a fine in an amount exceeding \$500 (see e. g., Penal Law, § 1960), or a fine of less than \$500 (see e. g., Penal Law, § 1428), or had not included a fine at all (see e. g., Penal Law, § 773), the Court might not have been able to bypass section 222 (now Penal Law, § 245).

In sum then, while it is rather hazardous to venture a generalization in this area, it appears that a felony is an offense punishable by death, or by imprisonment for a term exceeding one year.

Term of Sentence; First Offenders

The length of the sentence that may be imposed for a felony is either specifically prescribed by the section or article in which the crime is defined or left to the catch-all section that prescribes the punishment of felonies for which no other punishment is specifically prescribed (Penal Law, § 1935). Although there is little or no uniformity in the language of the various provisions, the sentences they prescribe fall into six basic categories:⁵

- (1) The death penalty (Murder 1, Penal Law, § 1045; Kidnapping, id., § 1250; Treason, id., § 2382);
- (2) Imprisonment for the term of the offender's natural life (Murder 1, Penal Law, § 1045);
- (3) Imprisonment for an indeterminate term with a minimum of not less than a specified number of years and a maximum which shall be the offender's natural life (Murder 2, Penal Law, § 1048; Kidnapping, under certain circumstances, id., § 1250; Lynching, id., § 1391);
- (4) Imprisonment for an indeterminate term with a minimum of one day and a maximum of the offender's natural life (Carnal abuse of a child, Penal Law, § 483-a; Sodomy 1, id., § 690; Rape 1, id., § 2010; Assault 2 with intent to commit any of the foregoing or Rape 2 or Sodomy 2, id., § 243; Sexual abuse while committing a felony, id., § 1944-a);
- (5) Imprisonment for a term of not more than or not exceeding a specified number of years (see e. g., Forgery 1, Penal Law, § 886);
- (6) Imprisonment for an indeterminate term the minimum of which shall be not less than a certain number of years and the maxi-

⁵ Penal Law, § 2191 prescribes instructions for sentencing under a seventh category, which seems to be no longer in existence. The section provides that where a crime is punishable by imprisonment for not less than

a specified number of years with no maximum, the court may impose a sentence to imprisonment for life or for any number of years not less than the amount prescribed.

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num of which shall be not more than a certain number of years (see e. g., Robbery 1, Penal Law, § 2125).

All offenders now sentenced to state prison (except those sentenced to terms of one day to life, as in category [4] above) are confined pursuant to indeterminate sentences with fixed minimum and maximum terms, or fixed minimum terms and a maximum of life imprisonment. Under this type of sentence the offender may be paroled after he has served the minimum term.⁶ Correction Law, § 212. While on parole, however, he is in the legal custody of the warden and remains so until the expiration of the maximum term specified in his sentence (id., § 213) unless sooner discharged from parole by the Board of Parole (id. § 220).

Under our statutory setup, the sentencing court determines and fixes the actual sentence within the limits prescribed by the legislature (Penal Law, § 1931). However, the limits are usually such that the court has very broad discretion.

With respect to the minimum, in most cases the legislature has not specifically prescribed one (as in [5] above). Where no minimum has been specifically prescribed, the court—if it sentences the offender to a state prison—fixes the minimum anywhere between the shortest period for any state prison sentence; viz., one year, and a period of one-half the maximum prescribed by the legislature for the crime involved (Penal Law, § 2189). It should also be noted that in these cases the court has discretion to sentence a male offender to imprisonment in a penitentiary for a term of one year or less (Penal Law, § 2186) and a female offender to imprisonment in a penitentiary for less than one year (Penal Law, § 2187)⁷ rather than to imprisonment in a state prison.

In cases where the legislature has prescribed the minimum, the court's discretion is narrower and the sentence must be to a state prison for an indeterminate term of at least the minimum number of years prescribed by the legislature for the crime.⁸

With respect to the maximum, the court may make it any period within the maximum prescribed by the legislature (Penal Law, § 2192) unless a minimum is specifically prescribed for the crime, in which case the maximum would have to be more than the minimum.

Cases involving life imprisonment are somewhat different. Where an offense is punishable by an indeterminate term consisting of a minimum of not less than a specified number of years and a maximum which shall be life—as in category (3) above—the court determines a minimum term of the specified number of years, or more, but must fix the maximum of life. *McHugh v. Joyce*, 2 App.Div.2d 976, 157 N.Y.S.2d 129 (2d Dept. 1956). When no minimum is prescribed and the sentence in the statute is imprisonment for the term of the offender's natural life—as in category (2) above—the court sentences the offender to life imprisonment. But, in such a case, the offender is considered to be serving an indeterminate sentence with a minimum of 40 years and a maximum of life (Penal Law, § 1945 subd. 6).⁹

⁶ Offenders serving terms of one day to life are considered for parole within six months after conviction and at least once every two years thereafter (Correction Law, § 214, subd. 3).

⁷ These sections state that imprisonment may be either in a penitentiary or a county jail. However, Correction Law, § 500-a prohibits the use of a county jail as a place where convicted felons may be imprisoned.

⁸ However, Penal Law, § 2186 seems to vest the court with authority to

sentence a male between the ages of 16 and 21 years to a penitentiary upon conviction of a crime for which a minimum of more than one year has been specifically prescribed by statute.

⁹ Statutes prescribing life imprisonment as a maximum (except for those prescribing imprisonment for a minimum of one day and a maximum of life) are mandatory and exclusive. Such terms cannot be suspended (Penal Law, § 2188) and are specifi-

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Another important point to bear in mind in connection with the length of any indeterminate sentence is that every offender sentenced to serve a minimum term of more than 30 years is eligible for parole as if his sentence had been for a minimum of thirty years (Penal Law, § 1945 subd. 7).

The following table, showing the prison sentences prescribed by statute for some of the better-known crimes and some crimes which are not so well-known but which carry heavy penalties, should help to set the text in perspective.

Crime & Penal Law Section	Term Prescribed	
	Minimum	Maximum
Abduction—§ 70	None ^{9a}	10 years
Arson 1—§§ 221, 224	None	40 years
Arson 2—§§ 222, 224	None	25 years
Arson 3—§§ 223, 224	None	15 years
Assault 1—§§ 240, 241	None	10 years
Assault 2—§§ 242, 243	None	5 years
	or	
	One day (if with intent to commit a sex crime)	Life
Bribery—§§ 371, 372, 374	None	10 years
Bribery (sporting contests)— § 382 subd. 1	1 year	10 years
Bribery (accepting a bribe)— § 382 subd. 2	1 year	5 years
Burglary 1—§§ 402, 407	10 years	30 years
Burglary 2—§§ 403, 407	None	15 years
Burglary 3—§§ 404, 407	None	10 years
Carnal abuse of a child (child 10 years old or under, defendant 18 or over)—§ 483-a	None	10 years
	or	
Sodomy 1—§ 690	One day	Life
	None	20 years
	or	
	One day	Life
Sodomy 2—§ 690	None	10 years
Extortion—§ 852	None	15 years
Extortion by threat to kidnap or to injure with weapon—§ 852	5 years	20 years
Blackmail—§ 856	None	15 years
Forgery 1—§§ 884, 885, 886	None	20 years
Forgery 2—§§ 887, 888	None	10 years
Forgery 3—§§ 889, 893	None	5 years
Operating a policy business— § 974-a	None	5 years

cally excluded from the multiple of-
fender laws. This does not mean,
however, that the court cannot add
time to the minimum it would other-
wise impose if the defendant was

armed as provided in Penal Law,
§ 1944. *People v. Obrictes*, 269 App.
Div. 960, 58 N.Y.S.2d 163 (2d Dept.
1945), aff'd mem. 295 N.Y. 670.

^{9a} None specifically prescribed.

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Crime & Penal Law Section	Term Prescribed	
	Minimum	Maximum
Book-making as a felony— § 986-c	None	5 years
Murder 1—§ 1045-a	40 years	Life
Murder 2—§§ 1046, 1047, 1048	20 years	Life
Manslaughter 1—§§ 1049, 1050, 1051	None	20 years
Manslaughter 2—§§ 1052, 1053	None	15 years
Criminal negligence resulting in death (vehicle, vessel, hunting) —§ 1053-a-f	None	5 years
Incest—§ 1110	None	10 years
Kidnapping—§ 1250. If offender is parent of person kidnapped	None	10 years
Otherwise	20 years	Life (If person kidnapped is returned unharmd before the trial; or upon recommendation of jury.)
Grand Larceny 1—§§ 1294, 1295	None	10 years
Grand Larceny 2—§§ 1296, 1297	None	5 years
Contriving a lottery—§ 1372	None	2 years
Lynching—§ 1391	20 years	Life
Maiming—§ 1400	None	15 years
Damaging a building or vessel by explosion—§ 1420 and	None	10 years
If life or safety of human being endangered	None	25 years
Damaging a building or property used for religious or cemetery purposes by explosion—§ 1420-a and	None	20 years
If life or safety of a human be- ing is endangered	None	50 years (highest maximum number of years prescribed for any crime)
Damaging military or naval equipment or stores (wilfully or maliciously)—§§ 1435, 1436, 1437	5 years	25 years
Perjury 1 and subornation of perjury 1—§§ 1620-a, 1632, 1633	None	5 years
Violations of Public Health Law with respect to narcotics—§ 1751		
Subd. 1—sale, gift or offer of narcotic to person under 21 years and	7 years	15 years
in any other case	5 years	15 years
Subd. 2—possession of narcotic with intent to sell	5 years	15 years

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Crime & Penal Law Section	Term Prescribed	
	Minimum	Maximum
Subd. 3—possession of certain quantities of narcotics	3 years	10 years
Endangering life by maliciously placing explosive near building, car, vessel, although no damage is done—§ 1895	None	25 years
Wilfully discharging a loaded firearm at an aircraft on ground or aloft—§ 1919	None	5 years
and If safety of any person endangered	None	20 years
Injuring RR property and appurtenances; obstructing tracks—§ 1991	None	5 years
and If safety of any person endangered	None	20 years
Rape 1—§ 2010	None	20 years
		or
Rape 2—§ 2010	One day	Life
Robbery 1—§§ 2124, 2125	None	10 years
Robbery 2—§§ 2126, 2127	10 years	30 years
Robbery 3—§§ 2128, 2129	None	15 years
Compulsory prostitution of women—§ 2460	None	10 years
Subds. 1—5, 7, 8 (Importing and exporting women for prostitution; compulsory prostitution)	2 years	20 years
Subd. 6—(Receiving money or other valuable consideration for procuring and placing)	3 years	25 years
Any felony (where no other punishment is prescribed by statute)—§ 1935	None	7 years

Additional Sentence if Armed ¹⁰

Sections 1905 and 1944 of the Penal Law vest the court with authority to tack on to the punishment elsewhere prescribed for a crime an additional term of not less than 5 nor more than 10 years:

- (1) If the offender while in the act of committing or attempting to commit the crime was an occupant of a stolen automobile or an automobile carrying fictitious license plates or an automobile which has been used in the commission of a crime or in an attempt to commit a crime (Penal Law, § 1944); or
- (2) If the offender while in the act of committing, attempting to commit, or leaving the scene of the crime was armed with any

¹⁰ The reported cases seem to deal only with the circumstances outlined in category (2) above; i. e., committing a crime while armed. Indeed, prior to 1963 both provisions were contained in one section and that was the caption of the section. No case has been found dealing with the circumstances outlined in category (1).

one of the weapons or dangerous instruments specified in Penal Law section 1897 (id., § 1905).

Prior to 1936, the increased punishment was mandatory where one of the above circumstances was present. *People v. Krennen*, 264 N.Y. 103, 109, 190 N.E. 167 (1934). But in 1936, the section was amended (Ch. 53 L.1936) and imposition of the additional punishment is now discretionary. See e. g., *People v. Kent*, 10 App.Div.2d 662, 196 N.Y.S.2d 154 (4th Dept. 1960).

Although the additional punishment is not in the nature of punishment for a separate crime, the factors set forth do not necessarily have to be elements of the crime charged: they merely are aggravating circumstances calling for additional punishment. See, e. g.: *People v. Griffin*, 7 N.Y.2d 511, 514-515, 199 N.Y.S.2d 674 (1960); *People v. Krennen*, 264 N.Y. 108, 110, 190 N.E. 167 (1934); *People ex rel. Bryan v. Jackson*, 5 App.Div.2d 723, 168 N.Y.S.2d 786 (3rd Dept. 1957).

Where the increased punishment is imposed it seems that the proper method is to add it as an indeterminate term to the indeterminate term imposed for the felony charged, and the result is simply an increase in the minimum and maximum term imposed for the crime. *People ex rel. Markov v. Brophy*, 284 N.Y. 323, 31 N.E.2d 43 (1940); *People v. Procito*, 261 N.Y. 376, 185 N.E. 673 (1933). However, the increased punishment does not merge completely with the punishment for the substantive crime: if improperly imposed it is severable and will not invalidate the entire sentence. *Matter of Lyons v. Robinson*, 293 N.Y. 191, 56 N.E.2d 546 (1944).

One further point might be noted about these provisions and that is their effect upon and relation to the court's power to suspend sentence or the execution of sentence.¹¹ If the court imposes the increased punishment it cannot suspend sentence or execution on the increased punishment (this is written into the sections). And even if the court does not impose the increased punishment, neither sentence nor execution can be suspended if the defendant is convicted of a felony while armed with any of the weapons or dangerous instruments specified in Penal Law section 1905. Penal Law, § 2188(c); *People ex rel. Bennett v. Merritt*, 173 Misc. 355, 18 N.Y.S.2d 146 (S.Ct. Orange Co. 1940), aff'd mem. 286 N.Y. 647.

Term of Sentence; Second and Third Offenders

Penal Law section 1941 prescribes a mandatory increase in the length of the sentence to be imposed upon a person convicted of a felony not punishable by a term of life imprisonment, if the offender has "been once or twice convicted within this state of a felony, of an attempt to commit a felony, or, under the laws of any other state, government, or country of a crime which if committed within this state, would be a felony" The increased punishment is not additional punishment for prior crimes: such crimes are merely elements in its determination. In other words, the punishment is only for the new crime but the prior convictions mandate the imposition of a heavier sentence. *People ex rel. Carollo v. Brophy*, 294 N.Y. 540, 63 N.E.2d 95 (1945).

Where an offender comes within the provisions of this section, the court must impose "an indeterminate term, the minimum of which shall be not less than one-half of the longest term prescribed upon a first conviction and the maximum of which shall be not longer than twice such longest term." Thus, for example, a defendant who previously has been convicted of either one or two felonies and presently stands convicted of Forgery in the first degree (Penal Law, § 884), which is punishable as a first offense by imprisonment for a term not exceeding 20

¹¹ The topic of suspended sentences is covered more thoroughly, infra.

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years (id., § 886), would have to be sentenced as a second or third offender, as the case may be, to an indeterminate term with a minimum of 10 years and a maximum anywhere between the minimum and 40 years.

Significantly, the minimum the court must set, in the above example, is now 10 years whereas, if the defendant had been a first offender the court could have set the minimum anywhere between 1 and 10 years or could have fixed a term of one year or less and sentenced the defendant to a penitentiary.

It should be noted that although the statute provides that the court must sentence the offender as therein provided, the court still has the power to suspend sentence or the execution thereof. Penal Law, § 2188; *People v. Webster*, 279 App.Div. 944, 111 N.Y.S.2d 255 (2d Dept. 1952); cf. *Matter of Hogan v. Bohan*, 305 N.Y. 110, 113, 111 N.E.2d 233 (1953).

For the purposes of this section, where sentence or the execution of sentence has been suspended on a prior felony, the prior felony counts as a conviction for sentencing the defendant as a second felony offender (Code of Cr.Proc., § 470-b)¹² but does not count as a conviction for sentencing the defendant as a third felony offender. *People v. Shaw*, 1 N.Y.2d 30, 150 N.Y.S.2d 161 (1956); *People ex rel. Lozzi v. Fay*, 6 App.Div.2d 18, 175 N.Y.S.2d 236 (2d Dept. 1958) aff'd mem. 5 N.Y.2d 890. And this appears to be the rule even where the suspension was on a conviction that occurred in another jurisdiction. *People ex rel. Goldman v. Denno*, 9 App.Div.2d 955, 196 N.Y.S.2d 1 (2d Dept. 1959), rev'd on other grounds, 9 N.Y.2d 138.¹³

The section also provides that where two or more crimes are charged in separate counts of one indictment or information or in two or more indictments or informations consolidated for trial, they are deemed to be one conviction for the purpose of the increased punishment prescribed. This applies even if the indictments were not formally consolidated for trial, so long as they are tried together. *People ex rel. Janosko v. Fay*, 6 N.Y.2d 82, 188 N.Y.S.2d 477 (1959). However, it has been held that where a person pleads guilty to three separate indictments on the same day the provision does not apply and the crime alleged in each is deemed to be a separate conviction. *People v. Taylor*, 16 App.Div.2d 944, 229 N.Y.S.2d 862, (2d Dept. 1962) aff'd mem. 13 N.Y.2d 675.

Term of Sentence; Third Narcotic Offenders

Subdivision 2 of Penal Law section 1941 provides that upon conviction of a third felony¹⁴ under any law relating to narcotics the offender shall be sentenced to imprisonment for an indeterminate term with a minimum of not less than 15 years and a maximum which must be for his natural life.

The minimum sentence prescribed by this section is more than double the minimum that could be imposed upon a first offender for the most serious narcotic crime (sale to a minor, Penal Law, § 1751 subd. 1), it is triple the minimum for selling narcotics, and five times the minimum

¹² This is so even though upon a literal reading, section 470-b appears to require that the previous conviction be alleged in the indictment; a procedure prohibited by § 275-b of the Code of Criminal Procedure. *People v. Hunter*, 3 App.Div.2d 926, 162 N.Y.S.2d 624 (2d Dept. 1957) aff'd mem., 4 N.Y.2d 692.

¹³ It also should be noted that none of the felonies in Article 162 (bail

jumping, parole jumping, escape, unlawful communications with prisoners, etc.) count as prior felony convictions for the purposes of this section or section 1942 (Penal Law, § 1609).

¹⁴ The prior convictions include attempts to commit felonies and convictions under the laws of other jurisdictions for narcotic crimes which would be felonies if committed in this state.

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for possession with intent to sell. The maximum is a mandatory life sentence.

Except for the fact that the court has no discretion with respect to the maximum and the fact that sentence and the execution thereof cannot be suspended (Penal Law, § 2188) all of the provisions discussed, supra, with respect to the application of Penal Law section 1941 apply to the sentencing of third narcotic offenders.

Term of Sentence; Second and Third Conviction for Committing Crime While Armed, etc.

In addition to the punishment prescribed in section 1941 for second and third felony offenders the court may impose an extra term of not less than 10 nor more than 15 years if it appears that the offender committed the crime under the circumstances set forth in Penal Law sections 1905 and 1944 (armed with a weapon, etc.) and previously has been convicted of a felony so committed. Upon a third conviction of a felony so committed the court may impose an extra term of not less than 15 nor more than 25 years.

Term of Sentence; Fourth and Subsequent Offenders

Penal Law section 1942 prescribes a mandatory increase in the length of the sentence to be imposed upon a person convicted of a felony—"other than murder, first or second degree, or treason"—¹⁵ if the offender has "been three times convicted within this state, of felonies or attempts to commit felonies, or under the law of any other state government or country of crimes which if committed within this state would be felonious"

When an offender comes within the provisions of this section, the court must impose an indeterminate sentence with a minimum term equal to the maximum that could be imposed upon a first offender or 15 years whichever is greater and a maximum term which shall be life imprisonment. The court has no power to suspend this sentence or the execution thereof (Penal Law, § 2188).

Thus, for example, a defendant who previously has been convicted of three felonies and presently stands convicted of Grand Larceny in the first degree (Penal Law, § 1294), which is punishable as a first offense by imprisonment for a term not exceeding 10 years, (id., § 1295), would have to be sentenced as a fourth offender to an indeterminate term of 15 years to life. And the Forgery defendant (discussed, supra, in connection with second and third offenders) if convicted as a fourth felony offender would have to be sentenced to an indeterminate term of 20 years to life.

For the purposes of this section, where sentence or the execution of sentence has been suspended on a prior felony, the prior felony does not count as a conviction. *People ex rel. Marely v. Lawes*, 254 N.Y. 249, 172 N.E. 487 (1930).

Also, and as with second and third offenders, where two or more crimes are charged in separate counts of one indictment or information or in two or more indictments consolidated for trial, they are deemed to be one conviction for the purpose of the increased punishment prescribed.

Term of Sentence; Sex Offenders and Multiple Sex Offenders

In 1950 the legislature added to the law a new method of dealing with sex offenders convicted of crimes involving violence or the abuse of chil-

¹⁵ The quoted language was added to section 1942 in the year 1932 (Ch. 617, § 1) and the crimes it covers are those punishable by death or maximum of life imprisonment. However, the language does not cover Kidnapping which was made punishable by death or maximum of life imprisonment in 1933 (Ch. 773, § 1).

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dren (Ch. 525). Under this procedure the court, in lieu of any other sentence, can impose upon such an offender an indeterminate sentence with a minimum of one day and a maximum which shall be the duration of the offender's natural life.

The procedure was designed to vest the courts with the greatest possible flexibility in the sentencing of such offenders and "to give equal flexibility to the Departments of Correction and Mental Hygiene and the Division of Parole in treating them." (Gov. Dewey's mem. of approval, New York State Legislative Annual 353-354). A sentence of one day to life is not mandatory in any case but where authorized and imposed it cuts across and is used in lieu of other punishment for a first or multiple offender. Although infliction of this sentence is within the discretion of the trial court no court may impose it until the court has received a complete written report of a psychiatric examination of the defendant (Penal Law, § 2189-a).

While an offender sentenced to a term of one day to life could be subjected to imprisonment for his entire life the sentence is not really one of life imprisonment as that type sentence is generally understood. The clearest expression of the legislature's intent in this connection is found in subdivision 10 of Penal Law section 3, which provides that:

"The terms 'life imprisonment' or 'imprisonment for life' shall not include imprisonment for an indeterminate term having a minimum of one day and a maximum of natural life."

Significant differences between a one day to life sentence and an ordinary life sentence are found in the fact that a one day to life sentence may be imposed with execution suspended (Penal Law, § 2188), does not result in civil death (*id.*, § 511 subd. 2), does not preclude the offender from being restored to certain civil rights after he has been paroled (*id.*, § 510), and is not the type of life sentence that would deprive a child between the ages of 15 and 16 of automatic juvenile delinquency treatment (*id.*, § 2186). Differences also exist with respect to parole. An offender serving a one day to life sentence is eligible to be considered for parole within six months after conviction and once every two years thereafter (Correction Law, § 214).¹⁶ Also, the Board has absolute discretion to discharge the offender from parole and thereby terminate the sentence (*id.*, § 220).

Penal Law Sections Authorizing one Day to Life Sentences

First Offenders

Assault 2—§§ 242, 243 with intent to commit:

Rape 1 or 2;

Sodomy 1 or 2; or

Carnal abuse (under § 483-a only. See *Tesseyman v. State*, 21 Misc. 2d 534, 199 N.Y.S.2d 355 [Ct. Claims 1960]).

Carnal abuse of a child 10 or under by a person 18 or over—§ 483-a.

Sodomy 1—§ 690

Rape 1—§ 2010

¹⁶ Notwithstanding the provisions of Penal Law section 2182 subd. 2 a sentence of one day to life is inflicted by sentence of imprisonment in a state

prison. *People ex rel. Schapp v. Martin*, 6 N.Y.2d 371, 189 N.Y.S.2d 884 (1959).

First Offenders

Sexual Abuse while committing a felony—§ 1944-a:

Applies to any felony (except Murder 1) where offender carnally abuses child 16 or under or engages in immoral practice with sexual parts or organs of any person and wounds or inflicts grievous bodily harm upon that person or uses weapon, drug or gas.

Multiple Offenders

Carnal abuse of a child of over 10 and less than 16 years of age after prior conviction of a sex crime—§ 483-b.

The first offense under this section is a misdemeanor if the offender has not previously been convicted within or without the State of a similar crime or of the crime of, or an attempt to commit:

- Rape 1 or 2;
- Abduction;
- Sodomy;
- Incest;
- Endangering morals (§ 483);
- Carnal abuse (§ 483-a) or
- Assault 2 (as defined above; except this section adds abduction to the crimes therein enumerated).

General Multiple Sex Offender Statute;

Applies to Second or Subsequent Offense—§ 1940.16a

If person previously convicted in this state or elsewhere of the crime of or an attempt to commit:

- Rape 1 or 2;
- Sodomy;
- Sodomy 1;
- Carnal Abuse (483-a, 483-b); or
- Assault 2, with intent to commit

- Rape 1 or 2;
- Sodomy;
- Sodomy 1, or
- Carnal abuse

commits or attempts to commit "a felony."

Calculating Terms of Imprisonment

Every prisoner has an absolute right to receive credit against the sentence imposed by the court for any time spent by him in confinement "in a state institution for defective delinquents or insane criminals, county or city psychiatric institution, prison or jail¹⁷ prior to his conviction and before sentence has been pronounced upon him." (Penal

^{16a} The language of this section appears to make it applicable if the second or subsequent conviction is a conviction for any felony. It also should be noted that the statute is applicable even if the first offense was a misdemeanor, such as carnal abuse under

section 483-b or some cases of sodomy. No case construing this section has been found.

¹⁷ Confinement does not actually have to be in a real jail. The word jail has been construed to mean any

Law, § 2193). This credit is called "jail time". It is applied against a prisoner's minimum term to advance the date of his eligibility for parole and against his maximum term to terminate the sentence sooner.

Curiously, the legislature has not provided any credit for time in confinement after conviction but before the prisoner's arrival at the institution in which the sentence is to be served¹⁸, and the courts have held that no credit for such time can be allowed. *Bretti v. Eastman*, 16 App. Div.2d 1027, 230 N.Y.S.2d 53 (4th Dept. 1962); *People ex rel. Jackson v. Weaver*, 279 App.Div. 88, 108 N.Y.S.2d 653 (3d Dept. 1951). However, the Supreme Court for Bronx County (Chimera, J.) has held that credit for this time should at least be allowed in a case where a person who was sentenced to an institution under the jurisdiction of the New York City Department of Correction was held in a detention facility of that Department while awaiting transfer to the institution to which he had been sentenced. *People ex rel. Manekos v. Noble*, 26 Misc.2d 460, 207 N.Y.S.2d 501 (S.Ct.Bronx 1960).

In addition to the automatic reduction for jail time, a prisoner may be granted a reduction in the minimum and maximum terms of his sentence as a reward for good behavior. Correction Law, § 230. The Correction Law provides that every prison (and penitentiary) is to have a board which must meet every month and determine the amount of good behavior time (within the limits prescribed by statute) to be allowed to each prisoner (id., § 235).¹⁹ The board's decision is made within the framework of rules formulated by the Commissioner of Correction (id., § 234) and the board has statutory authority to grant the allowance in full or in part, to withhold the allowance for the month in question, or to revoke allowances granted in prior months (id., § 235). The action of the board in granting or withholding these allowances is not reviewable if done according to law; but in all cases where the board withholds or revokes the allowance, it must forward a written report of its reasons for such action to the Commissioner of Correction (id., § 235).

The amount of reduction that may be allowed on the minimum term is 10 days per month, not to exceed four months per year (Correction Law, § 230, subd. 2). The effect of this allowance is to accelerate the date when the prisoner is eligible to be considered for parole and it cannot be applied for any purpose (even if parole is denied) against the maximum of an indeterminate term. *People ex rel. Clemente v. Warden of Auburn Prison*, 9 N.Y.2d 216, 213 N.Y.S.2d 55 (1961).²⁰ In other words, if an offender is sentenced to an indeterminate term of not less than 15 nor more than 30 years and is credited with all the good behavior time he can earn, he is eligible to be considered for parole after serving ten years of his sentence (assuming no jail time) and this—although a very important benefit—is the only benefit of the 10-day per month allowance.

By virtue of a 1962 law, a prisoner serving an indeterminate sentence, also can earn a reduction of his maximum term (Correction Law, § 230,

place where a prisoner happens to be, if the prisoner is under arrest. Thus, it may be confinement en route from another jurisdiction or confinement under police surveillance in a hospital that has no prison ward. *People ex rel. Broderick v. Noble*, 26 Misc.2d 903, 207 N.Y.S.2d 467 (S.Ct. Bronx 1960); *People ex rel. Higgins v. Close*, 12 Misc.2d 901, 177 N.Y.S.2d 456 (Dutch Co.Ct.1958); *People ex rel. Cahalan v. Warden of City Prison*, 96 N.Y.S.2d 749 (S.Ct.Bronx 1950).

¹⁸ A bill is pending before the 1964 Legislature to correct this.

¹⁹ Prisoners serving terms of one day to life are not eligible. Prisoners serving terms with maximum of life are eligible for reduction in minimum only. Correction Law, § 230.

²⁰ The reduction can, however, be granted to a prisoner serving a definite sentence (Correction Law, § 230), and when such a prisoner has served his time as so reduced, he is automatically released. However, until the expiration of his term, he has the same status as a parolee.

subd. 4). The idea behind this is to leave the prisoner with some reward for his good behavior if the Parole Board has refused to release him.²¹

The new law provides that every prisoner confined in a state prison or penitentiary for an indeterminate term (except a term of one day to life), may receive a 2-day per month reduction in his maximum term for good conduct, and a 3-day per month reduction in his maximum term "for meritorious progress and achievement in a treatment program to which he has been assigned." The reduction allowable on the maximum term is not to exceed two months per year. Prisoners are released automatically when the time earned equals the time that remains to be served, but remain under the supervision of the Board of Parole until the expiration of the maximum sentence imposed by the court. Also, all the above-described provisions with respect to determination of the time actually to be allowed on minimum sentences will apply to determination of the time actually to be allowed on maximum sentences.

Time-off for good behavior cannot be allowed on jail time. Correction Law, § 231. And good behavior time allowed on the maximum sentence cannot be used to reduce it below the minimum imposed by the court. Good behavior time allowed on the minimum sentence cannot be used to reduce the minimum in a state prison to less than one year, exclusive of jail time.²²

Place of Confinement

Section 70 of the Correction Law provides that there shall continue to be maintained for the security and reformation of prisoners of this state, six prisons for men. And section 90 of that chapter provides that there shall be one state prison for women.

In connection with the sentencing of women, it is important to note that when a woman is convicted of a felony and sentenced to a term of one year (or more), the sentence must be to a state prison (Penal Law, § 2187). Thus, it would seem that Penal Law, section 2182, subd. 1, permitting imprisonment for a term of one year to be in a county jail (which cannot be used for the confinement of convicted felons anyway [Correction Law, § 500-a]), penitentiary or state prison does not apply to women.

The names and locations of the various state prisons are as follows (Correction Law, §§ 70, 90):

Name of Prison	Location
Attica Prison	Attica, Wyoming County
Auburn Prison	Auburn, Cayuga County
Clinton Prison	Dannemora, Clinton County
Sing Sing Prison	Ossining, Westchester County
Wallkill Prison	Wallkill, Ulster County
Green Haven Prison	Stormville, Dutchess County
State Prison for Women	Bedford Hills, Westchester County

²¹In approving this bill, Governor Rockefeller stated (Mem. April 24 1962):

"The entire question of sentencing and punishment of criminal offenders continues to be the subject of review by the Temporary State Commission on revision of the Penal Law and the Criminal Code. The Commission can appropriately consider experience under the provisions of this bill."

²²There seems to be no authority either way on the question of whether jail time itself can reduce the term

that must be served within the walls of a state prison to less than one year. One can easily envision a sentence with a minimum of 1 year and 3 months where the offender has 4 months jail time to his credit and thus is eligible to be considered for parole after 11 months in prison. Perhaps the reason there is no authority is that, in 1934 and 1953, the Attorneys General expressed opinions that jail time can reduce the minimum to be served within a state prison to less than one year. (1934 Ops.N.Y.Att'y Gen., 450-451; 1953 Ops.N.Y.Att'y Gen., 154).

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The judgment and sentence of the court must specify the place of imprisonment (Penal Law, § 2180), and when the place is a state prison, the judgment specifies the prison that is designated as a receiving and classification institution for the judicial district in which the court is located (Penal Law, § 2198). An exception is made in the case of males between 16 and 21 years of age, and males between 15 and 16 years of age convicted pursuant to indictments charging crimes punishable by death or life imprisonment. When such persons are sentenced to a state prison term they must be committed to the Department of Correction's Reception Center at Elmira, New York, rather than to the prison that serves as a reception center for the court's judicial district (Correction Law, § 61; Penal Law, § 2186).

It should be noted that the Commissioner of Correction is not bound to retain the prisoner at the place of commitment specified in the judgment and sentence: the Commissioner has the power to transfer inmates from one state correctional institution to another (id., § 6-a).

B. STATE REFORMATORY

Reformatory Terms for Persons Convicted of Felony

A defendant convicted of a felony and sentenced between his or her 16th and 30th birthdays may, under certain circumstances, receive a reformatory term; i. e., a sentence to imprisonment for an indefinite period (not to exceed five years) during which the defendant may be paroled at any time and discharged at any time.

More specifically, a male between the ages of 16 and 21 years²³ convicted of a felony, including a felony punishable by a term of one day to life, but excluding a felony punishable by death or life imprisonment (Penal Law, § 2184-a); a male between the ages of 21 and 30 years, convicted of a felony and not previously convicted of a crime punishable by imprisonment in a state prison (id., § 2185); and a female between the ages of 16 and 30 years, convicted of a felony, and not previously convicted of a crime punishable by imprisonment in a state prison (id., § 2187-a) may in the discretion of the court be sentenced to a reformatory term.

A comparison of the provisions applicable to the three groups (males between 16 and 21, males between 21 and 30, and females between 16 and 30) reveals that the legislature has specified that a reformatory term is not available in the case of a male between the ages of 16 and 21 convicted of a crime punishable by death or life imprisonment (Penal Law, § 2184-a), and it has omitted this limitation in the statutes authorizing reformatory terms for the other two groups (Penal Law, §§ 2185, 2187-a). Although no case has been found that deals with this issue, it is difficult to believe that there should be such a distinction. In any event, it seems that statutes prescribing death or life imprisonment are mandatory and exclusive (see *McHugh v. Joyce*, 2 App.Div.2d 976, 157 N.Y.S.2d 129 [2d Dept. 1956]), and, hence, outside the scope of Penal Law, sections 2185 and 2187-a.²⁴ Another distinction between the statute authorizing a re-

²³The term "between the ages" as used in reformatory sections means between those birthdays on the date sentence is imposed. *People v. Schneider*, 276 App.Div. 781, 92 N.Y.S.2d 649 (2d Dept. 1949); see also 1955 Ops.N.Y. Att'y Gen., 192-193.

²⁴Prior to 1932 there still were crimes punishable by imprisonment for not less than a certain number of years with no maximum prescribed,

and in such cases the court could sentence the offender to life imprisonment (Penal Law, § 2191). In fact, even if the court sentenced the offender to a reformatory term for such a crime, he could be confined indefinitely, which might mean for life. See *People ex rel. Guariglia v. Foster*, 275 App. Div. 893, 90 N.Y.S.2d 238 (4th Dept. 1949), aff'd mem. 301 N.Y. 515. In 1932 the legislature established maxi-

reformatory term for males between 16 and 21 and the statutes dealing with the two other groups, is that the latter are applicable only if the person "has not theretofore been convicted of a crime punishable by imprisonment in a state prison" (Penal Law, §§ 2185, 2187, 2187-a) while the former contains no such limitation (id., § 2184-a).

When the Court imposes a reformatory term, it has no power to fix or limit the duration of that term (Penal Law, § 2195). The prisoner is committed to a reformatory or to the reception center (see *infra*), as the case may be, and thereafter, is confined under a standard reformatory term for persons convicted of felonies (Correction Law, § 288).

The reformatory term for a felony is an indefinite one which may be terminated by the Board of Parole. Although it has neither a minimum or maximum, as such, it cannot exceed five years (including jail time). Penal Law, §§ 2184-a, 2185, 2187-a; Correction Law, § 288. The Board of Parole determines fitness for release and may at any time grant parole, conditional release or absolute release and discharge.

Parole or conditional release does not effect a termination of the sentence. The person paroled or conditionally released remains under the supervision of the Board of Parole (Correction Law, § 282) and in the legal custody of the Department of Correction (id., § 281), subject to being retaken for a parole violation (id., § 283), until expiration of the five-year maximum or until absolute release, whichever is sooner (id., § 281). Absolute release truncates the term before the expiration of the five-year maximum. It is granted to a person when the Board believes "there is a strong or reasonable probability that if discharged, he will remain at liberty without violating the law and that his release is not incompatible with the welfare of society." (id., § 281, subd. 3).

Reformatory Terms; Commitments for Offenses Less Than Felony

A reformatory term for a male or female committed for an offense less than felony is an indefinite term not to exceed three years. And, except for the fact that the maximum duration of this term is three years instead of five years, the term is precisely the same in every respect as a reformatory term for a felony. Correction Law, §§ 281, 288, 291, 311 (e); Penal Law, §§ 2184-a, 2187-a; Code of Cr.Proc., §§ 891-a, 913-e, 913-m; Family Court Act, § 758(c); New York City Criminal Court Act, § 82(3).

1. Offenses Less Than Felony; Males

Penal Law section 2184-a provides that where a male between the ages of 16 and 21 years is adjudicated a juvenile delinquent, found to be a disorderly person or a vagrant, adjudged a wayward minor or a youthful offender, or found guilty of any offense or of a misdemeanor the court—in lieu of any other sentence—may impose a reformatory term. (The actual commitment of a male between the ages of 16 and 21 years, who is sentenced to a reformatory term, must be to the Department of Correction's reception center [see, *infra*]). Thus, in almost every case where a male between the ages of 16 and 21 is convicted in a criminal proceeding of something less than felony²⁵ or adjudicated in a quasi

ma for these crimes (L.1932, Ch. 275) and it also was in that year that Penal Law, § 2184-a was added (L.1932, Ch. 414, § 2). Prior to 1932 there may have been reluctance to include a limitation with respect to life imprisonment in Penal Law, §§ 2185 and 2187 because of the possibility that they might be interpreted as not applicable to crimes

with no maximum. Since the possibility of any such danger was obviated in the same year that section 2184-a was added, it is not surprising that the limitation was included in that section.

²⁵ Infractions do not seem to be included. There also are other things that would not be included, e. g., an adjudication that a person is a tramp

criminal proceeding because of having committed any criminal act, the court has discretion to sentence him to a state reformatory term.

With respect to juvenile delinquents, Penal Law, section 2184-a applies only to cases where the delinquent is adjudicated²⁶ after his 16th birthday. However, Family Court Act section 758(b) provides that the family court has authority to commit, for a state reformatory term, a juvenile delinquent who was 15 years of age at the time he committed an act which would be any one of a number of specified felonies had it been committed by an adult, and this section does not limit the Family Court to cases where the delinquent is adjudicated after his 16th birthday.

Wayward minors are persons between the ages of 16 and 21 who are adjudicated to be, or in danger of becoming, morally depraved (Code of Cr. Proc., § 913-a). As to this class of persons, the court's discretion to commit to a reformatory is limited by a legislative direction that insofar as practicable, the minor should first be placed on probation. Commitment to a reformatory may be made only "if such minor, by reason of delinquency or other adequate reason, is not a fit subject for probation" (id., § 913-e).

There do not seem to be any problems with respect to the statutes that deal directly with the other classes of offenders mentioned in Penal Law, section 2184-a; viz., youthful offenders (Code of Cr. Proc., § 913-m); disorderly persons (Code of Cr. Proc., §§ 899, 911);²⁷ vagrants; and persons convicted of offenses or misdemeanors.

It might be noted, that although there is statutory authorization for a state reformatory commitment in the case of a male between 16 and 21 years convicted of a felony or an offense less than felony (Penal Law, § 2184-a); a male between 21 and 30 years convicted of a felony (id., § 2184-a); a male between 16 and 30 years convicted of a felony (id., § 2185); and a female between 16 and 30 years convicted of a felony or an offense less than felony (id., § 2187-a), there is no provision authorizing a state reformatory commitment in the case of a male between 21 and 30 years convicted of an offense less than felony.

It also might be noted that there may be a question as to whether the Criminal Court of the City of New York has jurisdiction to sentence males convicted of the offense of disorderly conduct (see Penal Law, §§ 722, 722-a, 722-b, 723) or of vagrancy (Code of Cr. Proc., § 887) to a state reformatory. Section 83 of the New York City Criminal Court Act provides that the court may dispose of such cases in one of six specified ways, and commitment to a state reformatory is not enumerated therein.

2. Offenses Less Than Felony; Females

Penal Law, § 2187-a vests the court with discretionary authority to impose a reformatory term in lieu of any other sentence where a female between the ages of 16 and 30 years has been convicted of any one of a number of specified things, or adjudicated a wayward minor or youthful offender.²⁸

(Code of Cr. Proc., § 889; Penal Law, § 2370) or a determination on a charge against a person under 18 years for purchasing an alcoholic beverage through fraudulent means (Penal Law, § 496).

²⁶ It is not clear whether this means adjudicated or actually committed (see Family Court Act, § 753). It probably means committed (cf. 1955 Ops. N.Y. Att'y Gen., 192-193).

²⁷ In passing, it is of interest to note that under the provisions of section 910 of the Code of Criminal Proce-

sure (last amended in 1944 [Ch. 58]) a person adjudicated to be a disorderly person may be bound out in some lawful calling as a servant, apprentice, mariner or otherwise until he be of age, if a minor; otherwise, for one year. This binding out has "the same effect as the indenture of an apprentice."

²⁸ This section does not mention juvenile delinquents, or persons convicted of an offense. However, note that Family Court Act, § 758 is applicable to females as well as males.

Turning to the categories of offenses for which a reformatory term may be imposed upon a female under this section, the first nonfelony category, which is category "(2)" of the section, covers women:

"(2) convicted by any court or magistrate of petit larceny or vagrancy under subdivision three or four of section eight hundred eighty-seven of the code of criminal procedure, of habitual drunkenness, of being a common prostitute, or frequenting disorderly houses or houses of prostitution."

With respect to "petit larceny," misdemeanors are mentioned as a class in category "(3)" of this section, and in view of the recent vintage of the section (L.1954, Ch. 803, § 47), it is surprising that this crime is singled out. As for vagrancy (the long description of specific acts, in category "(2)," may or may not be simply an enumeration of some of the things set forth in subdivisions 3 and 4 of section 887 of the Code of Criminal Procedure), it is interesting to note that category "(2)" authorizes reformatory treatment for women convicted of acts specified in subdivisions 3 and 4 of section 887 of the Code of Criminal Procedure, and section 891-a of the Code, which deals specifically with reformatory terms for vagrants, merely prescribes a reformatory term for a female "convicted of a violation of subdivision four" of section 887. Also, it seems that there is no provision at all authorizing a reformatory term for a female convicted of vagrancy under any of the other subdivisions of section 887 of the Code (except for a female over 16 years of age committed as a vagrant, by a court in New York City, or Nassau or Suffolk County, to a private incorporated charitable institution and rejected by that institution [Correction Law, § 311]).

Category "(3)" of Penal Law, § 2187-a, covers women: "(3) convicted of a misdemeanor," and there seems to be no problem with respect to this.

Category "(4)" of Penal Law, § 2187-a, covers women:

"(4) committed under the provisions of section one-hundred twenty-two of the New York city criminal courts act, chapter six hundred fifty-nine of the laws of nineteen hundred ten, as renumbered by chapter seven hundred and forty-six of the laws of nineteen hundred thirty-three, and as amended."

The quoted language refers to a provision in the old New York City Criminal Courts Act (§ 122) authorizing the New York City Magistrates' Court to impose a state reformatory sentence upon persons arrested in the City and convicted of offenses paralleling the vagrancy offenses enumerated in category "(2)" discussed, supra. The New York City Criminal Courts Act was repealed by the 1962 Legislature, and some of the provisions of section 122, including the reformatory provision, are now in section 82 of the new act. However, the legislature has not changed the reference in Penal Law, section 2187-a, and, consequently, as of September 1, 1962, this reference became obsolete.

Category "(5)" of Penal Law, section 2187-a, applies to women: "(5) convicted and committed under the provisions of section eight hundred ninety-one-a of the code of criminal procedure." As pointed out in connection with category "(2)," supra, section 891-a of the Code is the section that specifically authorizes reformatory punishment for vagrants convicted under subdivision 4 of section 887 of the Code. In view of the fact that category "(2)" specifically refers to subdivision 4 of section 887 of the Code, there seems to be no need for category "(5)."

Category "(6)" of Penal Law, section 2187-a, covers wayward minors and youthful offenders.

Category "(7)" of Penal Law, section 2187-a, covers women "(7) committed under the provisions of section seventeen of chapter seven hun-

dred sixteen of the laws of nineteen hundred fifty-one." This reference is to the Girls' Term Court Act for the Magistrates' Courts in the City of New York, which was repealed by the 1962 Legislature, effective September 1, 1962 (L.1962, Ch. 703, § 3). The Legislature does not appear to have deleted or changed the reference.

Category "(8)," the last category listed in Penal Law, section 2187-a, applies to females: "(8) committed under the provisions of section three hundred and eleven-e of the correction law." Section 311 of the Correction Law is limited to courts in the city of New York and in Nassau and Suffolk Counties. Essentially, it authorizes these courts to commit dissolute females including vagrants to certain incorporated charitable reformatories. Paragraph (e) of that section (and not paragraph (c) as specified in Penal Law, § 2187-a) provides these courts with authority to re-commit a female to a state reformatory if she is rejected by the charitable institution as "unfitted to benefit by the discipline and training of such institution."

Place of Confinement

The fact that a person is committed to a reformatory or to the reception center (Correction Law, § 61) for a reformatory term does not necessarily mean that he or she will be confined in a reformatory. The Commissioner of Correction has the authority to transfer reformatory prisoners to any institution under the jurisdiction of his department or (in the case of a person under 21 years of age) to an institution under the jurisdiction of the Department of Social Welfare. Correction Law, §§ 6-a, 63, 279-a.²⁹ Section 63 of the Correction Law provides a limitation on this power, to the effect that "only persons convicted of a felony may be confined in a state prison." This section, however, is in Article 3-A which deals with the commitment and transfer of males between 16 and 21 years of age, and there is no similar statutory limitation directly applicable to females.³⁰

When a prisoner sentenced to a reformatory term is transferred to another institution, such as a state prison, his confinement is governed by the laws applicable to that institution but his parole and discharge still are governed by the laws applicable to reformatory terms. Correction Law, §§ 63, 279-a, 283; *People ex rel. Ward v. Jackson*, 286 App. Div. 942, 143 N.Y.S.2d 26 (3d Dept. 1955), *aff'd mem.* 3 N.Y.2d 1020, 170 N.Y.S.2d 356.

It should be noted that the transfer of a reformatory term prisoner to a state prison could result in the prisoner's confinement in that prison—subject to state prison rules and discipline—for a longer period than the maximum period he could have been forced to serve had he been sentenced directly to a state prison. Thus, a prisoner convicted of attempted Grand Larceny in the second degree (Penal Law, § 1296), punishable by a maximum term of 2½ years (*id.*, § 261, subd. 2, § 1297) could be sentenced to an indefinite term with a maximum of five years and kept in a state prison for the entire five years. Cf., *People ex rel. Ward v. Jackson*, *supra*.

²⁹ The Commissioner of Correction also has authority to transfer prisoners from a state prison to a reformatory and in such a case, the prisoner will be confined in the reformatory but still will be subject to all the terms and conditions of his state prison sentence. Correction Law, § 293.

³⁰ None is needed for males between the ages of 21 and 30 years, because males between these ages cannot be sentenced to a reformatory term for an offense less than felony.

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The names of the various reformatories and the rules with respect to direct commitments are as follows (Correction Law, § 270):

Name of Reformatory	Location	Commitment
Elmira Reformatory	Elmira, Chemung county	Males between 21 and 30, committed pursuant to Penal Law, § 2185.
Westfield State Farm	Bedford Hills, Westchester county	Females between 16 and 30, committed pursuant to Penal Law, § 2187-a.
Western Reformatory for Women	Albion, Orleans county	"
New York State Vocational Institution	West Coxsackie, Greene county	By transfer only.
Great Meadow Correctional Institution	Comstock, Washington county	"
Woodbourne Correctional Institution	Woodbourne, Sullivan county	"
The Youth Rehabilitation Facility ³¹		"

All males between the ages of 16 and 21 years (except mental defectives) who are committed to an institution under the jurisdiction of the Department of Correction must be committed to the Department's reception center at Elmira for classification, program-planning and transfer (Correction Law, § 61, subd. 1). Prisoners so committed are not deemed permanent inmates of the reception center: they are confined there only until transfer (id., subd. 3). Thus, a male between these ages who is sentenced to a reformatory term is committed by the court to the same place as he would be committed if he were sentenced to a state prison term and his place of confinement is assigned later. Although the commitments are the same, a reformatory sentence can be told apart from a state prison sentence by the fact that when the court imposes a reformatory sentence, it does not determine or fix the term of the sentence (id., § 61, subd. 2). When the Court does fix the term of the sentence (as a prison term), the prisoner must be confined in accordance therewith (id., § 61, subd. 2, § 64).

Males between the ages of 21 and 30 years who are given reformatory terms are sentenced and committed to the Elmira Reformatory (Penal Law, § 2185; Correction Law, § 270) and females who are given reformatory terms are sentenced and committed either to the Westfield State Farm at Bedford Hills or to the Western Reformatory for Women located at Albion. Penal Law, § 2187-a; Correction Law, § 270.

It is of interest to note that the superintendent of each of the direct commitment reformatories has the authority to make a determination that a person committed to his reformatory is mentally or physically incapable of participating in, or being materially benefited by, the treatment of the reformatory and the superintendent can—after the expiration of 60 days subsequent to admission of that person to the reforma-

³¹ This reformatory consists of such conservation work camps as the Commissioner of Correction shall from time to time establish for males who were between the ages of 16 and 21 at the time of the commission of the act for which they were committed. The Commissioner has the authority to transfer males between the ages of 21 and 25 years to this facility but the number of such transferees cannot exceed 20 per cent of the total inmate population in any one camp. Correction Law, § 314. Curiously, there seems to be no authority for the treatment of juvenile delinquents in this facility, or in a resident parole facility (Correction Law, § 315).

tory—return the person to the sentencing court to be resentenced and dealt with in all respects as though he had not been so committed (Correction Law, § 279). It also might be noted that whenever the Commissioner of Correction is satisfied that a direct commitment reformatory is over-crowded, he may advise the committing court of that fact and the court thereupon resentsences the offender (*id.*, § 278).

As for the reception center, the director only has authority to return persons "not properly committed," and the Commissioner of Correction may return persons where the facilities to care for them are over-crowded. In such a case, the court may resentence to an institution outside the jurisdiction of the Department of Correction, or make any other disposition in accordance with law (Correction Law, § 61, subds. 5, 6).

C. CITY REFORMATORY

Article 7-A of the Correction Law (§ 200 et seq.), which is the successor to the Parole Commission Law (L.1915, Ch. 579), provides authority for a separate sentencing setup in cities of the first class. Since the purpose of this Article is primarily to provide for reformatory-type sentences in such cities, it is relevant to consider it at this point, rather than after all the state-wide procedures have been discussed.

If a city of the first class has a department of correction with jurisdiction over a workhouse, penitentiary and a reformatory, the city may create its own parole commission (Correction Law, §§ 200, 201, 202). Once the parole commission has been established, any person who is convicted within the city of a crime or an offense and sentenced to an institution under the jurisdiction of the city's department of correction must be sentenced to either the penitentiary, the workhouse or the reformatory (*id.*, § 203).

If the court sentences the offender to the penitentiary or reformatory, the sentence is for a reformatory term. But, if the court sentences the offender to the workhouse, the sentence must be for a fixed period not to exceed six months, unless the charge involved is: (1) vagrancy; (2) disorderly conduct; (3) public prostitution; (4) soliciting on streets or in public places for the purposes of prostitution; or, (5) a violation of section 150 of the Tenement House Law or section 350 of the Multiple Dwelling Law (Correction Law, § 203[e]).³² When a defendant is convicted of one of these charges and has twice been convicted during the preceding 24 months or three or more times convicted during any period, of any of the specified charges, the court—if it sentences the offender to the workhouse—imposes a reformatory term.

The reformatory-type sentences, provided in Article 7-A are similar in nature to state reformatory sentences but are called "indeterminate" sentences (which is somewhat confusing since the word "indeterminate" also is used to describe a state prison sentence). Correction Law, §§ 202(e), 203(c), 204. As in the case of state-reformatory sentences, a court imposing an "indeterminate" sentence cannot fix a minimum or maximum term and the sentence can only be terminated by a board of parole (in this case the city's parole commission). However, "indeterminate" sentences to a penitentiary cannot exceed three years (*id.*, § 230 [b]) and "indeterminate" sentences to a workhouse cannot exceed two years, including jail time (*id.*, §§ 203[e], 204[b]). There is no provision in Article 7-A imposing a limitation on the duration of the term

³² Except for the offense of disorderly conduct and some forms of vagrancy, all of these offenses and sections deal with prostitution. It should

be noted that the Tenement House Law, specified in category "(5)," was repealed in 1952 (L.1952, Ch. 798).

of an "indeterminate" sentence to a city reformatory (Correction Law, § 203[d]).³³

Also, as in the case of state-reformatory sentences, the parole commission may parole, conditionally release, discharge, retake or reimprison persons committed for a reformatory-type term (Correction Law, § 204) and the sentencing court has no authority to recommend the length of imprisonment (People v. Tower, 308 N.Y. 123, 123 N.E.2d 805 [1954]). But, unlike a state reformatory sentence, the parole commission cannot conditionally parole, release or discharge a penitentiary prisoner before the expiration of the maximum of the "indeterminate" term, unless such action has been approved in writing by the sentencing court or judge (Correction Law, § 204[a] [2]; see People v. Tower, supra).³⁴

Article 7-A sentences for offenses less than felony have been attacked on the ground that they can result in penitentiary or workhouse imprisonment for more than one year (infamous punishment) without indictment or trial by jury and, hence, are unconstitutional. However, the courts have sustained such sentences, and where opinions have been written on this point (none seem to have been written by the Court of Appeals), they indicate that such sentences can be justified on the theory that they are correctional in nature rather than penal and have as their object moral reformation rather than punishment. People ex rel. Brewer v. Levy, 267 N.Y. 596, 196 N.E. 597 (1935) [no opinion]; People ex rel. Kipnis v. McCann, 199 App.Div. 30, 191 N.Y.Supp. 574 (1st Dept. 1921), aff'd mem. 234 N.Y. 502; People ex rel. St. Clair v. Davis, 143 App.Div. 579, 127 N.Y.Supp. 1072 (2d Dept. 1911); see also People v. Bellinger, 269 N.Y. 265, 271-272, 199 N.E. 213 (1935).

It should be noted that the provisions of Article 7-A do not apply in the case of a commitment in default of payment of a fine or a commitment for failure to furnish surety or sureties upon a conviction of disorderly conduct (Correction Law, § 203[c]). Where such commitments are made, the offender may be committed as otherwise provided by law to any institution under the jurisdiction of the city's department of correction; but cannot be committed to the penitentiary (id., § 203[f]). Moreover, no person can be sentenced to a penitentiary, workhouse or reformatory under the jurisdiction of the city's department of correction if the court imposes a fine in addition to imprisonment (ibid.; People v. DeLeen, 290 N.Y. 310, 49 N.E.2d 152 [1943]).

Article 7-A also does not apply to the sentencing of any person who is "insane, or mentally or physically incapable of being substantially benefited by being committed to a reformatory institution." Correction Law, § 203(e) 3. However, since the provisions of the Article are mandatory, in cases where it does apply, appellate courts have often had to deal with the problem of whether the sentencing court must make

³³ It should be noted that although the City of New York comes under the provisions of Article 7-A, the old New York City Criminal Courts Act (repealed, effective September 1, 1962) provided (§ 122) that males between 16 and 30 years of age who are convicted of an offense less than felony and are first offenders may be committed to the New York City Reformatory for Misdemeanants under a reformatory-type sentence which "shall not exceed the term of three years." The section also seemed to provide for a special parole commission for the reformatory. The new act, effective

September 1, 1962 (L.1962, Ch. 697, as amend. L.1962, Ch. 703), also authorizes sentences to the New York City Reformatory for Misdemeanants when males between the ages of 16 and 30 are convicted of an offense less than felony and are first offenders. But the new act does not contain any provision limiting the duration of the sentence or any provision for a parole commission (New York City Cr.Ct. Act, § 81).

³⁴ No such approval is needed for parole, conditional release or discharge of a workhouse or reformatory prisoner (Correction Law, § 204 [a] [1]).

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an express finding of incorrigibility before it can sentence an offender to a definite, fixed term in an institution under the jurisdiction of the city's department of correction; and, conversely, whether comments by the sentencing court, to the effect that it considers the offender incorrigible, will divest that court of the authority to sentence the offender to a reformatory-type term in such an institution.

It now seems to be well settled that the sentence itself creates a presumption that the court found the offender incorrigible (in the case of a definite sentence) or capable of being benefited by reformatory treatment (in the case of a reformatory-type sentence). *People v. Thompson*, 251 N.Y. 428, 167 N.E. 575 (1929). And this presumption applies even where the court makes ambiguous or conflicting statements respecting the defendant's reformability. But, where the court states, unequivocally, that the offender can or cannot reform, it must sentence the offender in accordance with that determination. It cannot sentence the offender under Article 7-A after it has made an unequivocal affirmative finding that the offender is incorrigible. (See dissenting opinion of Froessel, J. in *People ex rel. Kern v. Silberglitt*, 4 N.Y.2d 59, 62-70, 172 N.Y.S.2d 145 [1958]. The views expressed by Judge Froessel were later unanimously adopted by the Court when the same facts were squarely presented to it in a proper proceeding. *People v. Gross*, 5 N.Y.2d 131, 181 N.Y.S.2d 499 [1959]).

The commissioner of correction of the city has the authority to transfer inmates, serving "indeterminate" sentences, from any institution under his jurisdiction to any other institution under his jurisdiction (Correction Law, § 206[a]) but the act does not seem to furnish him with the authority to reject persons committed for reformatory-type treatment.

The authority to impose a reformatory-type "indeterminate" sentence in any case where the court could sentence an offender to a penitentiary, workhouse, city prison, county jail or similar institution has an interesting affect upon the variety of sentences available to the court. In the case of a felony, we have already seen that where the legislature has not specifically prescribed a minimum term in excess of one year, the court may sentence a first offender to a penitentiary. Thus, where Article 7-A is applicable, and where the offender is between the ages of 16 and 30 years, the court has two types of reformatory sentence available. It can sentence to a state reformatory, in which event the term will be subject to a 5-year limitation, or it can sentence to a penitentiary, and the term will be subject to a 3-year limitation (see e. g., *People ex rel. Quinn v. Schleth*, 180 App.Div. 319, 167 N.Y.Supp. 491 [1st Dept. 1917]). If the felony offender is more than 30 years of age, Article 7-A furnishes authority for a reformatory-type sentence where there would otherwise be none. As for an offense that is less than felony, it was previously noted there is no provision authorizing state reformatory treatment for a male over 21 years of age convicted of such an offense. Nor is there any provision authorizing state reformatory treatment for a male or female over 30 years of age convicted of such an offense. Article 7-A authorizes reformatory-type treatment in these cases.

D. COUNTY PENAL INSTITUTION

County penal institutions consist of county jails, penitentiaries and workhouses. Because of the somewhat confusing maze of statutes that deal with sentencing to these institutions some knowledge about their evolution is necessary for an understanding of the present setup.

Background

In colonial New York and during the early years of our statehood sentences usually called for corporal punishment or posting of a bond to

keep the peace, or both, and it was not the custom to impose sentences of long-term imprisonment. Imprisonment was relied upon primarily where the offender was unable to post a bond, and county jails were the only institutions for the confinement of persons convicted of crime (see Goebel & Naughton, *Law Enforcement in Colonial New York*, p. 515). Due to the fact that there were few long-term prisoners and the fact that county jails were used for a multitude of other purposes (detention of witnesses, civil prisoners and persons awaiting trial on criminal charges [They still are used for these purposes, see Correction Law, § 500-a]) there were no facilities for the segregation and employment of convicts. Thus, when corporal punishment was abolished (except in the case of a few felonies) and long-term imprisonment substituted as punishment for most felonies, the state built special institutions for the purpose, and state prisons came into existence (L.1796, ch. 30).

By 1830 it was recognized that county jails were totally unsuited for use as penal institutions for short as well as long-term prisoners; but, since state prisons were not useful or convenient for confinement of prisoners sentenced to less than two years imprisonment (the minimum state prison sentence was reduced to one year in 1862 [Ch. 417]), the legislature retained county jails as places for imprisonment of not more than one year and designed the sentencing structure (contained in the Revised Statutes of 1830) to provide for sentences to county jails of not more than one year, and to state prisons for terms of two years or more (Revised Statutes, Part IV, Chap. I, Title VII, § 12). The reluctance to permit imprisonment for more than one year in a county jail was so great that in many cases where crimes previously had been punishable by imprisonment in a county jail for terms of two and three years, they were made punishable by imprisonment in the alternative, of not more than one year in a county jail or not more than a number of years in a state prison (vestiges of this still can be found in our Penal Law, see §§ 80, 711, 932, 943, 1082).³⁵

The lack of facilities at the county level for proper segregation and employment of convicts also led to the construction, in some counties, of special county penal institutions—penitentiaries and workhouses—to be used instead of county jails for the confinement of short-term convicts. Thus, penitentiaries were authorized and built for the safe keeping of prisoners "sentenced to confinement at hard labor or to solitary imprisonment" (see e. g., L.1814, Ch. 176 ["The Penitentiary of the City of New York"]; L.1830, Ch. 214 [Kings County Penitentiary]; L.1847,

³⁵ The Revisers' notes explain the situation as follows:

"It will be perceived that imprisonment in a state prison for two years, is prescribed in some cases. We learn from one of the keepers of our prisons, that there will be no difficulty experienced by receiving convicts for that term, and that at Mount-Pleasant they can be usefully employed. It is believed the same remark is applicable to the Prison at Auburn. It seemed indispensable to allow imprisonment for such a term, in a large class of cases, which are now punishable by confinement in a county jail for a term not exceeding three years. The condition of those jails, and their total unfitness for such a confinement, must be known to every member of the legislature. If the prisoner is secluded in a solitary cell, the punish-

ment is more severe than imprisonment for double the term in a state prison. If he is not secluded, he corrupts, or becomes more corrupt; he cannot be employed in useful labor, and he remains an expense to the county. Impressed by these and various other considerations, the Revisers have supposed that no imprisonment in a county jail should exceed one year. It is believed that in most cases, this is more severe than the same term in a state prison. If the offence be such as to justify greater severity, a discretion is allowed to the courts, to imprison in a state prison for two years. Between the alternatives, of an imprisonment in a county jail more than one year, and allowing a confinement in a state prison two years, there appears no reason for hesitation."

Ch. 183 [Albany County Penitentiary]). And workhouses were authorized as adjuncts to all county jails (L.1891, Ch. 277, presently Correction Law, § 500-i). In addition, certain counties that did not have penitentiaries were authorized to contract with other counties that did, to receive and keep their convicts (see e. g., L.1859, Ch. 289). This has been carried forward to the present day; so that now, any county may contract with any other county having a penitentiary to receive and keep prisoners sentenced to not less than thirty days imprisonment (Correction Law, § 480).

In time the legislature authorized the use of penitentiaries as a supplement to the state prison system as well as the county jail system. For example, courts were authorized to sentence male felons between the ages of 16 and 21 years to serve any term of imprisonment in a penitentiary instead of a state prison (L.1856, Ch. 158); all females sentenced to state prison terms were incarcerated in penitentiaries instead of state prison sentences of the same length were discretionary for terms up to ten years in Kings County (L.1875, Ch. 529), up to five years in certain upstate counties (L.1869, Ch. 574, § 3) and up to three years in other judicial districts where there were penitentiaries (L.1875, Ch. 571, § 1).

The foregoing concepts with respect to the use of the various penal institutions were carried forward into the sentencing structure of the Penal Code of 1881. And, since our present statutory structure is essentially the same as the one set forth in that Code, an analysis of the Code's provisions sheds an important and interesting light upon the current provisions of the sentencing article of the Penal Law (Article 196).

The Penal Code of 1881 set forth the general rules presently found in Penal Law sections 2181, 2182 and 2183 requiring imprisonment for less than one year to be in a county jail; imprisonment for exactly one year to be either in a county jail, or in a penitentiary, or state prison; and imprisonment for more than one year to be in a state prison.³⁶ However, these provisions were not mandatory where special provision was made by statute for penitentiary or reformatory imprisonment.

With respect to imprisonment for less than one year, although Penal Code section 702 provided, as Penal Law section 2181 presently does, that such imprisonment must be inflicted in a county jail,³⁷ the section

³⁶ The text of these provisions as they appeared in the Penal Code of 1881 is as follows:

"§ 702. Imprisonment in county jail. Where a person is convicted of a crime, for which the punishment inflicted is imprisonment for a term less than one year, the imprisonment must be inflicted by confinement in the county jail, or place of confinement designated by law to be used as the jail of the county, except when otherwise specially prescribed by statute.

§ 703. Id.; in county jail or state prison. Where a person is convicted of a crime, for which the punishment inflicted is imprisonment for a term of one year, he may be sentenced to, and the imprisonment may be inflicted by, confinement either in a county jail, or in a penitentiary or state prison. No person shall be sentenced to imprisonment in a state prison for less than one year.

§ 704. Id.; in state prison.

Where a person is convicted of a crime for which the punishment inflicted is imprisonment for a term exceeding one year, or is sentenced to imprisonment for such a term, the imprisonment must be inflicted by confinement at hard labor in a state prison. But this and the two last sections shall not apply to a case where special provision is made by statute as to the punishment for any particular offense or class of offenses or offenders, nor to the cases specified in sections 698, 699, 700 and 701."

³⁷ This section actually read and still reads "county jail, or place of confinement designated by law to be used as the jail of the county." In at least one county the county jail and the county penitentiary were merged and thus, the penitentiary was the "place of confinement designated by law to be

was and is not applicable "when otherwise specially prescribed by statute," and the purpose of this exception appears to have been to exempt a county that has a penitentiary or has a contract with a county that does.

In this connection it might be noted that each of the penitentiaries in the state was created pursuant to a special provision made by statute and these statutes do not specify the lengths of the terms that may be served in those institutions. Also, there existed, in 1881, and still exists (Penal Law, § 2196) special statutory authority for courts in a county without a penitentiary to sentence non-felons to the penitentiary of another county "for any term not less than sixty days" (L.1874, Ch. 209, as amend., L.1876, Ch. 108 [The present provision is "not less than thirty days."]). Moreover, a note in the 1879 report of the Senate's Special Committee on revision of the statutes (pg. 13) furnishes a fairly clear indication of the legislature's intention. This note, which is appended to the section that ultimately became section 704 reads as follows:

"It admits of no doubt that county jails, as now constructed and administered, are not fit for any other purpose than the temporary detention of criminals. Yet persons sentenced for minor offenses and for short terms ought not to be placed in the State prisons. Until suitable penitentiaries under suitable discipline are provided, there seems to be no other safe and proper rule than that indicated by this and the last two sections."

As for sentences of more than one year, section 704 of the Penal Code provided and the Penal Law still provides (§ 2183) that such "imprisonment must be inflicted by confinement at hard labor in a state prison." But the legislature did not draft this section so as to preclude a sentence to a penitentiary for more than one year and this is obvious because section 704 contained (and Penal Law section 2183 contains, in substance) the following exceptions:

"But this and the two last sections shall not apply to a case where special provision is made by statute as to the punishment for any particular offense or class of offenses or offenders, nor to the cases specified in sections 698, 699, 700 and 701."

Special provision was made by statute for penitentiary imprisonment in excess of one year as an alternative to state prison imprisonment for the same term in the case of certain offenses, and since the above exception and these special provisions are still in effect, there are crimes which still are "punishable by imprisonment in a penitentiary or state prison for a term not exceeding five years" (Assault in the second degree, Penal Law, § 243; *see also, e. g., Bigamy, id., § 340; Contamination of salt wells, id., § 1758).³⁸

The exceptions in section 704 also include "the cases specified in sections 698, 699, 700 and 701." Section 698 provided that a female convicted of a felony must be sentenced to a penitentiary instead of a state prison and section 699 provided for discretionary penitentiary imprisonment of male felons in the 16 to 21 year age group, and discretionary penitentiary imprisonment of adult males sentenced to three years imprisonment or less (this was raised to five years or less in 1892 [Ch.

used as the jail of the county" (Onondaga Co. [L.1851, Ch. 32]).

³⁸ Special provision also was made by statutes not included in the Penal Code permitting imprisonment in certain penitentiaries for various terms in excess of one year. Such statutes did not mention particular crimes.

Most of these were repealed in 1899 (ch. 600); but one, permitting imprisonment for five years or less in the Albany and Syracuse County penitentiaries (L.1893, Ch. 114) remained in force until 1909 when it was consolidated as section 2197 of the Penal Law. It was repealed in the same year (L.1909, Ch. 467).

496]).³⁹ In 1896 sections 698 and 699 of the Code were amended to provide that females could be sentenced to a penitentiary only where the term imposed was less than one year (longer terms were to be to state prison) and males over 21 years of age could be sentenced to a penitentiary only where the term imposed was one year or less (L. 1896, Chs. 374, 553). However, the provision that males between the ages of 16 and 21 years, convicted of felony, could be sentenced to a penitentiary instead of a state prison, irrespective of the term, was allowed to stand. These provisions may presently be found in Penal Law sections 2186 and 2187.

Present Provisions

Sentence to County Penal Institution Upon Conviction of Felony.

Today felons may be sentenced to a county penal institution under the following circumstances:

- (1) Males between the ages of 16 and 21 years, convicted of felony, may be sentenced to a penitentiary instead of a state prison irrespective of the term (Penal Law, § 2186);
- (2) Where the term imposed upon a male convicted of felony is one year or less the imprisonment may be inflicted in a penitentiary (ibid.);
- (3) Where a sentence of less than one year is imposed upon a female, convicted of felony, she may be imprisoned in a penitentiary (id., § 2187);
- (4) Where a person is convicted of a crime for which the punishment inflicted is imprisonment for a term of one year he may be sentenced to a penitentiary (id., § 2182, subd. 1); and
- (5) Certain felonies are punishable by imprisonment in a penitentiary for more than one year (see e. g., Assault in the second degree, id., § 243; Bigamy, id., § 340; Contamination of salt wells, id., § 1758).

Curiously, the statutes are in conflict as to whether a convicted felon can be imprisoned in a county jail. The aforesaid statutes mentioned in items 1 to 4, supra, furnishing the authority for imprisoning a felon in a penitentiary also permit such imprisonment to be in the county jail of the county where the sentence is imposed (Penal Law, § 2182 subd. 1, §§ 2186, 2187). But the Correction Law prohibits the use of county jails for imprisonment or detention of a person sentenced for a felony. It provides:

"§ 500-a. Use of jails.

Each county jail shall be used:

4. For the confinement of persons convicted of any offense, *other than a felony*, and sentenced to imprisonment therein, or awaiting transportation under sentence to imprisonment in another county;" (Emphasis supplied.)

There is no specific statutory authority covering the question of whether a court in a county that does not have a penitentiary can sentence a felon to a penitentiary in another county (there is such authority in the case of a non-felon [Penal Law, § 2196]) and, although the statute which allows a county that has no penitentiary to contract with another that does maintain such an institution is broad enough to cover a contract for the imprisonment of felons (Correction Law, § 480), there is nothing to show that such a contract would be a prerequisite to a court's authority to sentence a felon to the penitentiary of another county.

³⁹ Sections 700 and 701 dealt with the reformatory and the house of refuge.

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When a felon is confined in a penitentiary the cost of the prisoner's maintenance is paid by the state (not exceeding \$5 per day, per capita [Penal Law, § 2182, subd. 3]).

Sentence to County Penal Institution Upon Conviction of Offense Less than Felony.

Except in the case of a reformatory term, sentences for offenses less than felony must be inflicted by imprisonment in a county penal institution. This may be a county jail, penitentiary or workhouse.

The Penal Law provides that sentences of less than one year must, and sentences of one year may be inflicted by imprisonment in a county jail (Penal Law, § 2181, § 2182 subd. 1). Each county must maintain one. (County Law, § 217.)

In addition, any county may build and maintain a workhouse:

"for the confinement of persons convicted within the county of crimes and criminal offenses the punishment for which is imprisonment in the county jail, and may provide for the imprisonment and employment therein of all persons sentenced thereto, and any court or judicial officer may sentence such person to such workhouse instead of to the county jail." (Correction Law, § 500-i).

As indicated, supra, imprisonment for one year or less than one year also can be inflicted in a penitentiary and this applies to non felons as well as felons.⁴⁰ However, Penal Law section 2196—which furnishes authority for imprisonment in a penitentiary of another county—is applicable only where a person has been convicted of a "crime or misdemeanor," and, hence, would not seem to apply to an offense or an infraction.

The sentence prescribed by statute in the case of many misdemeanors is simply imprisonment for "not more than one year." In addition, however, there are numerous sections specifying a wide variety of sentences that may be imposed for particular misdemeanors and offenses. And the severity of the various punishments set forth in these statutes has little or no relationship to whether the defendant has been convicted of an offense or a misdemeanor. The following list furnishes some examples:

Offense & Penal Law Section	Term Prescribed
Adultery (M) ^{40a} §§ 101, 102	Not more than 6 months
Peddling on air and bus terminal property (O) § 150	Not more than 30 days
Instigating fights between animals (M) § 182	Not less than 10 days nor more than 1 year
Selling disabled horses (auctioneer) (U) § 188-a	Not more than 6 months

⁴⁰ In this connection it also might be noted that Penal Law, § 1937 (which prescribes the punishment for misdemeanors where no other punishment is specifically prescribed) provides for punishment "by imprisonment in a penitentiary, or county jail, for not more than one year" and that there are other sections specifically authorizing imprisonment in a penitentiary or county jail, for not more than six months (Penal Law, § 102-Adultery; Code of Cr.Proc. § 892-Vagrancy). Disorderly persons are pun-

ishable, in some counties, by imprisonment only in a penitentiary for not more than six months (Code of Cr. Proc., § 903) and tramps are punishable "by imprisonment at hard labor in the nearest penitentiary for not more than six months;" the expense to be paid by the state (Penal Law, § 2370).

^{40a} (M) designates misdemeanor
(O) designates offense
(U) designates acts not specifically characterized as misdemeanor or offense.

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Offense & Penal Law Section	Term Prescribed
Dog stealing (U) § 194-b	Not more than 10 days
Budget Planning (M) § 412	Not more than 6 months
Unauthorized use of marks of N. Y. Worlds Fair 1964-5 Corp. (O) § 440-b	Not more than 10 days
Violation of section relating to second hand watches (M) § 447	Not more than 100 days
Failure to state true location of cemetery in ad (M) § 449	Not more than 6 months
Drawing water from canals (U) § 464	Not less than 1 year in county jail
Conducting a maternity hospital without a license (M) § 482 subd. 2	Not more than 60 days
Procuring alcoholic beverages for persons under the age of 18 years (O) § 484-d	Not more than 5 days
Coercion by employers (M) § 531	Not more than 6 months
Unlawful discrimination (M) §§ 700, 701	Not less than 30 days nor more than 90 days
Disorderly conduct (O) § 723	Not more than 6 months
Disgraceful practices offending health and decency (M) § 834	Not more than 1 year or less than 3 months
Agreements or contracts for privileges to deal with occupants of tenements, apartment houses or bungalow colonies (M) § 861	Not less than 30 days nor more than 1 year
Mock auction (M) § 943	Imprisonment for 30 days
Unlawful possession or use of an identification card issued by United Nations (M) § 966	Not more than 10 days
Second and third convictions of gambling as misdemeanor § 998	Not less than 10 days nor more than 1 year and not less than 30 days nor more than 1 year, respectively (first conviction no minimum and maximum of one year)
Hazing (M) § 1030	Not less than 30 days nor more than 1 year
Obscene prints and articles (M) § 1141 subd. 2.	
First offense	Not less than 10 days nor more than 1 year
Second offense	Not less than 30 days nor more than 1 year
Third offense	"An indeterminate term of not less than 6 months nor more than 3 years" ⁴¹

41. See note 41 on page A-31.

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Offense & Penal Law Section

Term Prescribed

Employment of minor in connection with obscene prints and articles (M) § 1141 subd. 3
First offense

Not less than 30 days nor more than 1 year

Second or subsequent offense

"An indeterminate term of not less than 6 months nor more than 3 years"⁴¹

Refusal to admit inspector to mines, tunnels and quarries; failure to comply with requirements of inspector (M) § 1270

Not less than 30 days

Violations of provisions of labor law; etc. (M) § 1275

Second offense

Not more than 30 days

Subsequent offense

Not more than 60 days
(first offense punishable by fine only)

Fraudulent representation in labor organization (M) § 1278

Not less than 10 days nor more than 30 days

Obtaining property or the use of property by fraudulently operating a slot machine, coin-box telephone or other coin receptacle (O) § 1293-c

Not more than 6 months

Malicious Mischief—tampering with fire equipment (M) § 1423 subd. 10

"Imprisonment in a county jail for the term of 10 days"

Malicious Mischief—tampering with signs (U) § 1423 subd. 11

Not more than 10 days

Purchasing or selling partially used non-transferable railroad tickets (M) § 1573

Not more than 10 days

Unlawful use of portable kerosene heaters (M) § 1673

Not more than 90 days

Omitting to label drugs or labeling them wrongly (M) § 1742

Second conviction

Not less than 10 days nor more than one year
(first offense punishable by not more than 1 year)

⁴¹A sentence of an indeterminate term of not less than 6 months nor more than 3 years raises the degree of the crime to a felony. Moreover, such a sentence cannot be served in a county penal institution or a state prison. Sentences to county penal institutions are not for indeterminate terms, and, except where specifically

authorized, cannot be for more than 1 year (Penal Law, § 2183). Sentences to state prison cannot be for less than 1 year (Penal Law, § 2182 subd. 2, § 2183). It seems that the only way this provision can lawfully be used is by sentencing the convict to not less than 1 year nor more than 3 years (or some lesser period) in a state prison.

Offense & Penal Law Section	Term Prescribed
Violations as misdemeanors with respect to narcotic drugs § 1751-a Second or subsequent conviction	"definite fixed period which shall be not less than 6 months and not more than 1 year" (first offense punishable by not more than 1 year)
Putting noisome or unwholesome substances or maintaining noisome business near highway (M) § 1754	Not less than 3 nor more than 6 months
Selling beverages containing wood alcohol (M) § 1760-a	Not less than 1 year
Sale or distribution of fireworks (M) § 1894-a subd. 8	Not more than 90 days
Riding bicycle on sidewalk or footpath (M) § 1909	Not more than 20 days
Peddling, unauthorized soliciting of business or trade, begging or loitering on certain railway property (O) § 1990-a	Not more than 30 days
Wilful violation of the terms of a lease (O) § 2040	Not more than 6 months
Sabbath breaking (M) § 2142 First offense	Not more than 5 days
Second or subsequent offense	Not less than 5 nor more than 20 days

Calculating Terms of Imprisonment.

The provision with respect to "jail time" (Penal Law, § 2193 [discussed, supra]), applies to county penal institutions in much the same manner as it applies to state institutions.⁴² Good behavior time also applies, but differs with the type of institution involved. Penitentiary prisoners have the same opportunity to earn good behavior time as definite sentence prisoners in a state prison (see discussion, supra, 23-4 and footnote 15), and most of the provisions of Article 9 of the Correction law, specifying the procedure to be followed by state prisons, are applicable to penitentiaries. However, good behavior time cannot be used to reduce the term of a penitentiary prisoner to less than three months, exclusive of jail time (Correction Law, § 230 subd. 3).

County jail prisoners (presumably this would include workhouse prisoners) sentenced to definite terms, and not imprisoned for failure to pay or as an alternative to a fine, may receive discretionary reductions of their sentences of five days per month for efficient and willing per-

⁴² Courts have refused to recognize "jail time" as applicable to sentences under article 7-A of the Correction Law (see e. g., *People ex rel. Stein v. McCann*, 225 App.Div. 623, 234 N.Y. Supp. 21 [1st Dept. 1929]), but this article was amended in 1961 (Ch. 258) and section 204(b) now specifically provides that "jail time" must be calculated as part of the term of a sentence under article 7-A. There is, too, one case holding that notwithstanding the broad language of Penal Law, §

2193 "jail time" should not be calculated as part of the term of a county jail sentence (*People ex rel. Murphy v. Holcomb*, 111 Misc. 460, 181 N.Y. Supp. 780 [S.Ct. Broome Co. 1921]) But the statutory language has been made even broader since this case was decided and the issue does not seem to have been raised again. It therefore seems safe to conclude that the case does not express the present state of the law.

formance of duties assigned to them (Correction Law; § 250.)⁴³ In calculating the reduction for a person sentenced to two or more individual terms the reduction is based upon the aggregate term of such sentences (id., § 251).⁴⁴

One other fact that might be noted about sentences to county penal institutions is that, except in cities with a population of one million or more, a court imposing a sentence of not more than sixty days may impose an interrupted or intermittent sentence; that is, the court may suspend the execution of the judgment of imprisonment on certain specified days or parts of days (Penal Law, § 2189).

E. CONCURRENT AND CONSECUTIVE SENTENCES

In General

In the absence of a statute,⁴⁵ when a person is sentenced for two or more crimes at the same time, or sentenced for a crime while under a previously imposed sentence for another crime, the court has discre-

⁴³ Although one might think that this section is applicable only to persons sentenced upon conviction of a criminal act, it recently has been held applicable to a civil prisoner committed for a term of six months for failure to obey a support order, *People ex rel. Foley v. Dros*, 24 Misc.2d 44, 202 N.Y.S.2d 741 (S.Ct. Bronx Co. 1960).

⁴⁴ The purpose of section 251 is not entirely clear. One explanation could be that it reduces the possibility of losing the reduction on a fractional part of a month where a prisoner has to serve another term commencing immediately thereafter. In this connection it seems that the reduction allowed under the preceding section (§ 250) of 5 days per month cannot be apportioned for a fractional part of a month (see 1959 Ops.N.Y.Att'y Gen., 240) and where the prisoner has been sentenced to consecutive terms (he would not commence serving the second until the first had expired) section 251 would allow him to have the benefit of the reduction on his second term for any fractional part of a month needed to complete the first term. However, it well may be that the section was put into the law in error. Prior to the time that sections 250 and 251 came into the Correction Law (L.1918, Ch. 550) there was no reduction at all allowable for county jail terms. Commutation was allowable on state prison and penitentiary terms and the amount of commutation varied with the length of the sentence; i. e., 5 days per month of a period of less than 1 year, two months per year for the first and second years; 4 months per year for the 3rd and 4th years and 5 months for each subse-

quent year (see L.1916, Ch. 358). For the purpose of computing commutation on consecutive sentences the several terms could be construed as one continuing term and this furnished the prisoner with a real advantage because he was eligible for a higher amount of commutation during the first four years of his second term (former Prison Law, § 231 [originally derived from L.1886, Ch. 21, § 2]). Sections 250 and 251 of the Correction Law made the concept of commutation applicable to county jail sentences and section 250 borrowed the 5 day per month provision applicable to sentences of less than 1 year in the statute dealing with sentences to a state prison or penitentiary. Thus, since the period of commutation or reduction (as it is now called) for county jail sentences always has been a constant 5 days, it is possible that the legislature erroneously borrowed the provision that provides for construing consecutive sentences as one term when it enacted section 251. In any event, when the provision dealing with commutation on state prison and penitentiary terms was changed to provide for a discretionary reduction of a constant period of up to 10 days per month irrespective of the length of the sentence, the provision for constraining consecutive sentences as one term was repealed (L.1935, Ch. 902, §§ 2, 3). Although Correction Law sections 250 and 251 were amended at that time to change the word "commutation" to read "reduction" section 251 remained in the law (id., § 13).

⁴⁵ New York State has such a statute (Penal Law, § 2190) which is applicable in two situations (see, *infra*, footnote 47).

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tionary power to direct that the second or subsequent sentence either be served concurrently with or commence after the expiration of (i. e., be consecutive) the other term or terms of imprisonment. See *People v. Ingber*, 248 N.Y. 302, 162 N.E. 87 (1928).

Presumptions

Where the court has discretion and specifies that the second or subsequent sentence is to run concurrently or consecutively that direction will, of course, govern. However, if the court does not specify, certain rules will automatically apply. If the sentences are pronounced at the same time by the same judge, there is a presumption that the terms of imprisonment are to be concurrent (see *People v. Ingber*, supra, 248 N.Y. 302, 305, 162 N.E. 87). If the sentences are pronounced at different times, in different courts, for completely unrelated crimes, or in courts of different sovereignties for offenses involving the same basic facts, they will be presumed to be consecutive. *Matter of Browne v. New York State Board of Parole*, 10 N.Y.2d 116, 218 N.Y.S.2d 33 (1961); *People ex rel. Winlander v. Denno*, 9 App.Div.2d 898, 195 N.Y.S.2d 165 (2d Dept. 1959).⁴⁶

Mandatory Consecutive Sentences

In this state, there are two situations in which the court has been deprived, by statute (Penal Law, § 2190), of discretion to choose between concurrent and consecutive sentences. In these situations the sentences must be consecutive, and even if the court fails to include this direction in the sentence, the statute will serve as "a direction to the jailer as to the term of the imprisonment" (*People v. Ingber*, supra, 248 N.Y. 302, 305, 162 N.E. 87). The first situation is where a person is convicted of two or more offenses before sentence has been pronounced upon him for either (Penal Law, § 2190, subd. 1); provided, however, that the offenses were not charged in the same indictment or information or in separate indictments or informations consolidated for trial (*id.*, subd. 4). The second situation is where a person, under sentence for a felony, afterward commits another felony and is sentenced to another term of imprisonment (*id.*, subd. 2).⁴⁷

⁴⁶ Prior to the decision in *Matter of Browne v. New York State Board of Parole* (cited in the text) there seemed to be some confusion as to whether sentences imposed by different courts of the same jurisdiction or sovereignty would be presumed to be concurrent (see opinion in the *Browne* case, 10 N.Y.2d 116, 120-121) 218 N.Y.S.2d 33. Courts, relying upon a statement in *People v. Ingber* (cited in the text) to the effect that sentences pronounced at the same time by the same judge would be presumed to be concurrent, seemed to be extending the presumption to cases where the sentences were imposed at different times by different judges (see *People ex rel. Gerbino v. Ashworth*, 267 App.Div. 579, 47 N.Y.S.2d 551 (1st Dept. 1944)). In the *Browne* case the Court of Appeals held that where a defendant who is under sentence imposed by a New York court is sentenced by another New York court for a completely unrelated crime, the presumption of concurrence does not apply and the sentences are

consecutive. The Court stated that "the 'so-called presumption of concurrence' is not applicable to sentences imposed at different times in different courts, for completely unrelated crimes" (p. 120) and, although it did not expressly confine the rule set forth in *Ingber* to the narrow fact situation covered by the language of that rule, its treatment of the *Ingber* case can easily be interpreted as an intention to so confine the rule.

⁴⁷ The full text of Penal Law, § 2190 is as follows:

"Sentence on two or more convictions of two or more offenses.

"1. Where a person is convicted of two or more offenses before a sentence has been pronounced upon him for either offense, the imprisonment to which he is sentenced upon the second or other subsequent conviction, must commence at the termination of the first or other prior term or terms of imprisonment, to which he is sentenced.

It seems that the first of the two aforesaid rules, making consecutive sentences mandatory, had its genesis in the Revised Statutes of 1830 (2 R.S. 700, § 11) and was enacted as a method of overcoming the presumption of concurrence that applied when the court imposed two sentences at the same time and failed to specify whether they were to run concurrently or consecutively. The Revisers believed that consecutive sentences were customarily imposed when the defendant was sentenced for two crimes at the same time and that when the court neglected to specify that the sentences were to be consecutive, the omission was through inadvertence and was not evidence of an intention that the sentences were to be concurrent (see opinion of Chief Judge Cardozo in *People v. Ingber*, supra, 248 N.Y. 302, 305, 162 N.E. 87). Obviously, though, the statute went further than merely negating any presumption of concurrence; for, where applicable, it stripped the courts of power to impose concurrent sentences.

The other situation in which consecutive sentences are mandatory, i. e., where a person, under sentence for a felony, afterward commits another felony and is sentenced to another term of imprisonment, does not seem to have been enacted to cope with a presumption of concurrence. The situation covered by this rule merely was "singled out and subjected to a rule whereby discretion is excluded" (*People v. Ingber*, supra, 248 N.Y. 302, 305, 162 N.E. 87).

Apart from the foregoing, research has not disclosed any reason as to why these two situations have been "singled out," and, it is submitted, the application of these rules can result in some senseless distinctions. For example, the first rule—making consecutive sentences mandatory when the defendant is convicted of two or more offenses before sentence has been pronounced upon him for either offense (Penal Law, § 2190, subd. 1)—seems to make the issue of whether the second or subsequent sentence must be consecutive depend upon when the trials are had or the pleas are taken. If a defendant pleads guilty to or is found guilty of two separate crimes before he is sentenced for either, the sentences must be consecutive (provided the crimes were not charged in the same indictment or information or in separate indictments or informations consolidated for the purposes of trial [*id.*, subd. 4]). However, if the defendant is convicted and sentenced for a crime and is subsequently convicted and sentenced for another crime (committed prior to the time the first sentence was imposed) the court has discretion to make the second sentence run concurrently. Compare *People ex rel. DiMaggio v. Morhous*, 282 App.Div. 991, 125 N.Y.S.2d 674 (3d Dept.1953), aff'd mem. 307 N.Y. 644, with *People ex rel. Gendelman v. Snyder*, 259 App.Div. 939, 19 N.Y.S.2d 577 (3d Dept.1940). Of course the effect of this rule can be softened in many cases through the use of a suspended sentence.

"2. Where a person, under sentence for a felony, afterward commits any other felony, and is thereof convicted and sentenced to another term of imprisonment, the latter term shall not begin until the expiration of all the terms of imprisonment, to which he is already sentenced.

"3. Where a person is convicted of two or more crimes and is sentenced to more than one term of imprisonment to be served consecutively, if such person is paroled after serving the minimum term of either such sentence, he shall be subject to the jurisdiction of the board of parole until the

expiration of the maximum terms of all such consecutive sentences.

"4. Where a person is convicted of two or more offenses constituting different crimes set forth in separate counts of one indictment or information, or in separate indictments or informations consolidated for the purposes of trial, the court may impose a separate sentence for each offense of which he is so convicted, and the court may order such sentences or any of them, if imprisonment is imposed, to be served concurrently or consecutively."

The second rule—making consecutive sentences mandatory when a person commits a felony while under sentence for a previous felony and is sentenced to another term of imprisonment—applies only to two or more felonies. If a person under sentence for a felony commits a misdemeanor or an offense, or if a person under sentence for a misdemeanor commits another crime (any grade) the court has discretion to make the second sentence run concurrently.

Acts Punishable Under Different Provisions of Law

Where a single act or omission is made criminal and punishable under more than one section of the law the perpetrator may be indicted and convicted of several crimes. In such a case, although he may be punished for any one of the crimes he cannot be punished for more than one (Penal Law, § 1938).

Thus, "if there were merely a single inseparable act violative of more than one statute, or if there were an act which itself violated one statute and was a material element of the violation of another, there would have to be single punishment" and consecutive sentences could not be imposed, even though separate crimes are involved. See e. g., *People ex rel Maurer v. Jackson*, 2 N.Y.2d 259, 264, 159 N.Y.S.2d 203 (1957). However, in such a case it is entirely proper to impose concurrent sentences, because what is forbidden is "multiple punishment not multiple convictions, or sentences that do not spell punishment. When concurrent sentences are imposed, there is no double punishment—there is a single punishment measured by the sentence for the highest grade offense into which all concurrent sentences merge." (id., 2 N.Y.2d 259, 269-270, 159 N.Y.S.2d 203).

As pointed out by the Court in the Maurer case, if concurrent sentences were not allowed, the defendant could not be prosecuted to a final judgment for several related crimes in a single indictment. And, apart from this, the imposition of concurrent sentences has a practical effect because it "insures that the defendant will not go unpunished if there is an error in his conviction for the highest degree of offense resulting in an acquittal as to that count." (ibid.)

Reformatory (Indefinite) Sentences and Sentences Under Article 7-A of the Correction Law ("Indeterminate" Sentences)

There does not appear to be any authority indicating whether a court, when sentencing a defendant for two or more crimes simultaneously, can impose consecutive state reformatory terms (i. e., indefinite sentences).

Inasmuch as the court has no power to fix or limit the duration of a reformatory term and since such a term has no minimum, the effect of consecutive reformatory terms—if they can be imposed—would be to subject the offender to the jurisdiction of the Board of Parole for a longer period of time and this, of course, would be accompanied by the possibility that the offender could be confined in an institution for that length of time, or be released after a short stay and returned to the institution at any time during that period (e. g., 6 years in the case of two misdemeanors or 10 years in the case of two felonies). However, in view of the fact that the reformatory term was not designed for the infliction of punishment befitting the specific crime committed (robbers, burglars, forgers and rapists, etc. all receive equal reformatory terms; and a reformatory term for a misdemeanor is three times as long as the maximum punishment that could be inflicted), but was designed as a reasonable period of time for the reformation of a young offender, a reasonable argument could be made that it is anomalous to allow consecutive reformatory sentences to be imposed simultaneously and before the offender has commenced his treatment.

In this connection, however, it should be noted that there is at least implied authority for imposing a reformatory term to run consecutively with a reformatory term previously imposed. In *Matter of Browne v. New York State Board of Parole*, supra, the Court of Appeals was dealing with a situation where a defendant serving a reformatory term for a misdemeanor (3 year maximum) was convicted of a felony and sentenced to a reformatory term (5 year maximum). The court held that the presumption of concurrence would not apply to these sentences and accepted, without discussion, the proposition that a court can impose a reformatory term which does not start to run until the expiration of a prior reformatory term.⁴⁸

With respect to a city reformatory-type sentence under article 7-A of the Correction Law (described, supra, pp. 38-41), which is similar in nature to the indefinite state reformatory sentence, the Court of Appeals has held that it is improper to impose consecutive sentences if both are imposed at the same time. *People ex rel. Gordon v. Ashworth*, 290 N.Y. 285, 49 N.E.2d 140 (1943).⁴⁹

Neither the majority opinion in the Court of Appeals nor the unanimous opinion of the First Department (264 App.Div. 201, 35 N.Y.S.2d 66) explained the rationale behind this conclusion; but the dissenting opinion of the three judge minority, by Chief Judge Lehman (who did not dissent on this particular point) sheds some light on the Court's reasoning. This reasoning is interesting, not only because of its bearing upon the article 7-A sentence, but also because of the lack of authority on the question of whether a court can simultaneously impose consecutive state reformatory sentences. The Chief Judge stated (290 N.Y. 285, 292, 49 N.E.2d 140):

"Before such indeterminate sentences to be served consecutively could be imposed, the court would be compelled to decide that at the end of the first term of imprisonment three years later the offender would still be capable of being 'substantially benefitted by being committed to a correctional and reformatory institution'; though discharge of the offender in accordance with section 204 before the end of three years would, it seems, indicate that, in the opinion of the Parole Commission and the trial court, longer imprisonment would not accord with the public interest; and conversely failure to terminate the imprisonment during the longest term of imprisonment permitted by the statute would, it seems, indicate that corrective and reformatory treatment failed to achieve its purpose. Such construction would thwart the purpose of the Parole Commission Law that correctional and reformatory institutions should be established in which offenders who are not incapable of moral improvement might be imprisoned until the desired improve-

⁴⁸ Respondent was sentenced for the misdemeanor on September 2, 1954, and for the felony on May 18, 1955; paroled on December 11, 1957, and apparently delinquent for approximately 6 months. The Court stated (10 N.Y.2d 116, 119-120, 282 N.Y.S.2d 33):

"Following his recommitment, appellants [the Board of Parole] computed the maximum expiration date of respondent's term to be February 1, 1963. In arriving at this date,

appellants regarded the two sentences of September 2, 1954 and May 18, 1955 as 'consecutive', adding the maximum of the second to the maximum of the first."

⁴⁹ It also is improper to impose an article 7-A sentence in combination with a definite sentence, because this involves simultaneous opposite findings on the issue of corrigibility. *People ex rel. Nally v. Noble*, 22 Misc.2d 394, 198 N.Y.S.2d 422 (S.Ct. Bronx Co. 1960).

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ment has been noted by the Parole Commission and the court or until three years of imprisonment had been served."⁵⁰

It is interesting to note that in the Gordon case the relator was seeking release from custody after having served his term under the first commitment and the Court—although holding that the sentencing court should not have imposed the two sentences at the same time—held (4 to 3) that the proper procedure was to remand the relator for sentencing on the second conviction. This would seem to imply approval of a practice of deferring sentence on one of the convictions until the conclusion of the first article 7-A term. However, it subsequently has been made quite clear that it is improper to defer sentence indefinitely, and that "where a defendant at the same time is convicted of two crimes for each of which separately he might be committed for an indeterminate term under section 203 of the Correction Law [article 7-A], sentence or the operation of sentence must be suspended upon one, if he is to be sentenced pursuant to section 203 under either conviction unless indeterminate sentences upon both run concurrently." Dictum in *People v. Cioffi*, 1 N.Y.2d 70, 72, 150 N.Y.S.2d 192 (1956); see also *Matter of Hogan v. Bohan*, 305 N.Y. 110, 111 N.E.2d 233 (1953). Thus, if the sentencing court follows the proper procedure, it must dispose of all the convictions at the same time, and there should be no occasion to remand for sentence on the second conviction after the first term has been served as set forth in the Gordon decision.⁵¹

Although, as shown above, this part of the Gordon holding has little, if any, current practical significance, the difference of opinion on this point between the majority (who held only that the two sentences could not be imposed simultaneously) and the three judge minority (who thought the article 7-A sentence should serve as a complete disposition of all the convictions before the court at that time) is important, because it goes right to the basic nature of any reformatory sentence.

In rejecting the contention that an article 7-A sentence exhausts the court's sentencing power the majority emphasized the punishment aspect, stating (290 N.Y. 285, 289, 49 N.E.2d 140):

"If we adopt the construction of the Parole Commission Law, that the imposition of an indeterminate sentence forbids any sentence upon pleas of guilty to unrelated misdemeanors, then we reach the unrealistic conclusion that the punishment for one misdemeanor is

⁵⁰ The above reasoning could easily be applied to the sentencing of an offender who is currently serving an article 7-A sentence imposed by another court for a different crime because here, as well as in the case of consecutive sentences imposed simultaneously, the second court would "be compelled to decide [in advance] that at the end of the first term of imprisonment . . . the offender would still be capable of being 'substantially benefited' " by an article 7-A sentence. Courts have expressed opinions going both ways on this point. (Compare *People ex rel. Bernard v. Ashworth*, 43 N.Y.S.2d 366 [S.Ct. Bronx Co. 1943] with *People ex rel. Bergman v. Ashworth*, 186 Misc. 500, 62 N.Y.S.2d 633 [S.Ct. Bronx Co. 1945].)

⁵¹ In the *Cioffi* case the Court of Appeals was not confronted with, and,

therefore, did not decide the question of whether a sentencing court would lose jurisdiction to sentence on one of the two convictions if it imposed an article 7-A sentence on one conviction and deferred sentence on the other until the article 7-A sentence had terminated. In view of the fact that the only decision in this State depriving a court of jurisdiction to sentence is a recent decision, which was specifically limited to "extremely long [6 years] and unreasonable delays" it is difficult to predict what the court would hold. See *People ex rel. Harty v. Fay*, 10 N.Y.2d 374, 223 N.Y.S.2d 468 (1961). In any event the offender could compel the court to impose sentence on the second conviction and thus get the benefit of a suspended or concurrent sentence. *Matter of Hogan v. Bohan*, 305 N.Y. 110, 111 N.E.2d 233 (1953).

made the only punishment possible, not only for two unrelated crimes but for as many misdemeanors as the prisoner may recall and wish to plead guilty to. It is submitted that such a construction, by providing for one punishment to become a satisfaction for any number of unrelated crimes, removes any deterrent to their commission and, therefore, weighs against this construction being in accord with the intention of the Legislature."

The minority, however, mindful that article 7-A does not prescribe punishment, as such, and provides for a sentence with a 3-year maximum, although the maximum punishment for a misdemeanor is imprisonment for not more than 1 year, stated as follows (p. 293):

"The punitive purpose of imprisonment [under article 7-A] is subordinated to its reformatory purposes. Where a statute expressly provides that sentences must be imposed which shall not be proportioned to an offender's guilt, there is little if any basis for reading into the statute an implied power to impose cumulative punishment for several offenses."

Sentences Where More Than One Institution is Involved

One of the more difficult, and apparently unresolved, problems is whether a court can make a sentence to one institution run concurrently with a sentence being served or to be served in a different institution.

1. The Same Sovereignty

Turning first to a situation involving two sentences by courts of the same sovereignty, a person could—as an example—be convicted of a felony in the Westchester County Court, for which he might be sentenced to a state prison and, while serving that term or before commencing to serve it, be convicted in the New York City Criminal Court of a misdemeanor and sentenced to 9 months in the City Penitentiary. If the New York City Court is aware of the state prison term it might wish to direct that the penitentiary term, run concurrently with it. Obviously, the prisoner would hardly be the one to complain (and this, perhaps, explains the dearth of authority on the question). However, it would seem to be somewhat of a paradox if a judgment ordering imprisonment in a county penitentiary ("the place of imprisonment must be specified in the judgment and sentence of the court" [Penal Law, § 2180]) could be satisfied by imprisonment in a state prison or, in other words, merge with a state prison sentence;⁵² especially in view of the fact that a misdemeanor is not punishable by imprisonment in a state prison.

Perhaps the answer to this type of problem can best be reached by determining whether it is possible for a term of imprisonment to commence prior to the time the prisoner is committed to the custody of the "place of imprisonment . . . specified in the judgment and sentence of the court" (Penal Law, § 2190). Because, as a rule, once a term commences it continues to run—irrespective of the place of con-

⁵² The chance of the converse of this situation occurring (i. e., a prisoner serving a term in a county jail being sentenced to a state prison term to run concurrently) seems so unlikely as not to warrant discussion. However, it should be noted that in the case of *People ex rel. DeSantis v. Warden of New York City Penitentiary*, 176 Misc. 844, 29 N.Y.S.2d 266, aff'd mem. 262 App.Div. 1003 the Supreme Court (Bronx County 1941-Eder, J.) stated that a state prison sentence can be

served concurrently with an article 7-A New York City Penitentiary sentence. The court held, however, that because the subsequently imposed state prison sentence was executed first (and the Court thought this was irregular) it could not run concurrently with the first sentence. In other words, the court held that a second sentence can run concurrently with the first, but the first cannot run concurrently with the second.

finement—until it expires (unless the prisoner does something to interrupt it). See e. g., *People ex rel. Rainone v. Murphy*, 1 N.Y.2d 367, 153 N.Y.S.2d 21 (1956).

With respect to a state prison or reformatory, the available criteria seem to point to the conclusion that a sentence to a state institution cannot begin to run until the prisoner is received in the institution. Although there is no statute directly applicable to the situation, there is a statute specifying that for the purpose of the good behavior allowance applicable to state prison and penitentiary prisoners "the term of imprisonment of each prisoner shall begin on the date of his actual incarceration in a state prison or penitentiary," or in the Department of Correction's reception center (Correction Law, § 231). This has been interpreted—in cases dealing with post conviction "jail time"—as authority for the proposition that the sentence, as such, cannot commence until the prisoner actually has been delivered into the custody of the proper official of the institution named in the judgment. See *People ex rel. Jackson v. Weaver*, 279 App.Div. 88, 108 N.Y.S.2d 653 (3d Dept. 1951); *People ex rel. Uebelmesser v. Carter*, 176 App.Div. 804, 163 N.Y. Supp. 445 (2d Dept. 1917); *Janosko v. Kross*, 27 Misc.2d 210, 207 N.Y.S. 2d 197 (S.Ct.N.Y.Co.1960). Moreover, the Governor, in 1960 and 1961, vetoed bills designed to make the term of a sentence commence as soon as it is pronounced (see N.Y.S. Legislative Annual, 1960, p. 602; 1961, p. 567).

With respect to a county penal institution, it is well to bear in mind that the above cases deal only with sentences to a state institution, and, although the statute they rely upon mentions county penitentiaries also, this section does not deal directly with the problem of when the term, as such, commences. These factors are significant, because five years before this statute was enacted (L.1886, Ch. 21, § 3), the Fourth Department held that where a person was sentenced to a penitentiary the sentence began to run at the time the prisoner was committed to the county jail and not at the time the prisoner was received in the penitentiary; and that Court thought there was a distinction, for this purpose, between a penitentiary and a state prison sentence. *People v. Lincoln*, 25 Hun 306 (4th Dept. 1881). The Court stated (p. 307):

"In the case in hand we are of the opinion that the sentence began to run from the date it was pronounced, and that all the time the respondent was in custody after that day is to be credited upon her sentence. Being thus credited, it appears to the special county judge that she had been imprisoned six months. The conviction was not for a felony, and the imprisonment in jail was as much of a punishment in theory of law as in the Monroe County Penitentiary.

"The case is therefore not within the reasoning of Attorney-General Schoonmaker, stated in his letter of March 14th, 1879, to the clerk of Auburn prison: He was considering cases of felony punishable by imprisonment in a State's prison, by becoming 'an inmate of a State's prison'".

Therefore, it appears that a state prison or state reformatory sentence cannot start to run prior to the date of actual incarceration in an institution under the jurisdiction of the State Department of Correction, while a penitentiary or county jail sentence might start to run as soon as the prisoner is incarcerated in any institution pursuant to the judgment (but not before incarceration, *People ex rel. King v. McEwen*, 62 How. Pr. 226 [Albany Recorder's Court 1881]). This could very well lead to the conclusion that a state prison or reformatory sentence cannot be served concurrently with a sentence being served in another institution; and, to a strong argument that a county jail or penitentiary sentence can.

2. More Than One Sovereignty

Turning now to sentences imposed by courts of different sovereignties, one would have to add to the question of when the New York sentence begins to run the additional question of whether service in the prison of another state or in a federal prison can "expiate an offense against the dignity of this state" (see dictum of Cardozo, Ch. J. in *People v. Ingber*, 218 N.Y. 302, 306, 162 N.E.2d 87 [1928]).

Two New York Supreme Court justices have considered the problem of whether a New York Court can make a sentence to a state prison run concurrently with a federal sentence and have concluded—without finding it necessary to hold—that this is possible. *People ex rel. Winelander v. Ruthazer*, 17 Misc.2d 720, 183 N.Y.S.2d 765 (S.Ct. Queens Co. 1959); *People ex rel. Bove v. McDonnell*, 128 N.Y.S.2d 643, 649 (S.Ct. Bronx Co. 1953).

The Second Department, however, when considering the question of whether there was a presumption of concurrence applicable to a state sentence imposed subsequent to a federal sentence (but before the latter had commenced) in a case where both convictions involved the same basic facts drew a distinction between two sentences imposed by courts of the same sovereignty and two sentences imposed by courts of different sovereignties. *People ex rel. Winelander v. Denno*, 9 App.Div.2d 898, 195 N.Y.S.2d 165 (2d Dept. 1959). The Court stated:

"The common-law presumption that two sentences, imposed by one court or by different courts of the same jurisdiction or sovereignty, are concurrent, in the absence of a direction to the contrary by the second sentencing judge, is not applicable when the sentences are imposed under the laws and by the courts of separate sovereignties, such as the State of New York and the United States, and when the two places of confinement are entirely different. The provisions of section 2190 of the Penal Law and the common-law presumption mentioned above have reference, and are applicable, only to those offenses recognized and punishable as crimes by the State of New York."
(Citations omitted.)⁵³

An opinion of the Fourth Department (in the case of *People ex rel. Rainone v. Murphy*, 1 App.Div.2d 754, 147 N.Y.S.2d 197 [1955]) also sheds some light upon this question. In the Rainone case the relator who had been on parole from a state prison, was arrested pursuant to a New York State Parole Board warrant for an act of delinquency. The delinquency consisted of committing a federal crime and the relator was turned over to the federal authorities for trial. After he was sentenced by the federal court he was returned to the custody of the New York Parole Board. But, instead of sending the relator back to state prison, the Board redelivered him to the federal authorities so that he could serve his federal sentence. When released from the federal penitentiary after serving the federal sentence, he was once again returned to the custody of the New York Parole Board and this time was sent to state prison to complete his term. He then claimed that the time he served in the federal penitentiary should be credited against the state prison term and that, as a result, his state prison term had expired. The Fourth Department held against this contention and stated: "State and federal sentences, being sentences of confinement to two different places, do not run concurrently." The Court of Appeals reversed, but did so because the State Parole Board, through taking custody of the relator, had started his

⁵³ This decision was written before the Court of Appeals decided *Matter of Browne v. New York State Board of Parole*, 10 N.Y.2d 116, 218 N.Y.S.2d 33 (1961) which clarified—to some

extent—the scope of this presumption even where two sentences are imposed by courts of the same sovereignty (see discussion, *supra*, footnote 46).

sentence running again (it had stopped running on the date he was declared delinquent [Correction Law, § 218]), and thereafter had no power to stop it (1 N.Y.2d 367, 153 N.Y.S.2d 21).⁵⁴

In sum then, the question of whether a state court can validly direct that its sentence is to run concurrently with a term the prisoner is serving in another jurisdiction does not seem to have been authoritatively resolved in this state. However, the authorities stating that a state prison or reformatory sentence cannot commence prior to the date of actual incarceration in an institution under the jurisdiction of the State Department of Correction and the appellate authorities dealing with cases involving sentences by courts of different sovereignties furnish strong evi-

⁵⁴ A further explanation of the point made in the Rainone case might be helpful at this point. When a prisoner is in complete and unconditional custody serving a sentence, the state can do nothing to stop that sentence from running: it can be stopped only if the prisoner escapes or becomes delinquent. Thus if the state simply delivers the prisoner to another sovereign, to serve another sentence, the first sentence continues to run while he is serving the other (see *People ex rel. Reynolds v. Martin*, 3 N.Y.2d 217, 165 N.Y.S.2d 26 [1957]).

When a person is released on parole, he still is in the legal custody of the state; but this custody terminates if he commits a crime under the laws of another sovereign—for example under federal law—and his state sentence stops running at that point (see opinion of Halpern, J. in *Perillo v. New York State Board of Parole*, 4 App. Div.2d 355, 165 N.Y.S.2d 139 [4th Dept. 1957], *aff'd per curiam*, 4 N.Y.2d 1013). Thereafter, the matter of which sovereign will have custody depends entirely upon which sovereign gets custody first. If the State Parole Board takes custody first by having the person arrested pursuant to a delinquency warrant, the sentence will start to run again * and, although the state can and should deliver the prisoner to the federal authorities for trial and sentencing, the first sentence continues to run irrespective of whether the federal authorities return the prisoner to the state before he serves the federal sentence. In this situation, therefore, the prisoner should be returned to the state before he serves his federal sentence, so that the state can fully perform its duty.

However, if the federal authorities take custody of the offender before the Parole Board regains custody, the federal government has complete and unconditional custody and can execute its sentence without waiting for the state to finish. In such a case, the Board of Parole can compel the pris-

oner to serve the balance of his term (calculated from the date of delinquency) after the federal term. This is so even if the prisoner is admitted to bail, pending prosecution on the federal charge, and arrested for parole delinquency before the federal sentence is imposed, because the state has acquired only conditional custody; that is, its custody is subject to the prior right of the federal government. *Perillo v. New York State Board of Parole*, *supra*. (If the state authorities take custody while the prisoner is at liberty on bail, he would, of course, be entitled to credit for the length of that custody [Correction Law, § 218; Penal Law, § 2193, subd. 2].).

* In the Rainone case the Court of Appeals placed emphasis upon the fact that the prisoner was in the custody of the Parole Board, and said: "Regardless, however, of what the Parole Board does with the prisoner, after it has regained custody of him, his State sentence continues to run" (*id.*, p. 373). However, in 1960 section 218 of the Correction Law was amended so as to provide that the sentence does not begin to run again until the prisoner is returned to an institution under the jurisdiction of the Commissioner of Correction. Thus, if the Board regained custody and kept the prisoner in a city prison or county jail instead of returning him to state prison (which is what happened in the Rainone case [see vols. 50-4 rec. on appeal]), the state might still get complete and unconditional custody and the right to keep the prisoner until his state prison sentence has terminated; but, if it delivered the prisoner to the federal authorities—to serve a federal term—before returning him to an institution under the jurisdiction of the Department of Correction, a strong argument could be made that the state prison sentence will not run concurrently with the federal sentence, because, under the new language of section 218, the sentence never started to run again.

dence that if the question were squarely presented, it would be answered in the negative.⁵⁵

In this connection it is interesting to note that there seems to be a difference of opinion among federal judges on the question of whether a federal court can validly impose a sentence that will run concurrently with a state prison sentence.⁵⁶

The United States Code, unlike New York law, provides that a federal sentence "shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence" (18 U.S.C., § 3568). But the federal courts (unlike the New York Courts) do not name the place of imprisonment: they merely commit the prisoner to the custody of the Attorney General, who has exclusive power to designate the place of confinement and who "may designate any available, suitable and appropriate institutions, whether maintained by the Federal Government or otherwise, or whether within or without the judicial district in which the person was convicted" (id., § 4082; 18 U.S.C., Form 25).

The federal court, however, may recommend the place of imprisonment (there is space for this on the official form of commitment) and if the court recommends that the offender serve his federal sentence in a state prison where he happens to be serving a previously imposed state court sentence, this recommendation, though not binding, will be followed. (See discussion by Judge James N. Carter [Dist. Judge S.D.Cal.] at Pilot Institute on Sentencing 26 F.R.D. 231, 355-365.) And this is the source of confusion.

Applying the above procedure it has been held that where a federal court recommends a state prison as the place of confinement, and the recommendation is followed, the federal court has made its sentence run and its sentence does run concurrently with a previously imposed state prison sentence being served in that prison. See *Wertz v. Looney*, 208 F.2d 102 (10th Cir.1953). But it also has been held that a federal court cannot make its sentence run concurrently with a state court sentence, and that the aforesaid procedure cannot affect the sentence. If it could, stated the Court, it would either deprive the Attorney General of his exclusive right to designate a place of imprisonment—which the court cannot do—or result in "a sentence which is so uncertain as to leave to the Attorney General the decision as to whether the intent of the Court shall be effectuated"—which the court also, and obviously, cannot do. *United States v. Hough*, 157 F.Supp. 771 (S.D.Cal.1957).

This issue could affect the sentence of a New York State prisoner as follows. If a person commits a crime under the laws of New York and also commits a crime under federal law (both crimes could involve the same act),⁵⁷ the sovereignty that apprehends or takes custody of him first will have the right to follow through to completion of its judgment and sentence (see footnote 51). If New York State apprehends the offender before the federal authorities and if the federal court sentences the of-

⁵⁵ Whether that answer would also apply to a sentence to a county penal institution is a more difficult question.

⁵⁶ Compare *Wertz v. Looney*, 208 F.2d 102 (10th Cir. 1953) with *Lunsford v. Hudspeth*, 126 F.2d 653 (10th Cir. 1942) and *United States v. Hough*, 157 F.Supp. 771 (S.D.Cal. 1957).

⁵⁷ The Second Department has recently held (two justices dissenting) that section 33 of the Penal Law and

section 139 of the Code of Criminal Procedure which bar a second prosecution for the same act if there has been a conviction or acquittal in "another state, territory or country" do not apply to crimes tried by the federal government, because "the Federal Government does not fall into any of those categories." *People v. Lo Cicero*, 17 App.Div.2d 31, 230 N.Y.S. 2d 384 (2d Dept.1962), appeal pending.

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fender in accordance with the procedure used in *Werntz v. Looney*, supra, the federal sentence can run concurrently with the state sentence. However, if the federal authorities apprehend the offender first (and, if it be assumed that under New York law the New York court cannot make its sentence run concurrently with the federal sentence), the offender cannot receive concurrent sentences. Therefore, the question of whether the offender receives concurrent or consecutive sentences could depend entirely upon the fortuitous circumstance of who arrests him first.⁵³

Calculating Terms of Imprisonment

1. "Jail Time"

Where a person is arrested on two or more charges or is arrested on one charge and, while in custody, a warrant is filed because of another charge, there seems to be some confusion as to the method of calculating the "jail time" to be credited on the various charges. Penal Law section 2193 provides that "Any time spent by a person . . . convicted of a crime in a . . . jail prior to his conviction and before sentence has been pronounced upon him shall become and be calculated as part of the term of the sentence imposed upon him . . ." but does not furnish any guidance as to whether the prisoner is entitled to receive credit on each sentence for the "jail time".

Thus, if a person is arrested and charged at the same time with three separate crimes and sentenced to consecutive sentences, the sheriff or the New York City Department of Correction can certify the same "jail time" to be applied against each of the three sentences (see *Matter of Donohue v. Brown*, 3 Misc.2d 969, 153 N.Y.S.2d 336 [S.Ct. West.Co. 1956]) or take the position that the prisoner should not be credited more than once for the same jail time and credit the "jail time" against only one of the sentences. Also, in a case where a prisoner is being held pending trial on one crime and a warrant is received to hold him for a different crime, the sheriff or the New York City Department of Correction can take the position that he should receive "jail time" credit on the sentence for the second crime dating from the time the warrant was filed to the time the prisoner is sentenced on that crime, even though, during all of that time, he was in custody pending disposition of the first charge (see *Janosko v. Kross*, 27 Misc.2d 110, 207 N.Y.S.2d 197 [S.Ct. N.Y.Co. 1960]) or, it seems, with equal validity, take the position that the prisoner is not entitled to any "jail time" at all on the sentence for the second crime.

2. Parole

If a person is sentenced to consecutive indeterminate state prison sentences, or to an additional and consecutive indeterminate sentence while serving the minimum of a prior sentence, the Board of Parole will aggregate the minima of the sentences in order to determine when the prisoner will be eligible for parole. (Of course, if a prisoner is sentenced to a new and consecutive term after he has served the minimum of a prior term, he is eligible for parole when he has served the minimum of the new term.) Thus, for example, a person sentenced to two consecutive terms is not compelled to serve the maximum of the first term and the minimum of the second term before he is eligible for parole: he is eligible after serving the aggregate of the minima. However, the practice of aggregating the minima, or, as it is sometimes called, paroling the prisoner (within the prison walls) on the first term so that he can begin serving

⁵³ For discussions of this problem and citations supporting the text, see 359-361; "Sentencing Methods and Techniques in the United States," June 1962 issue of "Federal Probation." "The Offender Who Violates Both State and Federal Law," Pilot Institute on Sentencing, 26 F.R.D. 231.

the minimum of the second term, does not affect the maximum duration of the terms, and the second term does not actually begin to run when the prisoner is "paroled on his first term," because, for the purpose of calculating the expiration dates of consecutive sentences, the second term does not begin to run until the expiration of the maximum of the first term. In other words, the prisoner receives no credit against the maximum of his second term until the expiration of the maximum of the first term. Penal Law, § 2190 subds. 1-3;⁵⁹ *Siraguso v. Moore*, 273 N.Y. 59, 6 N.E.2d 97 (1937); *People ex rel. Di Vito v. Fay*, 3 App.Div.2d 926, 162 N.Y.S.2d 619 (2d Dept. 1957), *aff'd mem.* 4 N.Y.2d 864; *People ex rel. Merrill v. Jackson*, 7 App.Div.2d 166, 180 N.Y.S.2d 964 (3d Dept. 1958).

If a parolee is sentenced to a state prison or reformatory for a crime or offense committed while on parole from a state institution, the Board of Parole may compel the prisoner to serve the portion, or any part of the portion, remaining of the maximum term of the sentence on which he was released on parole (calculated from the date of delinquency) before he begins to serve the new term (Correction Law, § 219).

For parole purposes this is similar to consecutive indeterminate terms that are imposed simultaneously. The portion of the old sentence designated by the Board of Parole becomes a new minimum term—imposed by the Board instead of a court—and the Board adds that portion to the minimum of the new sentence imposed by the court to determine when the prisoner will again be eligible for parole. But here the similarity ends, because in this situation, the action taken by the Board of Parole can control the expiration date of the maximum of the second sentence. This is so because when the prisoner begins serving the minimum of the second sentence he begins serving the second sentence, as such, and if the Board has not compelled him to finish serving the maximum of his first term, before he commences his second term he will be serving both sentences concurrently; i.e. he will finish serving the remainder of his first sentence while he actually is serving the second sentence. See description in 106 Leg.Doc. 1960, p. 19 (31st Annual Report, Division of Parole).⁶⁰

In addition to the power to decide whether and when the second sentence will run concurrently with the first, the Board also has the power to revoke its determination on this issue after the second sentence has started to run. For example, if a parolee who has 7 years left on the maximum of his term (term "A") is sentenced for a crime committed while on parole to a term of not less than 2 nor more than 5 years (term "B"), the Board might compel him to serve 3 years more of term "A" before commencing to serve term "B". He might then be paroled on term "B", after serving an additional 2 years (the term "B" minimum). At this point (having served 5 years) he would be released on parole. If he happens to be declared delinquent and returned to prison after being on parole for 1 year, the Board then can stop term "B" from running, and compel the prisoner to serve the remaining 1 year of term "A" before beginning to serve the remaining 2 years of term "B". See *People ex rel. Kenny v. Jackson*, 4 N.Y.2d 229, 173 N.Y.S.2d 591 (1958).

⁵⁹ Penal Law section 2190 is not very clear on this matter and there is nothing in the Correction Law to cover it.

⁶⁰ This seems contrary to the language of Penal Law, § 2190, subd. 2 and the intent of subd. 3 but was accepted—without comment—by the Court of Appeals in *People ex rel. Kenny v. Jackson*, 4 N.Y.2d 229, 173

N.Y.S.2d 591 (1958) where it was conceded to be so by the Attorney General (*id.*, p. 235). The Attorney General had raised this point in a prior habeas corpus involving this prisoner and the Supreme Court had rejected it. (*People ex rel. Mahon v. Warden*, 1 Misc.2d 267, 144 N.Y.S.2d 837 [S. Ct. Bronx Co. 1955], *aff'd mem.* 2 App.Div.2d 876). He did not raise it again in his brief in the Kenny case.

One other aspect of the interplay between parole and consecutive sentences might be noted. As pointed out on pages A-5, A-6, supra, Penal Law section 1945 provides that a person sentenced to life imprisonment is eligible for parole in the same manner as a person serving an indeterminate term with a minimum of 40 years (subd. 6) and a person sentenced to an indeterminate term with a minimum in excess of 30 years is eligible for parole as though he had been sentenced to an indeterminate term with a minimum of 30 years (subd. 7). But this section does not seem to apply to the aggregate minima of consecutive sentences, and hence, if a person is sentenced at the same time to two or more consecutive terms and the aggregate minimum of the terms is more than 40 years, he must be held in prison until he has served the aggregate minimum, even though this would be longer than a person sentenced to life imprisonment (see 1960 Ops. N.Y. Att'y Gen.).

F. SUSPENDED SENTENCE; SUSPENDED EXECUTION OF JUDGMENT; PROBATION

It is, of course, obvious that a plea or verdict of guilty is not the judgment of the court: the sentence is its judgment. See e. g., *People v. Cioffi*, 1 N.Y.2d 70, 150 N.Y.S.2d 192 (1956). And it is well established that the court must, within a reasonable time after a plea or verdict of guilty, pronounce its sentence. *Matter of Hogan v. Bohan*, 305 N.Y. 110, 111 N.E.2d 233 (1953). Where the sentence of the court is a term of imprisonment or a fine, judgment has been imposed and this, by and large, disposes of the matter insofar as the court is concerned. However, where the court pronounces a suspended sentence or pronounces sentence and suspends execution of the judgment, the matter of judgment remains sub judice and there is no judgment. *People v. Shaw*, 1 N.Y.2d 30, 150 N.Y.S.2d 161 (1956); *People v. Hareq*, 292 N.Y. 321, 55 N.E.2d 179 (1944); *People ex rel. Marely v. Lawes*, 254 N.Y. 249, 172 N.E. 487 (1930); *People ex rel. Lozzi v. Fay*, 6 App.Div.2d 18, 175 N.Y.S.2d 236 (2d Dept. 1958), *aff'd mem.*, 5 N.Y.2d 890. The fact that the judgment is sub judice not only prolongs the court's responsibility in the matter and allows the offender to escape the immediate infliction of punishment, but also means there is a question as to whether the offender is subject to the disabilities, disqualifications and forfeitures that apply to a person who has been "convicted." *People v. Fabian*, 192 N.Y. 443, 86 N.E. 672 (1908); and these are the sources of the problems surrounding the subject of suspended sentences.

The Court's Inherent Power Under Common Law to Suspend Sentence or Execution of Sentence

There seems to be no question about the fact that the power to suspend sentence or the execution of sentence dates back to the early days of the common law and was inherent in any court that had jurisdiction to sentence (see *People ex rel. Forsyth v. Court of Sessions*, 141 N.Y. 288, 86 N.E. 386 [1894]).⁶¹

However, the authorities reflect a sharp difference of opinion as to the nature and scope of this power. The United States Supreme Court has stated that the inherent power to suspend sentence was exercised at common law only in case of error or miscarriage of justice affecting the le-

⁶¹ The opinion in the *Forsyth* case only mentions the power of a court of record but it has been held that the power also belongs to a court that is not a court of record. *People ex rel. Dunnigan v. Webster*, 14 Misc. 617, 36 N.Y.Supp. 745 (S.Ct. Monroe Co. 1895), *aff'd mem.* 1 App.Div. 631; Cf. *Matter of Hogan v. N. Y. Supreme Court*, 295 N.Y. 92, 65 N.E.2d 181 (1946).

gality of the conviction, as a temporary measure for the purpose of enabling a pardon to be sought, and that a court does not have inherent power to suspend sentence if it bases its refusal to sentence upon considerations extraneous to the legality of the conviction: i.e., mitigating circumstances connected with the crime; previous good character; age of the offender; etc. *Ex parte United States*, 242 U.S. 27, 37 S.Ct. 72 (1916). In contrast, the New York Court of Appeals (in an opinion written 22 years before *Ex parte United States* was decided) clearly indicated that the inherent power to suspend sentence meant the power to permanently suspend sentence for any reason that appeals to the judicial discretion. *People ex rel. Forsyth v. Court of Sessions*, supra.

The Court of Appeals, in the *Forsyth* case, stated that the practice of suspending sentence "had its origin in the hardships resulting from peculiar rules of criminal procedure, when the court had no power to grant a new trial, either upon the same or additional evidence, and the verdict was not reviewable on the facts by any higher court" (*id.*, p. 293). The United States Supreme Court agreed with this. However, the Court of Appeals, quoting from *Hale's Pleas of the Crown*, where (according to the Court) it is stated that the practice also was employed "when favorable or extenuating circumstances appear and when youths are convicted of their first offense" reached the conclusion that the common law power to suspend sentence included the power to permanently suspend when the court found "favorable or extenuating circumstances" not necessarily connected with the legality of the conviction. The Supreme Court did not agree with this.

The United States Supreme Court (in *Ex parte United States*) claimed that the quotation from *Hale's Pleas of the Crown* relied upon by the New York Court of Appeals was not accurate, and that the above quoted language does not appear therein. The Supreme Court stated, that in its opinion, the origin of the practice and the history of its use in England proved that suspension of sentence or suspension of the execution of judgment was employed for only two reasons: (1) "on grounds of error or miscarriage of justice which, under our system, would be corrected either by new trials or by the exercise of the power to review;" and (2) as a temporary measure to grant time for the purpose of enabling a pardon to be sought or bestowed (*id.*, p. 44). The Court then said:

"But neither of these conditions serve to convert the mere exercise of a judicial discretion to temporarily suspend for the accomplishment of a purpose contemplated by law into the existence of an arbitrary judicial power to permanently refuse to enforce the law." (*ibid.*)

It is interesting to note that while the Supreme Court discussed the power to suspend sentence or the execution of sentence (the case actually involved suspended execution), the Court of Appeals discussed only the power to suspend sentence. This is significant, because the Second Department has held that the broad inherent power mentioned in the *Forsyth* decision does not extend to suspension of execution. *People ex rel. Hirschberg v. Seeger*, 179 App.Div. 792, 166 N.Y.Supp. 913 (2d Dept. 1917), appeal dismissed, 223 N.Y. 659. However, the two powers have now become so commingled that courts no longer seem to recognize any distinction between them. See *People v. Oskroba*, 305 N.Y. 113, 117, 111 N.E.2d 235 (1953); *Ex parte Kuncy*, 168 Misc. 285, 5 N.Y.S.2d 644 (S.Ct. N.Y.Co. 1938), *aff'd mem.*, 280 N.Y. 794.

The Constitutional Problem

The United States Supreme Court's decision that the federal courts do not have inherent power to base a suspended sentence or suspended execution upon considerations extraneous to the legality of the conviction was not, however, based upon its interpretation of the powers of courts.

under the common law of England: it was based upon the distribution of powers under the United States Constitution. The Court held that any power of the federal judiciary to permanently suspend sentence or the execution thereof (i.e., to permanently refuse to impose punishment) upon considerations extraneous to the legality of the conviction would infringe upon the power of the legislative branch of the federal government to define and fix the punishment for crime "which includes the right in advance to bring within judicial discretion for the purpose of executing the statute elements of consideration which would be otherwise beyond the scope of judicial authority" (id., p. 42). Moreover, since Congress had not provided the federal courts with the right to exercise judicial discretion to permanently relieve from punishment based upon elements extraneous to the legality of the conviction, the Supreme Court held that the judicial exercise of this power would also infringe upon the powers of the executive department; because, as stated by the Court, "the right to relieve from punishment fixed by law and ascertained according to the methods by it [the legislative branch] provided, belongs to the executive department" (ibid.). It might be noted, in this connection, that the Supreme Court recommended that Congress consider the problem and deal with it by appropriate legislation.

With respect to the New York State Constitution, since the New York Court of Appeals has stated (in the Forsyth case) that the power to suspend sentence on any ground that appeals to the judicial discretion is part of the inherent power of the judiciary, it seems clear that the exercise of the power when based upon considerations extraneous to the legality of the conviction would not infringe upon the power of the legislative branch to set the standards for punishment; or, as a result, infringe upon the power of the executive branch to relieve from punishment fixed by law.

However, it should be noted, that the Court of Appeals did not have to rule on this question. The issue before the Court was whether a statute which "confirmed" the judiciary's right to base a suspended sentence upon considerations extraneous to the legality of the conviction was an unconstitutional invasion of the pardoning power of the executive. And the Court's remarks were made in the course of upholding this statute. (The appeal for legislation by the United States Supreme Court in *Ex parte United States* is a clear indication that the Supreme Court would have arrived at the same conclusion.)

The Forsyth opinion also contained a word of caution to the legislature about its power to deal with suspended sentences. The statute therein involved (L.1893, Ch. 279) provided that the court "may, in its discretion, suspend sentence, during the good behavior of the person convicted, where the maximum term of imprisonment prescribed by law does not exceed ten years, and such person has never before been convicted of a felony." Although the Court did not seem troubled by the fact that the legislature was limiting the number of situations in which this inherent power of the judiciary could be exercised, it was troubled by fact that the legislature had said that sentence could be suspended "during the good behavior of the person convicted". The Court was concerned that this language might be read as expressing a condition which, if complied with, would preclude the trial court from revoking the suspension. The Court wanted it to be clearly understood that the legislature lacked the power to tie the hands of the judiciary in this fashion and stated (p. 296):

"The power to suspend judgment during good behavior, if understood as expressing a condition, upon the compliance with which the offender would be absolutely relieved from all punishment and freed from the power of the court to pass sentence, is open to more doubt. The legislature cannot authorize the courts to abdicate their

own powers and duties or to tie their own hands in such a way that after sentence has been suspended they cannot, when deemed proper, and in the interest of justice, inflict the proper punishment in the exercise of a sound discretion. Nor can the free and untrammelled exercise of this power or the right to pass sentence according to the discretion of the court be made dependent upon compliance with some condition that would require the court to try a question of fact before it could render the judgment which the law prescribes. The statute must not be understood as conferring any new power. The court may suspend sentence as before, but it can do nothing to preclude itself or its successor from passing the proper sentence whenever such a course appears to be proper."

Statutory Power to Suspend Sentence or the Execution of Judgment

Penal Law section 2188 presently provides that any court authorized to impose sentence may suspend sentence or impose sentence and suspend the execution of judgment.⁶² But this power to suspend does not extend to all cases. The statute specifies the following situations in which the court cannot do so:

- (a) Where the offender is convicted of a crime punishable by death or life imprisonment. This includes crimes punishable by an indeterminate term having a minimum of not less than a specified number of years and a maximum of life (see footnote 9, supra); but does not include crimes punishable by an indeterminate term of one day to life;
- (b) Where the defendant is a fourth felony offender under Penal Law section 1942;
- (c) Where the defendant is convicted of a felony committed while armed with a weapon, as provided in Penal Law section 1944 [sic.]. And this applies even where the court does not impose the additional punishment prescribed by section 1944;
- (d) Where the defendant is convicted of a third narcotic felony under Penal Law section 1941, subd. 2.

Although section 2188 does not prescribe any standards for the exercise of the discretionary power to suspend sentence or execution of judgment, the section does set up certain procedural prerequisites where a felony is involved. In such a case, before the court suspends sentence or the execution of judgment, it must obtain, consider and file a written report containing details of the circumstances of the crime; the prior criminal record of the offender; the offender's social history; and, "a physical, mental or psychiatric examination if any." Also, the district attorney must be given an opportunity to be heard and the court "shall enter in the minutes the reasons for such action." In addition, if the defendant has been found guilty of one of the violent sex crimes punishable by a term of one day to life the court must obtain, consider and file a special psychiatric report, made in accordance with a specified procedure, before suspending sentence or the execution of judgment.

Where the court suspends sentence or execution of judgment it may do so with or without a condition attached. For example, the court may simply grant the favor and suspend sentence or execution of judgment, or it may impose sentence and suspend execution upon condition that the offender perform some act (which condition the offender is free to

⁶² There is no indication in any of the statutes as to whether the court can impose a twofold judgment (fine and imprisonment) for one crime and then suspend execution of one part (either the fine or the imprisonment). However, in view of the fact that in

the year 1925 Penal Law § 2188 was amended (L.1925, Ch. 276) to eliminate the words "of the whole or a part" from the declaration of the court's power to suspend execution of judgment, it seems fairly clear that such action would be improper.

accept or reject). Code of Cr.Proc., § 493; People ex rel. Woodin v. Ottaway, 247 N.Y. 493, 161 N.E. 157 (1928).

Time When Power May Be Exercised

The court may suspend sentence or execution of judgment at any time. But where the court has pronounced a judgment prescribing a term of imprisonment, the imprisonment directed by that judgment cannot be suspended or interrupted after it has commenced. Penal Law, § 2188; Code of Cr.Proc., § 470-a.

Thus, the court cannot change the judgment or suspend execution of it after the convict has been delivered to the place of imprisonment and has commenced service of the term specified therein. Nor can the court reserve the power to change the judgment, or provide in advance that execution of the judgment will be suspended after the offender has served a certain number of years under it. People ex rel. Paris v. Hunt, 201 App.Div. 573, 194 N.Y.Supp. 699 (3d Dept.1922), aff'd mem., 234 N.Y. 558; People ex rel. Holton v. Hunt, 217 App.Div. 428, 216 N.Y.Supp. 765 (3d Dept.1926). Moreover, even where the judgment subsequently is vacated because the offender was not sentenced in compliance with the multiple offender statutes (Penal Law, § 1943), the court cannot suspend the new sentence or execution of the new judgment if the offender has served time under the old one. People v. Von Glahn, 308 N.Y. 662, 124 N.E.2d 312 (1954); Matter of Moore v. Thorn, 245 App.Div. 180, 281 N.Y.Supp. 49 (4th Dept.1935), aff'd mem., 270 N.Y. 502. And the rationale behind this rule could well cover any case where an invalid judgment is vacated.⁶³

However, where consecutive sentences are imposed, the court can suspend execution of any term of imprisonment that has not yet commenced, notwithstanding the fact that the offender is incarcerated and serving a prior term. People v. Flynn, 33 Misc.2d 157 (Gen.Sess.1962); People v. Thuna, 266 App.Div. 223, 41 N.Y.S.2d 857 (2d Dept.1943) (dictum).

Sentence also can be suspended by an intermediate appellate court (but not the Court of Appeals) on an appeal from a judgment. These courts have discretionary power to reduce the sentence to the lightest term the trial court might have imposed (Code of Cr.Proc., § 543) and this includes the power to suspend sentence or the execution of judgment (also the power to place the offender on probation) even where the offender has started to serve the term. People v. Zuckerman, 5 N.Y. 2d 401, 185 N.Y.S.2d 8 (1959); People v. Silver, 10 App.Div.2d 274, 199 N.Y.S.2d 254 (1st Dept.1960).

⁶³ In Matter of Moore v. Thorn (cited in text) the Appellate Division based its holding upon the fact that Penal Law, § 1943, which governs the procedure for resentencing a person as a multiple offender, requires the court to deduct "from the new sentence all time actually served on the sentence so vacated." The Court reasoned that this required it "to consider the prior confinement . . . to which the prisoner was subjected under his original sentence as a part of his imprisonment under the corrected sentence" (245 App.Div. 180, 183-184) and, hence, the prisoner already had commenced service of the

corrected sentence. In 1960 the legislature added an additional provision making it mandatory, in any case "where a judgment of conviction is vacated and a new sentence is thereafter imposed with respect to the same crime," to deduct from and credit to the term of the sentence subsequently imposed, "any time spent by a person under the original sentence" (Penal Law, § 2193, subd. 4). Although there do not seem to be any cases in point, it seems quite possible that this new statute opens the door to applying the rationale of the Thorn case in situations that do not involve multiple offenders.

Probation

In New York State probation is primarily a local court function which is coordinated, supervised and aided (financially and otherwise) by the state government. The individual courts employ and supervise their own probation officers and the Division of Probation in the State Department of Correction oversees the whole system (Correction Law, §§ 14-14f; Code of Cr.Proc., Title 9, Part 6, § 927 et seq.).

The functions of a probation officer are twofold: (1) to make a pre-sentencing investigation and report for the court as to the circumstances of the crime and the background and physical and mental condition of the offender; and (2) to supervise persons who are granted a suspended sentence or suspended execution of judgment and placed on probation.

When the court suspends sentence or execution of judgment it is not compelled to place the offender on probation: it may just suspend sentence or execution and let the matter go at that. See *Ex Parte Kuney*, 168 Misc. 285, 5 N.Y.S.2d 644 (S.Ct.N.Y.Co.1938), *aff'd mem.*, 280 N.Y. 791. However, where the court believes the offender can benefit from supervision by a probation officer, or wants to keep close track of him, the court—when it suspends sentence or execution of judgment—can place the offender on probation; i. e., under the supervision of a probation officer. Penal Law, § 2188; Code of Cr.Proc., § 483. (Before placing a non felon on probation, the court must have and file a pre-sentencing report similar to the one required in the case of a suspended sentence on a felony).

When the court places the offender on probation, it determines the terms and conditions of probation—which it can subsequently modify or expand (Code of Cr.Proc., § 932)—and, thereafter, the probation officer assumes supervision (*id.*, § 936).

The period of probation is fixed by the court, but is subject to certain limitations. Code of Cr.Proc., § 933, N.Y.C.Cr.Ct. Act, § 41. In the case of an offense less than felony, the period cannot exceed 3 years. (The offense of Disorderly Conduct is subject to a special limitation of 2 years [Penal Law, § 723]. In the case of a felony, probation cannot extend beyond the maximum time for which the offender might have been sentenced (except for abandonment, where the probation may continue until the 17th birthday of the youngest child). If the offender is a minor, the probation cannot extend beyond his minority (Code of Cr.Proc., § 933) and where juvenile delinquency is involved, the probation cannot exceed 2 years (1 year in the case of a person "adjudicated in need of supervision"), but can be extended for an additional year under "exceptional circumstances" (Family Court Act, § 757). Where the court does not specifically fix the period of probation it will be assumed that the probation continues for the maximum period. See *People ex rel. Valiant v. Patton*, 221 N.Y. 409, 117 N.E. 614 (1917). Should the probationer abscond or be convicted and incarcerated for another crime during the probation period, the time which he remains away or the time he is incarcerated is added to the period of probation.

If the court fixes a period of probation which is less than the maximum the court may, at any time during that period, expand it to the maximum (Code of Cr.Proc., § 932; Penal Law, § 2188).⁶⁴ The court may also,

⁶⁴ There may be some question as to whether the court can do this in the case of an offense less than felony at a time which is within the 3 year period but not within the longest term for which the defendant might have been

sentenced. Section 932 of the Code states that "the court may at any time . . . enlarge the . . . period of probation as to any probationer." But Penal Law, § 2188 states: "The court from time to time while the

and at any time, terminate the probation and discharge the probationer.

It might be noted that where the judgment of the court is that the offender pay a fine and be imprisoned until it is paid, if the court suspends execution of the judgment and places the offender on probation, the judgment is considered satisfied and the probation terminates when the fine is paid. (Code of Cr.Proc., § 483, subd. 2).

Revocation

Where the offender is not on probation the court may, at any time during the longest period for which the offender could have been sentenced, revoke a suspended sentence or revoke the suspension of execution, and "impose any sentence or make any commitment which might have been imposed at the time of the conviction" (Code of Cr.Proc., § 470-a; Penal Law, § 2188). After the expiration of the longest period for which the offender could have been sentenced, the court is powerless to revoke the suspension, even if proceedings to do so were commenced prior to the expiration of the period. See *People ex rel. Berman v. Marsden*, 3 App. Div.2d 980 (4th Dept. 1957); *People v. Kastel*, 172 Misc. 784, 17 N.Y.S.2d 418 (Co.Ct.Mont.Co.1939). However, if the offender is convicted of another crime before the period expires, the suspension may be revoked after the expiration of the period. Code of Cr.Proc., § 470-a (the statute does not say how long after the expiration).

Where the offender is on probation, revocation of the suspension can be made at any time during the period of probation (*ibid.*). Hence, if the period of probation exceeds the longest term for which the defendant might have been sentenced (as it could in the case of a misdemeanor), the defendant can be sentenced during the period of probation, notwithstanding the fact that the longest term for which he could have been sentenced has expired (Code of Cr.Proc., § 470-a). And if the period of probation (including any extension) is less than the longest term for which the defendant might have been sentenced, the defendant cannot be sentenced after probation has terminated, even though the longest term for which he could have been sentenced has not expired. Code of Cr.Proc., § 483; *People ex rel. Spiegel v. McCann*, 236 App.Div. 146, 258 N.Y.Supp. 324 (1st Dept. 1932), *aff'd mem.*, 261 N.Y. 606.

When the court imposes the sentence it is not compelled to take into account any time the offender has spent on probation, or the lapse of time between the date sentence was suspended and the date it is imposed: the court can impose any sentence it could have imposed at the time of the conviction. See e. g., *People ex rel. Schurman v. Ashworth*, 9 Misc.2d 448, 67 N.Y.S.2d 179 (S.Ct. Bronx Co. 1945); *People ex rel. Pringle v. Livingston*, 135 Misc. 475, 239 N.Y.Supp. 122 (S.Ct. Onondaga Co. 1930). Moreover, the court, if it has imposed sentence and suspended the execution of judgment, is not bound by the previous sentence, but may revoke it and impose a different sentence. Code of Cr.Proc., § 470-a; *Nunz v. Monroe County Court*, 5 Misc.2d 592, 150 N.Y.S.2d 698 (Monroe Co.Ct. 1956).

In the case of an offender on probation, the probation must, of course, be revoked before the new sentence can be imposed. However, before the court can revoke probation, it must arraign the offender on the probation violation and give him an opportunity to be heard (Code of Cr.Proc. § 935). This does not mean the probationer is entitled to a full scale trial, or that any formal procedure must be followed: it merely means "notice to the probationer of the violation charged, with an opportunity to attack or deny the charge." *People v. Oskroba*, 305 N.Y. 113, 111 N.E.

defendant is on probation, may extend the period of probation to a date fixed in the order, but within the longest period for which the defendant might have been sentenced upon conviction."

2d 235 (1953). The court is not accountable as it would be if it had to try a question of fact (*People ex rel. Forsyth v. Court of Sessions, supra*); but only for an abuse of discretion (*People v. Oskroba, supra*).

There does not seem to be any statute granting a non probationer a chance to be heard before suspension is revoked; but it has been held that a hearing, in such a case, is "in keeping with our traditional spirit of fair play which the law reflects" (*People ex rel. Goldberg v. Sheriff of Suffolk Co., 206 Misc. 820, 137 N.Y.S.2d 498 [Co.Ct. Suffolk Co. 1954]*) and, prior to the statute that imposed the requirement for a hearing on revocation (*L.1928, Ch. 640*), it was held that denial of a hearing on revocation "violates elementary principles of criminal jurisprudence, and makes the statutory provision designed to be humane and reformatory authority for arbitrary imprisonment unknown to our laws, and can only leave a rankling injustice in the mind of the defendant" (*People ex rel. Stumpf v. Craig, 79 Misc. 98, 140 N.Y.Supp. 652 [S.Ct. Monroe Co. 1913]*).

Suspended Sentence or Suspended Execution of Judgment as a Conviction

When a person is "convicted" of a crime, he becomes subject to certain indirect consequences; such as disabilities, disqualifications, forfeitures and exposure to increased punishment upon a subsequent conviction. However, the term "conviction" has more than one meaning in the criminal law: it sometimes is used to mean the verdict and sometimes used to mean the adjudication of guilt that is embodied in the judgment of the court. See *People v. Fabian, 192 N.Y. 443, 86 N.E. 672 (1908)*.

It certainly would not seem right to say that a person has been "convicted" and should suffer the indirect consequences that follow upon "conviction" merely because a jury has found him guilty, if the court never has pronounced a judgment adjudicating his guilt. Until there is an adjudication by the court, the defendant has no right of appeal (*People v. Cioffi, 1 N.Y.2d 70, 150 N.Y.S.2d 192 [1956]*) and there are ways in which the verdict or the legality of the entire proceeding can be attacked before, or at the time, the defendant appears for judgment (*Cf. Matter of Richeffi v. New York State Board of Parole, 300 N.Y. 357, 90 N.E.2d 893 [1950]*; and see list of remedies in footnote 66, *infra*). Therefore, where indirect consequences are involved, the meaning of the word "convicted" ought to presuppose a judgment of conviction. But, it usually is said that the sentence is the judgment of the court, and that where sentence or the execution of judgment is suspended, there is no judgment (see e.g. *People v. Shaw, 1 N.Y.2d 30, 150 N.Y.S.2d 161 [1956]*). Thus, there is a problem as to whether a suspended sentence or suspended execution of judgment—which today is no different from a judgment insofar as the offender's legal remedies are concerned, but is not a judgment in the true sense of the word—means that the person has been "convicted" within the meaning of the statutes that impose indirect consequences.

It seems anachronous and not in keeping with the present state of the law to say that where there is a suspended sentence or suspended execution, there has been no judgment; especially if it is said in an attempt to show that the defendant's guilt has not been finally adjudicated. This would clearly be a carryover from the days when the only way to correct an error or miscarriage of justice was to suspend sentence or execution of judgment.⁶⁵ In those days a suspended sentence meant that the defendant had not had a fair trial or that there was a legal defect in the proceedings, and it was quite logical to say that there was no judgment of conviction, and, ergo, no adjudication of guilt. Also, even if the Court

⁶⁵ The opinions in *Matter of Forsyth v. Court of Sessions* and *Ex parte United States* discussed, *supra*, contain detailed explanations of the origin of the practice of suspending sentence or execution of judgment.

of Appeals' interpretation of the common law practice of suspending sentence or execution of judgment (Matter of Forsyth v. Court of Sessions, supra) be accepted in preference to the narrower interpretation by the United States Supreme Court (Ex parte United States, supra), it still would be logical to say that there was no judgment of conviction, because one could not tell whether the suspension stemmed from a legal error or a miscarriage of justice, or stemmed from extenuating circumstances that warranted relief from punishment.

Today, however, when the defendant has an arsenal of remedies for legal errors and miscarriages of justice⁶⁶ and the sole reason for suspending sentence or judgment is some factor extraneous to the legality of the conviction, there seems to be no justification for saying that there is no judgment of conviction, and, ergo, no adjudication of guilt in a case where sentence or execution has been suspended. This becomes even clearer when one realizes that the sentencing procedure is precisely the same—including the right to appeal (Code of Cr.Proc., § 517, subd. 3)—whether the court pronounces sentence, suspends sentence, or pronounces sentence and suspends execution, and that "it is incumbent upon the Court . . . to pronounce judgment, either to sentence the defendant to a term in prison or to suspend sentence or to impose a sentence and suspend its execution" (*emphasis supplied*). Matter of Hogan v. Bohan, 305 N.Y. 110, 113, 111 N.E.2d 233 (1953)⁶⁷

Moreover, this principle long ago received statutory recognition in the provision which makes a suspended sentence or suspended execution of sentence "a conviction for the purpose of affecting the weight of the defendant's testimony in any action or proceeding, civil or criminal." (Code of Cr.Proc., § 470-b).

Thus, it seems that it is more logical to regard the suspended sentence or execution of sentence as at least an adjudication of guilt, and, for this purpose, as a judgment of conviction. In this connection it might be noted that the judgment itself actually embraces two things: "the judgment embraces the adjudication of guilt of the crime charged and the penalty imposed or sentence" People ex rel. Emanuel v. McMann, 7 N.Y. 2d 342, 197 N.Y.S.2d 174 (1960); People v. Sullivan, 3 N.Y.2d 196, 198, 165 N.Y.S.2d 6 (1957).

Therefore, it is only natural to find that today—although courts still say and in some cases hold that a suspended sentence or suspended execution of judgment is not a judgment of conviction—courts are quite willing, in many situations, to hold that a person who has received a suspended sentence or suspended execution of judgment has been "convicted" and must suffer the indirect consequences thereof (see, infra).

One of the germinal opinions in this area was written by the Court of Appeals in People v. Fabian, 192 N.Y. 443, 86 N.E. 672 (1908). The opinion in that case first pointed out that the words "conviction" and "convicted" have a dual meaning and may be employed to refer to either the verdict or the judgment. The Court then reasoned that since the term "conviction" has "varying meanings," the answer to the question of whether a conviction presupposes a sentence—or, in other words, a

⁶⁶ For example: motion for a new trial (Code of Cr.Proc., §§ 462-466); motion in arrest of judgment (id., §§ 467-470); opportunity to show cause against the judgment (id., §§ 480-481); certificate of reasonable doubt (id., §§ 527-528); and, appeal (id., § 517).

⁶⁷ The deferred sentence (which is improper) is now roughly analogous to what a suspended sentence was be-

fore the suspended sentence was considered as a judgment for the purpose of the various methods of correcting error. Thus it is revealing that the Court of Appeals has refused to recognize a deferred sentence as a conviction in a situation where it would recognize a suspended sentence as a conviction. Matter of Richetti v. New York State Board of Parole, 300 N.Y. 357, 90 N.E.2d 893 (1950).

judgment—must be ascertained by an inquiry, in each instance, as to what was intended by the legislature when it used the term "conviction".

But the Court did not then hold that a suspended sentence was a conviction for the purpose therein involved. The Court held that in the case of a statute mandating disfranchisement upon conviction of a felony, the legislature meant only "a conviction in the more comprehensive sense of the term . . . a judgment based on a verdict of guilty, and that a person is not convicted within the meaning of the Constitution [disfranchisement provision, presently Art. 2, § 3] or the statutes enacted in pursuance thereof against whom sentence has been suspended after verdict" (id., p. 453). In so holding, the Court relied heavily upon old precedents, reflecting the aforesaid reasons for not considering a suspended sentence a conviction, and revealed that its concern centered on whether a suspended sentence would afford the defendant an opportunity to attack the legality of the proceedings. In this connection the Court stated: "It would hardly be reasonable to authorize the disfranchisement of a voter simply because a verdict had been found against him (upon which judgment might have been or might yet be arrested)." (id., p. 448; *emphasis supplied*).

Since the reasoning in the Fabian case seems to be based, to some extent, upon the Court's reluctance to consider a suspended sentence a final adjudication of guilt, it is understandable that courts today reach a different result when considering other disabilities. Thus, although the language of the Court, with respect to the necessity of a search for legislative intent, became the established rule governing decisions to this day, the judicial presumption adopted by the Court as a guide for interpreting that intent does not seem to have been followed. This presumption, which the Court quoted with approval, from the dissenting opinion below is as follows (id., pp. 449-450):

"where disabilities, disqualifications and forfeitures are to follow upon a conviction, in the eye of the law, it is that condition [sic] which is evidenced by sentence and judgment; and where sentence is suspended, and so the direct consequences of fine and imprisonment are suspended or postponed temporarily or indefinitely, so, also, the indirect consequences are likewise postponed."

The rule today, when interpreting a statute that imposes a disability, disqualification or forfeiture upon a person convicted of a crime or offense seems to be to regard a suspended sentence as a conviction. Thus, for example, it has been held that a suspended sentence is a conviction: for the purpose of automatic revocation of the motor vehicle operator's license of a person convicted of a third or subsequent traffic offense (*Jones v. Kelly*, 9 App.Div.2d 395, 194 N.Y.S.2d 585 [4th Dept. 1959]); for the purpose of automatically barring from waterfront union positions persons convicted of felony (*De Veau v. Braistead*, 5 N.Y.2d 236, 183 N.Y.S.2d 793 [1959]); for the purpose of automatic revocation of a license as a practitioner of medicine, because of a conviction of felony (*Robinson v. Board of Regents of University of N. Y.*, 4 App.Div.2d 359, 164 N.Y.S.2d 863 [3d Dept. 1957]); for the purpose of automatic forfeiture of a license to practice dentistry, upon conviction of felony (*Matter of Weinrib v. Beier*, 294 N.Y. 628, 64 N.E.2d 175 [1945]); and, for the purpose of automatic disbarment, upon conviction of felony (*Matter of Sugarman*, 237 App.Div. 346, 260 N.Y.Supp. 824 [1st Dept. 1932]).

Additionally, where the degree of a crime is raised to felony because the offender has previously been convicted of the same or another crime, a suspended sentence or suspended execution will count as a conviction. Code of Cr.Proc., § 470-b; *People v. Goho*, 265 App.Div. 1030, 39 N.Y.S.2d 665 (4th Dept. 1943); *People v. Duff*, 137 Misc. 352, 244 N.Y.Supp. 557 (Gen.Sess.1930).

With respect to the multiple offender laws, which provide extended prison terms for persons who previously have been convicted, the holdings follow the classic rationale. A prior suspended sentence or suspended execution of judgment is, by statute, declared to be a conviction for the purpose of sentencing a second offender (Code of Cr.Proc., § 470-b, subd. 1). But, apart from this, it does not count as a conviction because it is not a judgment and, thus, cannot be used to sentence someone as a third or fourth offender. *People v. Shaw*, 1 N.Y.2d 30, 150 N.Y.S.2d 161 (1956); *People ex rel. Mareley v. Lawes*, 254 N.Y. 249, 172 N.E. 487 (1930); *People ex rel. Lozzi v. Fay*, 6 App.Div.2d 18, 175 N.Y.S.2d 236 (2d Dep.1958), aff'd mem. 5 N.Y.2d 890.

G. FINES

A number of the felonies and most of the misdemeanors and offenses in the Penal Law are punishable by a fine which may be imposed in addition to or in lieu of a term of imprisonment.⁶⁸ The amounts of the fines vary over a wide range but do not vary in proportion to the grade of the offense or the prison term prescribed (see *infra*). This seems to be the result of two factors: (1) the fines were established at different times and, therefore, reflect different dollar values; and (2) the Legislature seems to have relied to a greater extent upon large fines as a deterrent for crimes that may occur in the operation of an otherwise legitimate business (usually misdemeanors, or felonies punishable by relatively short sentences) than it has for other crimes.

Amount of the Fine

The amount of the fine that can be prescribed by the Legislature and imposed by a court is limited by the New York constitutional provision that (Art. I, § 5):

"Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishment be inflicted, nor shall witnesses be unreasonably detained."

But there seems to be a paucity of precedent in this State on the subject of what is or is not an "excessive" fine. And, according to *Corpus Juris Secundum*, courts generally are circumspect in their treatment of the subject (24B C.J.S., p. 537):

"The courts are reluctant to say that the legislature has exceeded its power in authorizing excessive fines, and as a general rule will not do so except in a very clear case; and, therefore, the widest latitude should be given to the discretion and judgment of the legislature in determining the amount necessary to accomplish the object and purpose it has in view.

In determining whether a fine authorized by statute is excessive in the constitutional sense, due regard must be had to the object designed to be accomplished, to the importance and magnitude of the public interest sought to be protected, to the circumstances and the nature of the act for which it is imposed, and in some instances

⁶⁸ It is interesting to note that many felonies are not punishable by fine. E. g., Abortion (§§ 80, 81); Arson (§ 224); Assault, 1st Deg. (§ 241); Bigamy (§ 340); Burglary (§ 407); Carnal abuse of a child (§ 483-a); Sodomy (§ 690); Dueling (§ 731); Eavesdropping (§ 740); Illegal voting (§ 765); Extortion (§ 852); Forgery (§§ 886, 888, 893); Operating a policy business (§ 974-a); Murder, 1st Deg. (§§ 1045, 1045-a); Murder, 2d Deg. (§ 1048); Manslaughter, 1st Deg. (§ 1051); Compulsory prostitution of wife (§ 1090); Incest (§ 1110); Kidnapping (§ 1250); Grand Larceny (§§ 1295, 1297); Lynching and Mob Violence (§§ 1391, 1392); Maiming (§ 1400); Certain types of Malicious Mischief (§§ 1420, 1420-a, 1422); Narcotic violations (§ 1751); Rape (§ 2010); Robbery (§§ 2125, 2127, 2129).

to the ability of the accused to pay, although the mere fact that in a particular case accused is unable to pay the fine required to be assessed does not render the statute unconstitutional."⁶⁹

Under our present statutory structure the court's discretion as to the amount of the fine to be imposed is limited by legislatively prescribed standards which have been separately provided for individual crimes. These standards fall into four basic categories:

- (a) Those that merely prescribe the dollar amount of the maximum fine that can be imposed (e. g., Penal Law, § 1935);
- (b) Those that prescribe only the dollar amount of the minimum fine that can be imposed (e. g., Penal Law, § 1275 [3d offenders]);
- (c) Those that prescribe the dollar amounts of both the minimum and the maximum fine that can be imposed (e. g., Penal Law, §§ 1141, 1867, 2142); and
- (d) Those that prescribe fines geared to the value of the fruits of the crime: i. e., a multiple of the value of the fruits of the crime (e. g., Penal Law, §§ 460, 932, 934, 1864).

The fines range anywhere from a maximum of five dollars (offenses against railroad property, Penal Law, § 1990) to a maximum of ten thousand dollars (e. g., Bribery of participants in sporting contests, Penal Law, § 382 [felony]; Failing to pay wages of employees, id., § 1272 [misdemeanor]). And, where corporations are convicted, a maximum of twenty thousand dollars (Conspiracies to prevent competitive bidding on public contracts, id., § 581-a [misdemeanor]).⁷⁰

Although, as indicated above, the Legislature generally has prescribed separate standards for each of the crimes punishable by a fine, there are certain catchall standards applicable to crimes for which no other punishment is specifically prescribed. Thus, a person convicted of a felony for which no other punishment is specially prescribed may (in addition to or in lieu of imprisonment) be fined not more than one thousand dollars. Penal Law, § 1935. A person convicted of a misdemeanor for which no other punishment is specially prescribed may (in addition to or in lieu of imprisonment) be fined not more than five hundred dollars. Id. § 1937. A person convicted as an accessory to a felony may be fined not more than five hundred dollars (in addition to or in lieu of imprisonment). Id., § 1934. Where a person is convicted of a crime punishable by an unspecified fine, a fine of not more than five hundred dollars may be imposed. Id., § 36.⁷¹ And, attempts are punishable by a fine not more than one-half the largest sum prescribed upon a conviction for the offense attempted (in addition to or in lieu

⁶⁹ This latter proposition; i. e., that the inability of the accused to pay the fine does not mean that the fine is excessive or the statute unconstitutional, is supported by authority in this State. *People v. Watson*, 204 Misc. 467, 126 N.Y.S.2d 832 (Gen.Sess. 1953); *In re Baker*, 183 Misc. 113, 50 N.Y.S.2d 431 (Scholarie Co.Ct.1944); *People v. Kelly*, 32 Misc. 319, 66 N.Y. Supp. 733 (Gen.Sess.1900).

⁷⁰ There also are some substantial fines prescribed in other chapters of the Consolidated Laws. For example, violation of the state anti-trust law (a misdemeanor) is punishable by a maximum fine of twenty thousand dollars for individuals and fifty thousand

dollars for corporations (General Business Law, § 341).

⁷¹ This section could well be interpreted as providing a limitation on the maximum amount of the fine that can be imposed in a case where the Legislature has merely provided for the minimum fine (as in category "(b)" in the text). The section reads:

"§ 36 Limit of fine where statute does not specify amount.

"Where in this chapter, or in any other statute making any crime punishable by a fine, the amount of the fine is not specified, a fine of not more than five hundred dollars may be imposed."

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of imprisonment). Id., § 261. Where "a corporation is convicted of an offense for which a natural person would be punishable with imprisonment, as for a felony, such corporation is punishable by a fine of not more than five thousand dollars." Id., § 1932.

The following list provides a sampling of the present schedule of fines for the various crimes and an indication—for the purpose of comparison—of the maximum term of imprisonment applicable to each. Unless otherwise indicated the fines may be imposed in addition to the term of imprisonment.

Crime and Maximum Term of Imprisonment	Fine	
	Maximum	Minimum
Abduction (§ 70)—10 years	\$1,000	None ^{71a}
Adultery (§ 102)—6 months	\$250	None
Instigating fights between animals (§ 182) 10 days (min.) 1 year (max.)	\$1,000	\$10
Auctioneer selling disabled horses—6 months (§ 188-a)	\$100	\$5
Assault 2d Deg.—5 years (§ 243)	\$1,000	None
Corporations and voluntary associations practicing law (§ 280). Officers, etc., pun- ishable as for a misdemeanor	\$5,000 (corporation)	None
Receiving deposits over \$25 in insolvent bank (§ 295) 1 year (min.) 5 years (max.)	\$3,000	\$500
False statements or rumors as to banking institutions (§ 303—misdemeanor)—1 year	\$1,000	None
Bribery of a judicial officer (§ 371)—10 years	\$5,000	None
Bribery of participants in sports contests (§ 382) 1 year (min.) 10 years (max.)	\$10,000	None
Participant in sports contest who solicits or accepts bribe (§ 382) 1 year (min.) 5 years (max.)	\$10,000	None
Coercion by employers—6 months (§ 531)	\$200	None
Conspiracies to prevent competitive bidding on public contracts—1 year (§ 581-a)	\$5,000 (natural person) \$20,000 (corporation)	None
Fraudulent issue of stocks and bonds (§ 662)—7 years	\$3,000	None
Officer or director of a corporation who is- sues stock beyond amount authorized or sells shares he does not own (§ 664, subs. 6, 7) 6 months (min.) 1 year (max.)	\$5,000	None
Misconduct of officers and agents of pipe- line corporations—6 months (§ 669)	\$1,000	None
Violation of election law by public officer or employee (§ 763)—3 years	\$3,000	None
Election misdemeanors (§ 782)—1 year	\$500	\$100

^{71a} None = none specifically pre-
scribed; i. e., any amount less than
stated maximum.

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Crime and Maximum Term of Imprisonment	Maximum	Fine	Minimum
Agreements or contracts for privileges to deal with occupants of tenements, apartment houses or bungalow colonies (§ 861) 30 days (min.) 1 year (max.)	\$100	(natural person)	\$10
	\$1,000 (corporation)		\$50
Having possession of counterfeit coin (§ 894)—5 years	\$500		None
Advertising counterfeit money and stamps (§ 895) 1 year (min.) 5 years (max.)	\$1,000		\$100
Using false name or address in connection with advertising counterfeit money or stamps (§ 895) 1 year (min.) 5 years (max.)	\$2,000		\$100
False rumors as to stocks, bonds or public funds (§ 926)—3 years	\$5,000		None
Reproduction or forgery of archeological objects (§ 959)—90 days	\$200		\$25
Fraudulent disposition of property subject to lease or hire—1 year (§ 960—misd.)	\$1,000		None
Punishment for second and third convictions of gambling (§ 998)—misdemeanors 10 days (min.) 1 year (max.)—2d offense	\$500		None
30 days (min.) 1 year (max.)—subsequent	\$1,000		None
Hazing (§ 1030—misd.) 30 days (min.) 1 year (max.)	\$100		\$10
Manslaughter, 2d deg.—15 years (§ 1053)	\$1,000		None
Criminal negligence resulting in death (§§ 1053a-1053f)—5 years	\$1,000		None
Obscene prints and articles (§ 1141, subs. 1, 2)—			
1st offense 10 days (min.) 1 year (max.)	\$2,000		\$150
2nd offense 30 days (min.) 1 year (max.)	\$3,000		\$250
3rd offense 6 months (min.) 3 years (max.)	\$5,000		None
Advertisements relating to certain diseases (§ 1142-a)—6 months	\$500		\$50
Destroying property insured—5 years (§ 1201)	\$500		None
Refusal to admit inspector to mines, etc., or failure to comply with requirements of inspector (§ 1270—misd.) 30 days (min.) 1 year (max.)	None	(see footnote 71, supra)	\$50
Failure to pay wages of employees in accordance with provisions of labor law (§ 1272—misd.)—1 year	\$10,000		\$100
Violations of provisions of labor law; industrial code; etc. (§ 1275—misd.)			
1st offense—no jail term	\$100		None
2nd offense—30 days	\$500		\$100
Subsequent—60 days	None	(see footnote 71, supra)	\$300

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Crime and Maximum Term of Imprisonment	Maximum	Fine	Minimum
Bribery of members of the Legislature (§ 1327)—10 years	\$5,000		None
Perjury 1st deg. & subornation of perjury 1st deg. (§ 1633)—5 years	\$5,000		None
Wilful violation of health laws (§ 1740, subd. 2)—1 year	\$2,000		None
Re-confining persons discharged upon writ (§ 1788)—6 months	\$1,000		None
Taking unlawful fees—10 years (§ 1826)	\$4,000		None
Auditing and paying fraudulent claims upon the state or a municipal corporation—5 years (§ 1863)	\$5,000		None
Misappropriation by county treasurer (§ 1867) 1 year (min.) 5 years (max.)	\$10,000		\$500
Injury to public record—5 years (§ 2050)	\$500		None
Stealing, destruction, mutilation or concealment of testamentary instrument (§ 2052)—5 years	\$1,000		None
Seduction (§ 2175)—5 years	\$1,000		None
Prostitution of women (§ 2460) 2 years (min.) 20 years (max.)	\$5,000		None
Receiving proceeds of prostitution of women (§ 2460, subd. 8) 2 years (min.) 20 years (max.)	\$1,000		None
Peddling, begging or loitering on air and bus terminal property (§ 150—offense)—30 days	\$10		None
Unauthorized use of marks of New York World's Fair 1964-1965 Corp. (§ 440-b—offense)—10 days (alternative, not in addition to fine)	\$50		None
Conducting maternity hospital without license (§ 482, subd. 2—misd.)—60 days	\$50 (for each day violation continues)		None
Procuring alcoholic beverages for persons under the age of 18—5 days (§ 484-d—offense)	\$50		None
Disorderly conduct—6 months (§ 723—offense)	\$50		None
Unlawful possession or use of an identification card issued by United Nations (§ 966—misd.)—10 days	\$50		None
Unapproved portable kerosene heaters (§ 1673—misd.)—90 days	\$100		None

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Crime and Maximum Term of Imprisonment	Maximum	Fine Minimum
Riding on railway cars; boarding cars in motion, obstructing passage of car; trespassing upon railway tracks (§ 1990—offense) no jail term	\$5	\$1
Peddling, begging or loitering on railway property (§ 1990-a—offense)—30 days	\$10	None
Wilful violation of the terms of a lease (§ 2040—offense)—6 months	\$50	None
Discrimination against children in dwelling houses (§ 2041—misd.) no jail term	\$100	\$50
Sabbath breaking (§ 2142—misd.) 1st offense—5 days	\$10	\$5
Subsequent offense 5 days (min.) 20 days (max.)	\$20	\$10
Delivering false bill of lading to canal collector (§ 460)—2 years		Fine not exceeding three times the value of the property omitted in such bill.
Obtaining property by false pretenses (§ 932)—3 years		Fine not more than three times the value of the money or property affected or obtained
Fraudulently obtaining property for charitable purposes (§ 934) 1 year (min.) 3 years (max.)		Fine not exceeding the value of the money or property obtained.
Conversion of property held in trust or by virtue of office (§ 1302) punishable as for larceny, plus fine appearing opposite column		Fine not exceeding the value of the property misappropriated or stolen with interest and 20% in addition.
Obtaining proceeds of fraudulent audit or payment (§ 1864) 3 years (min.) 5 years (max.)		Fine not exceeding five times the amount or value.

Enforcement

A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied. Code of Cr.Proc., §§ 484, 718. The court may merely order that the defendant be imprisoned until the fine is paid, in which case he will remain incarcerated one day for each one dollar of the fine. Or, the court may order that the defendant be imprisoned for a specified time (not to exceed one day for each one dollar of the fine) unless the fine is sooner paid.⁷² This period is in addition to any sentence of imprisonment that may be imposed: it commences at the expiration of the prison sentence and the incarceration simply continues at the same prison or jail until the fine is paid or the judgment satisfied. *People ex rel. Gately v. Sage*, 13 App.Div. 135, 43 N.Y.Supp. 372 (2d Dept. 1897).

⁷² There is an exception to this general rule in Penal Law, § 1302 where it is provided that the court can direct that the defendant be imprisoned "for not more than five years in addition to the term of his sentence . . . unless the fine is sooner paid." In such a case the duration of the enforcement term would not depend upon the amount of the fine.

The additional period for failure to pay a fine is not the same as a sentence of imprisonment, because duration of the confinement is within the prisoner's own control. Thus, for example, the fact that a person might possibly stand committed for more than 27 years if he failed to pay the \$10,000 maximum fine prescribed for the misdemeanor set forth in section 1272 of the Penal Law does not mean that this crime is, in fact, a felony: the 27 year period would not be the sentence of the court, but only a method of enforcing the sentence. *Matter of McKinney v. Hamilton*, 282 N.Y. 393, 26 N.E.2d 949 (1940). Also, although the imprisonment might last for more than one year the prisoner will not be confined in a state prison (unless confinement is to follow upon a state prison term [*People ex rel. Gately v. Sage*, supra]). Code of Cr.Proc., § 488; see *Matter of McKinney v. Hamilton*, supra.

A commitment to enforce payment of a fine is within the discretion of the court and does not have to be imposed merely because the fine has been imposed. The sentence is valid without the commitment (*People ex rel. Sedotto v. Jackson*, 307 N.Y. 291, 121 N.E.2d 229 [1954]) and unless the sentence contains a direction for commitment this method of enforcement cannot be employed. *People ex rel. Wright v. Redman*, 27 Misc.2d 984, 209 N.Y.S.2d 1001 (Sup.Ct.Erie Co. 1960).

However, apart from commitment for nonpayment there does not seem to be any statutory procedure for enforcing a judgment that an individual is to pay a fine. Where corporations are convicted the fine may be collected in the same manner as a judgment in a civil action—i. e., execution (Code of Cr.Proc., § 682)—but there is no parallel procedure applicable to individuals.⁷³ Moreover, there seems to be a conflict among the authorities in this State as to whether the courts have inherent common law power to issue a writ for body execution (*capias pro fine*) or property execution (*levari facias*) to collect a fine imposed in a criminal judgment. Compare *Kane v. People*, 8 Wend. 203, 215 (Ct. of Errors 1831) with *People ex rel. Gately v. Sage*, 13 App.Div. 135, 136-137, 43 N.Y.Supp. 372 (2d Dept. 1897) and *Conlon v. Lisk*, 13 App.Div. 195, 204-205, 43 N.Y.Supp. 364 (2d Dept. 1897).

It might be noted that a court can impose a fine, direct that the defendant be imprisoned until it is paid, and suspend execution of the judgment of imprisonment "on such terms and conditions as it shall determine" (Code of Cr.Proc., § 483, subd. 2). This procedure can be used as a device for having the defendant pay the fine at a future date or pay it in installments, while the court retains power to commit him if the conditions are not met.

Additionally, the Criminal Court of the City of New York has the power "to extend time to pay any fine imposed upon a plea of guilty to or a conviction on any charge of a grade less than a misdemeanor." If the defendant does not pay within the extended time, the court may order his arrest (N.Y.Cr.Ct. Act, § 62).

Power to Remit

Any court of record, except an inferior court of local jurisdiction, which has imposed a fine for any criminal offense, has the power to

⁷³ Article 20 of the Judiciary Law (§§ 792-796) provides a procedure for execution to collect a fine "imposed by a court of record, upon a grand or trial juror, or upon any officer or other person" but this does not seem to apply to fines imposed in a judgment of conviction. The provisions of Article 20 are substantially the same as the ones adopted in the revised statutes (2 R.S. 484, §

22 et seq.) and the revisers' notes indicate that they had submitted a similar procedure to be applied where a fine is imposed in a judgment of conviction. This procedure was not enacted by the Legislature (see 3 R.S. 850 [2d Ed.]).

There is no judicial authority, either way, on the applicability of Article 20 to criminal judgments.

remit all or part of a fine imposed by it, or imposed by an inferior court of local jurisdiction in the same county. Code of Cr.Proc., § 484. In addition, the New York City Criminal Court has the power "to remit a fine imposed by it and in place thereof to substitute in its discretion imprisonment." N.Y.Cr.Ct.Act, § 33(2).

The power to remit fines is discretionary, but will not be exercised unless it is shown that the fine was arbitrary, unreasonable or excessive; or, unless there are compelling circumstances arising subsequent to the imposition of the fine which convince the court that the remission of the fine will serve the ends of justice. See *People v. Watson*, 204 Misc. 467, 126 N.Y.S.2d 832 (Gen.Sess.1953); *In re Hershey Farms, Inc.*, 175 Misc. 641, 24 N.Y.S.2d 163 (Gen.Sess.1941).

Penalties and Forfeitures

In addition to a term of imprisonment and a fine, some crimes also are punishable by a penalty or forfeiture to be recovered in a civil action. Thus, for example, an attorney who commits an act of misconduct defined by section 273 of the Penal Law forfeits to the party injured treble damages to be recovered in a civil action (in addition to the punishment prescribed for a misdemeanor). Similarly, an embezzler, besides being subject to the punishment prescribed by law, forfeits ten times the sum or ten times the value of that which was taken plus the actual damages sustained to the party aggrieved. Penal Law, § 377. Also, in addition to the punishment prescribed for discrimination, every offender is liable to a penalty of not less than \$100 nor more than \$500 to be recovered by the person aggrieved. *Id.*, § 791. A tenant who has purchased products from a dealer that has paid the landlord for the privilege of selling to tenants "may recover of such seller or dealer for his benefit a penalty" of \$250 and the seller also is liable to prescribed criminal punishment. *Id.*, § 870, subd. 3. A person who knowingly re-commits, for the same cause, any person who has been discharged upon a writ is liable to specified punishment and, in addition, forfeits to the party aggrieved \$1250. *Id.*, § 1788. One who persuades another to visit a gambling establishment is guilty of a misdemeanor and in addition to the punishment prescribed therefor is liable to the other person for losses suffered at play therein. *Id.*, § 980. For exacting payment of money won at gambling, the law imposes a forfeiture of five times the value of the payment exacted "to be recovered in a civil action, by the persons charged with the support of the poor"—no other punishment is prescribed. *Id.*, § 989. A railroad that refuses to redeem an unused passage ticket forfeits to the aggrieved party \$50 to be recovered in a civil action. *Id.*, § 1562. A sheriff who violates certain provisions with respect to the care and custody of prisoners "forfeits to the person aggrieved treble damages" and also may be punished for a misdemeanor. *Id.*, § 1875. And, a corporation that sends messenger boys to certain prohibited places "is guilty of a misdemeanor, and incurs a penalty of fifty dollars to be recovered by the district attorney"—no other punishment is prescribed. *Id.*, § 488.

Most of the penalties and forfeitures prescribed by the Penal Law are recoverable by the persons injured, through a separate civil action. This differs somewhat from the practice with respect to fines, because no separate action or judgment is necessary for a fine: it is imposed as part of the judgment of conviction, and does not, as a rule, redound to the benefit of the person injured by the crime.

However, it should be noted that in certain cases fines can be used for the benefit of or paid by the State to the person injured by the crime.

Thus, a fine imposed upon conviction for abandonment of a child "may be applied in the discretion of the court to the support of the child." Penal Law, § 480. A fine imposed upon a conviction for conversion of

property held in trust (a fine not exceeding the value of the property stolen, with interest, plus 20%) must be turned over to the party injured: i. e., the party injured is entitled to receive so much of the fine as does not exceed the value of the property stolen with interest from the date of the commission of the offense and a reasonable sum to defray the expense of collecting same. Id., § 1302. And, a public body injured by a fraudulent audit or payment is entitled to receive the fine imposed upon a public officer who is convicted of the crime. Id., § 1864.

H. SPECIAL COMMITMENTS

In certain cases criminal courts can dispose of charges by committing offenders to special institutions. Such commitments cannot really be called "sentences" but, since the resulting confinement often disposes of the criminal charge, these commitments are relevant to this survey.

Mental Defectives

If a person over the age of 16 is "convicted of a criminal offense" (any grade)⁷⁴ and it is determined that he or she is a mental defective, the court, instead of passing sentence in the usual form, may commit the offender to an institution for defective delinquents under the jurisdiction of the Department of Correction.⁷⁵ Correction Law, §§ 438, 451. This commitment is for an indefinite period of time and continues until the defective is discharged by the superintendent of the institution. Correction Law, § 441-a. It is a judgment of conviction⁷⁶ and is deemed a final disposition of the offense charged (unless the superintendent of the institution rejects the inmate). Correction Law, § 438; People ex rel. Vischi v. Martin, 8 N.Y.2d 63, 201 N.Y.S.2d 753 (1960).

At first glance, an indefinite commitment that could mean life imprisonment might seem to be an unduly severe method of dealing with a person convicted of a misdemeanor or an offense or even a minor felony. However, it should be noted that the commitment is more in the nature of an insanity commitment than a sentence. It must be based upon a certificate of mental defect by two examining physicians (or an examining physician and a certified psychologist) showing facts and circumstances to support a conclusion that the defendant is a mental defective and that the defect is of such a nature that commitment is for the offender's own welfare and the welfare of others. Correction Law,

⁷⁴This includes a felony, misdemeanor (see e. g., People ex rel. Gaudino v. Superintendent, 263 App. Div. 1042, 33 N.Y.S.2d 787 [3d Dept. 1942]), offense and a charge such as vagrancy (People ex rel. Stolofsky v. Superintendent, 259 N. Y. 115, 181 N.E. 68 [1932]).

⁷⁵There are two such institutions: one for males and one for females. The institution for male defective delinquents is the "Eastern Correctional Institution" at Napanoch. Correction Law, § 430. The institution for female defective delinquents is the "Albion State Training School" at Albion. Id., § 450.

⁷⁶The statute (Correction Law, § 438) provides for the commitment of a person who has been "convicted." Since the commitment itself is the judgment of conviction, the word

"convicted" as used in the statute must mean only the plea or verdict (see People ex rel. Vischi v. Martin [cited in text]). However, one court recently has stated that the commitment can only follow upon a sentence and that a person who has not been sentenced cannot be committed under Correction Law § 438 because he has not been "convicted" (see People ex rel. Ascencio v. Warden of Women's House of Detention, 28 Misc.2d 460, 209 N.Y.S.2d 931 [S.Ct.N.Y.Co.1960]). This decision seems to be erroneous.

Also, the fact that the statute provides for the commitment of a person who has been "convicted" leaves some doubt about whether a wayward minor or youthful offender can be committed to an institution for defective delinquents.

§§ 438, 444. In addition, habeas corpus is available, at any time, to test the fact of mental defectiveness. *Id.*, § 446; see *People ex rel. Gaudino v. Supt. etc.*, 263 App.Div. 1042, 33 N.Y.S.2d 787 (3d Dept. 1942); *People ex rel. Romano v. Thayer*, 229 App.Div. 687, 242 N.Y.S. 289 (3d Dept. 1930).

A person charged with a crime⁷⁷ but found to be unable (because of mental defect) to stand trial also may be committed to an institution for defective delinquents. Such a commitment would be under the provisions dealing with insanity and is one of a number of alternatives available to the court in a case where the defendant cannot stand trial. Code of Cr.Proc., §§ 662-b, 872; Correction Law, §§ 438, 451. As in the case of a convicted offender, this commitment is for an indefinite time. (A more detailed discussion of insanity commitments is set forth, *infra*.)

The institutions for defective delinquents also receive—by transfer—persons sentenced or committed to other penal or correctional institutions⁷⁸ and subsequently found to be mental defectives. Correction Law, §§ 438, 438-a, 438-b, 439, 451. Thus, a misdemeanor or felon (but not one who has been convicted of murder in the first degree) sentenced to a State or local penal or correctional institution and subsequently found to be a mental defective can be transferred from that institution to an institution for defective delinquents. Correction Law, §§ 438-a, 439, 451. And an offender committed to the Reception Center, whether misdemeanor, felon, juvenile delinquent, youthful offender, wayward minor, petty offender or vagrant also may be transferred to an institution for defective delinquents.⁷⁹ *Id.*, § 438-b. These transfers are administrative transfers, without court order, but must be based upon a certificate of mental defect as in the case of a direct commitment. The transfer does not affect the term of the sentence, as such.

A person of "borderline normal" or "low normal" intelligence confined in a State correctional institution also may be transferred to an institution for defective delinquents. This type of transfer is similar to the transfer of a mental defective in that it is an administrative transfer, but different in that it only can be effected from a State institution and it

⁷⁷The term "crime" as used here-in does not include an offense and, outside the City of New York, it does not include a misdemeanor cognizable by the local courts of special sessions. Code of Cr.Proc., § 873.

⁷⁸It might be noted that a patient in a State school for mental defectives (under the jurisdiction of the Department of Mental Hygiene) can be transferred to an institution for defective delinquents if he has committed or is liable to commit a dangerous act. This transfer is upon court order after a proceeding before three commissioners. Certification by this procedure is not a conviction, but the person so transferred is held under the same terms and conditions as persons directly committed. Mental Hygiene Law, § 134-a; Correction Law, § 438.

⁷⁹It is interesting to note that the transfer provisions are not coterminous with the commitment provisions. Direct commitment is available without regard to the grade of

the offense. Transfer is available only in the case of a crime (excluding murder 1), unless the transfer is from the Reception Center in which case it is available for any offense. (The Reception Center is only for males between the ages of 16 and 21 years and, therefore, the transfer provisions for females are not as broad as the provisions for males.)

It might also be noted that where a male is adjudicated a juvenile delinquent, youthful offender or wayward minor and found to be a mental defective before commitment, he cannot be committed to the Reception Center (Correction Law, § 61) and, since he has not been "convicted" of a crime, it seems doubtful that he can be committed to an institution for defective delinquents (see footnote 76, *supra*). The same reasoning would be applicable in the case of a female. However, if the male is committed to the Reception Center and then found to be a mental defective, there would seem to be no problem.

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is not based upon a certificate of mental defect. The transfer is pursuant to rules made by the Commissioner of Correction and based upon "appropriate psychometric testing and clinical observation." Transfer does not affect the term of imprisonment in any way. Correction Law, § 439-b.

In connection with administrative transfers to special institutions, it might be noted that in a recent case dealing with the administrative transfer of an allegedly insane prisoner from Attica State Prison to Dannemora State Hospital (for insane prisoners), the Court of Appeals held that habeas corpus was available to challenge the transfer, even though the prisoner's term had not expired. *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 215 N.Y.S.2d 44 (1961). The Court acknowledged that ordinarily "a prisoner has no standing to choose the place in which he is to be confined" but held that "courts should not sanction, without question, removals in cases of alleged insane prisoners, which can conceivably be uncontrolled and arbitrary." In so holding, the Court expressed concern about the possibility that the prisoner "may be confined with deranged persons who are liable to harm and/or adversely affect him."⁸⁹ Thus, by analogy, it would seem that a prisoner transferred to an institution for defective delinquents pursuant to an administrative order has the right to judicial review of the basis for the transfer.

If, before the expiration of the term for which an inmate received from another institution was sentenced it be found that his confinement in an institution for defective delinquents is unsuitable for any reason, the inmate will be returned to the institution from which he came. Correction Law, § 442.

Inmates of an institution for defective delinquents may be released on parole and, although the Board of Parole must be given an opportunity to investigate the inmate's case and is charged with supervision of these persons, parole eligibility is determined (within certain limitations) by the officials of the institution. Correction Law, § 445.

Subject to two exceptions parole may be granted at any time. The exceptions are as follows (Correction Law, § 445):

"[1] An inmate shall not be paroled before he might have been paroled from another institution, if any, to which he was originally committed or [2] before he would have been paroled if he had been committed to a reformatory or correctional institution under a similar charge."

These exceptions seem somewhat confusing. The first exception clearly means that an inmate originally sentenced to an indeterminate term and then transferred cannot be paroled before the expiration of the minimum imposed by the court.⁸¹ But it also could mean that a person sentenced to one year in a penitentiary and then transferred is not eligible for parole until the sentence expires. The second exception (i. e., "or before he would have been paroled if he had been committed to a reformatory or correctional institution under a similar charge") is even more troublesome. Certainly there is no way to tell when an inmate would have been paroled if he had been committed to a reformatory (indefinite term) or if he had been sentenced to a State prison (indeterminate term with minimum fixed by court) instead of being committed to an institution for defective delinquents—without specific sentence—on the same charge, much

⁸⁹ In 1962 the procedure for transfer to Dannemora State Hospital was changed. The new procedure requires a court order, after notice and an opportunity to be heard. Correction Law, § 383 (L.1962, ch. 393).

⁸¹ There is no credit for good conduct ("good time") applicable to time served in an institution for defective delinquents.

less "under a similar charge." The only situations that might be covered by this provision are cases where offenders have been convicted of crimes punishable by mandatory minima or are multiple offenders punishable under one of the multiple offender sections.

Discharge from an institution for defective delinquents depends upon the type of commitment that serves as authority for holding the inmate. Where the inmate was directly committed by judgment of conviction, the superintendent of the institution, with the approval of the Commissioner of Correction, may discharge him "if it be found that his further confinement therein is unsuitable." Correction Law, § 441-a. This also would apply to an inmate committed by transfer from an institution under the jurisdiction of the Department of Mental Hygiene (see footnote, supra). And the rule is substantially the same in the case of an inmate committed pursuant to the procedure applicable to persons found unable to stand trial, except that in this case, if an indictment or information is pending and the inmate becomes able to stand trial, he must be returned for that purpose.⁸² Code of Cr.Proc., § 662-b; Correction Law, § 441-a.

Where the inmate is under a specific sentence and has been transferred to an institution for defective delinquents, he is not eligible for discharge until his term expires. If he was transferred to the institution pursuant to the provision applicable to persons of "borderline normal" or "low normal" intelligence, he has an absolute right to be discharged when his term expires. Correction Law, § 439-b. But, if the inmate was transferred pursuant to a certificate of mental defect, then he will be discharged at the expiration of his term only if the superintendent of the institution finds that it is reasonably safe for him to be at large and that his friends or relatives are able and willing to comfortably maintain him without further public charge. (Approval of the Commissioner of Correction is a prerequisite to discharge.) Correction Law, § 441. If the superintendent is of the opinion that the inmate (transferred pursuant to a certificate of mental defect) is a mental defective who should not be discharged, the superintendent may apply to a court for an order of retention, which will be issued upon a new certificate of mental defect. Thereafter, the inmate will be held under the same terms and conditions as a person who has been directly committed to the institution. *Id.*, §§ 440, 441. It might be noted that although there is no statutory requirement for notice and an opportunity to be heard in the procedure for procuring an order of retention (§ 440), this protection has been read into the statute by the Court of Appeals. *People ex rel. Morriale v. Branham*, 291 N.Y. 312, 52 N.E.2d 881 (1943).

Inmates also may be discharged while on parole. A direct commitment inmate may be discharged upon recommendation of the Board of Parole and the approval of the Commissioner of Correction. A transferree may be discharged upon completion of the maximum sentence imposed by the court.

⁸² Section 441-a of the Correction Law provides that the superintendent's right to discharge inmates is subject to the provisions of section 662-b of the Code of Cr.Proc. That section (§ 662-b) provides that a person found unable to stand trial must be returned to face a pending indictment if he regains his faculties. However, Correction Law section 438 provides that a commitment to an institution for defective delin-

quents "by a court of competent jurisdiction shall be deemed a final disposition of the indictment or criminal offense charged and shall wholly divest the said court of its jurisdiction over the prisoner under said commitment or by reason of said offense. . . ." Therefore, the proviso in Correction Law, § 441-a seems inconsistent with § 438 of the Correction Law.

In addition to parole and discharge, inmates also may be released from an institution for defective delinquents by transfer to an institution under the jurisdiction of the Department of Mental Hygiene. (This requires consent of the Commissioner of Mental Hygiene.) Provisions for transfer are applicable to persons under 21 years of age (Correction Law, § 439-a); persons over 21 years of age not in confinement pursuant to a judgment of conviction (*id.*, § 439-c); persons over 21 years of age committed pursuant to a judgment of conviction and confined for five years or more (*ibid.*); and, persons held after the expiration of their term (*id.*, § 441). In the case of a person under 21 years of age, transfer does not alter the rules relating to parole and discharge. All other transferees are henceforth governed by the rules of the Department of Mental Hygiene with respect to all matters including convalescent status and release. These transfers are revocable.

Insane Persons

A person charged with a crime or an offense and found to be "in such state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or the proceedings or of making his defense" may be committed to an appropriate institution of the Department of Correction (Matteawan State Hospital at Beacon⁸³) or to any appropriate institution of the Department of Mental Hygiene. The procedure employed and the choice of institution depends upon the grade of the charge; whether the crime was committed in or out of the City of New York; and the stage of the proceedings.

Thus, where the defendant is charged with an offense which is not a crime or outside the City of New York with a misdemeanor of which courts of special sessions have exclusive jurisdiction (see Code of Cr. Proc., §§ 56, 56-a, 56-b) and it appears to the court or magistrate that he is unable to stand trial, the court or magistrate may order a psychiatric examination. If the psychiatrists conclude that the defendant is unable to stand trial and able to benefit from immediate care and treatment, a separate civil proceeding will be instituted for his commitment as provided in the Mental Hygiene Law for the commitment of a person not in confinement on a criminal charge. In this case, commitment is to an institution under the jurisdiction of the Department of Mental Hygiene and is deemed a final disposition of the offense or misdemeanor charged. If the defendant is found to be unable to stand trial but is not committed, the court before which the criminal charge is pending may dismiss the charge "or may make such order as may be appropriate and within . . . [its] powers." Code of Cr. Proc., § 873.

Where the charge is a felony or an indictable misdemeanor (i. e., a crime not cognizable by a court of special sessions), or in the City of New York a felony or any misdemeanor, and no indictment or information has been filed the same basic procedure is applicable. Here, however, the court may commit the defendant to either a Department of Correction institution (Matteawan State Hospital) or to an institution under the jurisdiction of the Department of Mental Hygiene and the defendant may be transferred—with the consent of the respective department heads and without court order—from an institution under the jurisdiction of one department to an institution under the jurisdiction of the other, or to a veterans administration institution. Although a determination (in the civil commitment proceeding) that the defendant is unable to stand trial terminates the criminal proceeding, the district attorney may obtain an indictment or file an information at any time. When he does so, a warrant will be lodged with the director of the

⁸³ Of course, and as discussed, committed to an institution for defective supra, such a person also can be committed to an institution for defective delinquents.

institution in which the defendant is confined and all further proceedings are had as if the defendant had been indicted prior to his commitment (see, *infra*). But, if the district attorney does not present evidence to a grand jury or file an information (in the City of New York) within six months from the date of the commitment and makes a written statement that he does not intend to reopen the matter, it cannot be reopened. Code of Cr.Proc., § 872.

If the defendant has been indicted (anywhere), or if in the City of New York an information has been filed against him, the procedure is different: there is no separate civil commitment proceeding under the Mental Hygiene Law (unless one already has been instituted). The court in which the indictment or information is pending can at any time before final judgment order the psychiatric examination (or receive the report of a psychiatric examination ordered by another court or a magistrate before the indictment or information was filed); hold a hearing, if requested, on the issue of the defendant's sanity; and, if it finds the defendant unable to stand trial or continue with the proceedings, make the commitment, which must be to an institution under the jurisdiction of the Department of Correction (Matteawan State Hospital). A defendant so committed may at any time be transferred—with the consent of the respective department heads and without court order—to an institution under the jurisdiction of the Department of Mental Hygiene. Commitment, whether it occurs before or after the filing of an indictment or information, merely suspends further proceedings until the defendant is able to continue. However, the indictment or information may be dismissed upon consent of the district attorney if the defendant is a resident of another state or country and may be removed thereto, or after the defendant has been in continuous confinement under the commitment for more than two years. Code of Cr.Proc., § 662-b, 871, 875.

A defendant confined in Matteawan when the indictment or information is dismissed (under the two year provision) can be retained therein without further court order and will not be discharged until he has recovered or until the superintendent is of the opinion that it is reasonably safe for him to be delivered to the custody of his relatives or friends. Code of Cr.Proc., § 662-b; Correction Law, §§ 409, 410. But a defendant who happens to be confined in an institution under the jurisdiction of the Department of Mental Hygiene when the indictment or information is dismissed cannot be retained without a further court order. This involves a separate civil proceeding for the certification of a person not in confinement on a criminal charge. Code of Cr.Proc., § 662-b.⁸⁴

A person who is able to stand trial, but who is acquitted on the ground that he was insane at the time of the crime must be committed to the custody of the Commissioner of Mental Hygiene. This commitment is automatic and is made without regard to the defendant's present condition. Anyone so committed may be placed in any institution under

⁸⁴The statute is not clear as to whether an additional civil proceeding is necessary (after dismissal of the indictment) in the case of a person indicted after commitment to an institution under the jurisdiction of the Department of Mental Hygiene (commitment prior to indictment would have been based upon a civil proceeding). Nor is it clear as to whether a separate civil proceeding is necessary to transfer a person from Matteawan to a Department of

Mental Hygiene institution after the indictment is dismissed.

It should be noted that the statute authorizing retention of an inmate in Matteawan (without court order) after dismissal of the indictment or information mentions that institution by name and, therefore, might not be applicable to a person confined in an institution for defective delinquents. Thus, there does not appear to be any statutory provision applicable to defective delinquents.

the jurisdiction of the Department of Mental Hygiene or transferred—without court order—to an institution under the jurisdiction of the Department of Correction. However, if the Commissioner of Mental Hygiene is at any time of the opinion that such person may be conditionally released or discharged without danger to himself or others, he may commence a proceeding for conditional release or discharge in the court that committed the defendant. Also, the defendant, himself, may make application for discharge or release to the court by which he was committed and, if after receiving a report from the Commissioner of Mental Hygiene the court considers there may be merit in the application, it will proceed as it would in a case where the application was made by the Commissioner. Code of Cr.Proc., § 454.

A prisoner serving a sentence in any State or local penal or correctional institution and found to be insane can be transferred to a Department of Correction institution for insane prisoners. Such transfer is pursuant to a commitment made by a court after notice and an opportunity to be heard. Correction Law, §§ 383, 408.

The Department of Correction maintains two institutions for insane prisoners: Matteawan State Hospital and Dannemora State Hospital. Commitment will be to Matteawan in the case of any person "undergoing a sentence of one year or less or convicted of a misdemeanor, or adjudicated to be a youthful offender, wayward minor or juvenile delinquent." Also, all insane female prisoners are committed to Matteawan. Correction Law, § 408. Commitment will be to Dannemora in the case of any male person convicted of a felony and confined in any one of the State prisons or correctional institutions or in a penitentiary. Also, any inmate of the Eastern Correctional Institution (i. e., the institution for male defective delinquents) who was committed on a judgment of conviction for any crime or offense or transferred thereto while under sentence for any crime or offense (including a juvenile delinquent, youthful offender or wayward minor) and who is insane will be committed to Dannemora. Correction Law, § 383.⁸⁵

If the prisoner recovers before the expiration of his sentence he is transferred, without court order, to the institution from which he came. Correction Law, §§ 386, 410. If the prisoner continues to be insane at the expiration of his term, the procedure depends upon whether he is confined at Matteawan or Dannemora.

A prisoner confined at Matteawan who continues to be insane at the expiration of his term may be retained therein (or transferred to an institution under the jurisdiction of the Department of Mental Hygiene) until he has recovered or is otherwise legally discharged. No court order is necessary for retention or transfer. Correction Law, § 409.

A prisoner confined at Dannemora who continues to be insane at the expiration of his term cannot be retained without a new commitment. More specifically, if the director of the Dannemora State Hospital believes the prisoner is still insane at the expiration of his term, he may apply "for the certification of such person as provided in the mental hygiene law for the certification of a person not in confinement on a criminal charge." This means a separate civil proceeding, after which an order may be issued committing the insane person to the custody of the Commissioner of Mental Hygiene. A person so committed may be placed in an institution under the jurisdiction of the Department of

⁸⁵ Because of the wording of certain provisions prescribing the procedure applicable in the case of a person confined in a penitentiary or in a New York City Department of Correction institution, it is difficult to determine whether a male person

under sentence for a felony and confined therein would be committed to Dannemora or Matteawan: the law seems to permit commitment to either. (Compare Correction Law, §§ 383, subds. 1, 1-a, and 408, subd. 1-a.)

Correction or the Department of Mental Hygiene and can be transferred from one to the other and back again. Correction Law, § 384.

It might be noted that the Correction Law provides the Commissioner of Mental Hygiene with general authority to transfer certain patients from State hospitals under his jurisdiction to Matteawan (§ 412). This is an administrative transfer, without court order, and the patients that may be transferred fall into three categories: (1) inmates held under any other than a civil process; (2) any patient who has previously been sentenced to a term of imprisonment in any correctional institution, and who still manifests criminal tendencies; or (3) any such patient who has previously been an inmate of Matteawan.⁸⁶ Also, the Mental Hygiene Law (§ 85) provides that the Commissioner of Mental Hygiene may authorize the director of any State hospital to commence a proceeding to certify any dangerous inmate of a State mental hospital to Matteawan. After a proceeding, during which the allegedly dangerous inmate may be represented by counsel, if the court agrees that the inmate is dangerous, the court orders the transfer to Matteawan. Persons transferred under Correction Law, § 412 or Mental Hygiene Law, § 85 may be transferred back to a civil institution, when conditions permit, without court order.

The foregoing discussion of the provisions relating to commitment of defective delinquents and insane persons accused or convicted of crime is merely a skeletal outline designed to serve as a basis for an understanding of the manner in which the procedures applicable to such persons fit into the sentencing structure.⁸⁷ It should be noted that the statutes governing these matters are not arranged in any sort of logical order and are permeated with patchwork, ambiguities, conflicting provisions and unjustifiable distinctions.

Arrested Narcotic Addicts

"The Arrested Narcotic Addict Commitment Act," effective January 1, 1963 provides procedures for detoxification of narcotic addicts im-

⁸⁶ In 1961 the United States Court of Appeals for the Second Circuit held that the provision of § 412, authorizing administrative transfer to Matteawan of an ex-convict who manifests criminal tendencies, is unconstitutional because no requirement for a hearing can be read into it. The Court based its decision upon the fact that a hearing is necessary in other cases of transfer and relied heavily upon the fact that a hearing is required for transfer of a dangerous insane inmate who is not an ex-convict. (See Mental Hygiene Law, § 85.) It stated that there is "nothing to demonstrate that ex-convicts who, after expiration of their sentences, become mentally ill, are inherently more dangerous than those mentally ill who are not ex-convicts" and that "a state must guard against classifications which are so arbitrary that they are repugnant to the equal protection clause of the Fourteenth Amendment." United States ex rel. Carroll v. McNeill, 294 F.2d 117 (2d Cir. 1961). Certiorari was granted (368 U.S. 951) but during the pendency of the appeal the relator died and the Supreme Court di-

rected that the judgment be vacated as moot (369 U.S. 149). Subsequently, another transferee under § 412 raised the same question on a writ of habeas corpus in a state court. The writ was dismissed and, on appeal, the Second Department stated that although it was in accord with the rationale of the Carroll case, it was bound by a prior New York Court of Appeals case in which the question of the unconstitutionality of section 412 was specifically raised and rejected. People ex rel. Aronson v. McNeill, 19 App.Div.2d 731, 242 N.Y.S.2d 427 (2d Dept. 1963). Appeal dismissed on ground that relator not an aggrieved party, 13 N.Y.2d 1043.

⁸⁷ A recent report by a special committee of the Association of the Bar of the City of New York in cooperation with Cornell Law School contains a thorough analysis, including recommendations, of the procedures applicable to commitment, retention and discharge of insane persons. This report, which covers both civil and criminal commitments, is entitled "Mental Illness and Due Process" (Cornell University Press, 1962).

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mediately after arrest and voluntary civil commitment for treatment in lieu of prosecution. Mental Hygiene Law, §§ 208-215. In view of the fact that voluntary civil commitment can lead to abatement of the criminal charges, it is relevant to note certain portions of the Act.

Briefly, persons arrested for certain narcotic crimes, and persons arrested for other crimes and offenses who show symptoms of addiction, are informed upon arraignment before the committing magistrate that they may request consideration for civil commitment to a hospital facility. If this request is made and the defendant is found to be a narcotic addict the court may order that the defendant be civilly committed. Before commitment, the court must obtain certification from the Commissioner of Mental Hygiene that he is agreeable to the acceptance of the defendant in a designated facility having a special unit for the care and treatment of drug addicts.

In the case of persons charged with specified narcotic crimes the court cannot make a civil commitment if: (a) there is an undisposed prior felony charge pending or an uncompleted sentence on such charge, or parole time owing (except upon request of the Board of Parole); or (b) the defendant has been convicted of two prior felonies; or (c) the defendant has been civilly committed under this Act on three or more prior occasions; or (d) the amount of drugs involved in the instant charge is substantially greater than would be necessary to support the defendant's own habit; or (e) facilities are not available at the time the commitment is sought; or (f) it is not in the interest of justice to commit the defendant civilly. Mental Hygiene Law, § 211.

In the case of persons charged with other crimes or offenses the court's power to make a civil commitment is limited by additional restrictions. These additional restrictions prohibit civil commitment if: (1) the defendant has been previously convicted of a capital crime; or (2) the present charge involves a felony punishable by a mandatory minimum term; or (3) the defendant is charged with a felony and, if convicted, would have to receive a statutory mandatory minimum term because of a prior felony conviction; or (4) the district attorney refuses to consent. Mental Hygiene Law, § 212.

The civilly committed narcotic addict receives inpatient care and treatment and aftercare supervision. He is not released from inpatient care until the Commissioner is satisfied that he has received the maximum benefit from such care. After release from inpatient care, he is required to report periodically to an aftercare facility and is subject to reasonable regulation of his conduct. The total time spent by an addict in inpatient treatment and aftercare supervision as a result of a single arrest cannot exceed thirty-six months. Mental Hygiene Law, § 213.

During care and treatment the criminal charge that led to the arrest of the addict is held in abeyance. The charge is dismissed and the commitment terminated if the Commissioner of Mental Hygiene certifies that discharge from aftercare in advance of the maximum expiration date is warranted. Apart from this, if the charge is a misdemeanor and the defendant has not previously been convicted of a felony, and has not previously been committed on a separate arrest under the provisions of this Act, the criminal charge is dismissed upon certification of one year of inpatient care or aftercare supervision. Such dismissal in no way lessens the power of the Commissioner of Mental Hygiene to exercise continuous supervision to the extent of the thirty-six month period. In all other cases the charge is automatically dismissed three years after the initial commitment if the Commissioner certifies that the defendant has been subject to inpatient or aftercare supervision throughout the period. Mental Hygiene Law, § 213.

The addict can be recommitted by the Commissioner for inpatient care at any time during the aftercare period. Also, if the addict escapes

or disappears from aftercare supervision, or proves unfit for treatment or supervision within the thirty-six month period, he can be returned to the court and the criminal proceedings are reactivated. In this event, the addict is entitled to "jail time" credit against his sentence for time spent in confinement prior to and during his civil commitment but not for time spent under aftercare supervision. Mental Hygiene Law, § 213.

Young Offenders and Females Convicted of Certain Offenses: Charitable Institutions

There are certain situations where the law provides that a court may, if it chooses, commit an offender to a private incorporated institution (approved by the Department of Social Welfare) rather than to a State or local penal or correctional institution.

The court has this discretionary authority in the case of a juvenile delinquent (Family Court Act, § 758), wayward minor (Code of Cr. Proc., § 913-e), or youthful offender (id., § 913-m). Commitment in each of these cases is for a period not to exceed three years. A juvenile delinquent may be committed to a charitable institution "subject to the further orders of the court," but in no event for more than three years (Family Court Act, § 758). A wayward minor may be committed to a charitable institution for "an indeterminate period not to exceed three years" (Code of Cr. Proc., § 913-e), "may be released or paroled in the manner provided by law with respect to adult and other offenders" (id., § 913-d), and also may be returned to the court for other disposition (e. g., State reformatory) if he does not behave (ibid.). A youthful offender commitment to a charitable institution "shall be for a period not to exceed three years" and the statute does not mention parole, release or return to the court. (id., § 913-m).

Courts in New York City and Nassau and Suffolk counties have discretionary authority to commit to a charitable institution when sentencing women found guilty of certain offenses. Correction Law, § 311: N.Y.C.Cr.Ct.Act, §§ 80, 82, 83, 84.

Correction Law section 311 provides that a court in New York City or in Nassau or Suffolk counties is authorized to commit females over the age of 16, who are found guilty of certain offenses,⁸⁸ to specified charitable institutions. These commitments are for an indefinite term, not to exceed three years. Females so committed may be released or paroled at any time by the authorities of the institution, but cannot be released within six months after commitment without the written consent of the committing court. If a female proves unfit for the institution, she may be returned to the court for other disposition. Expenses of commitment to and care and maintenance in such an institution are charged to the county from which the commitment was made. Correction Law, § 311.

The New York City Criminal Court Act contains provisions dealing with the same subject matter as Correction Law, § 311. These provisions are broader than and in some respects conflict with the Cor-

⁸⁸ The offenses specified are as follows:

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| <ol style="list-style-type: none"> 1. Being found in a reputed house of prostitution or assignation, or 2. Being found in company with or frequenting the company of thieves or prostitutes, or 3. Associating with vicious or dissolute persons, or 4. Being wilfully disobedient to her parent or guardian, and is | <ol style="list-style-type: none"> 5. Being a prostitute or of intemperate habits and has not been an inmate of a state prison or penitentiary, or 6. Being a vagrant, or 7. Petit larceny, and has not been an inmate of a state prison or penitentiary . . ." |
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rection Law provision. The Act provides that a court may make a commitment to a charitable institution in the case of any female over the age of 16 who is convicted of:

- (1) a misdemeanor, provided she has not theretofore been an inmate of a State prison or penitentiary (§ 80);
- (2) any one of a number of offenses relating primarily to prostitution (§ 82); or
- (3) the offense of disorderly conduct, or vagrancy (other than prostitution or being a diseased person) (§ 83).

In the first situation (the misdemeanor) commitment is for an indefinite term not to exceed three years and the parole, release and re-commitment provisions are similar to those in Correction Law, § 311. N.Y.C.Cr.Ct.Act, § 80. In the second situation (prostitution) commitment is for a term of three years and in the third situation (disorderly conduct and non-prostitution vagrancy) commitment is not to exceed one year. Id., §§ 82, 83. There is no provision for parole applicable to commitments under situations 2 and 3 but a person so committed may be released before the expiration of the term, under a procedure substantially similar to the one in Correction Law, § 311. N.Y.C. Cr.Ct.Act, § 84. The Act provides that the expenses of commitment and care under the misdemeanor section (§ 80) shall be a City charge, but the Act does not seem to contain a similar provision applicable to commitment under the prostitution or disorderly conduct sections (§§ 82, 83).

APPENDIX B

THE INSANITY DEFENSE

Reprinted from 1963 Interim Report of Commission on Revision of Penal Law and Criminal Code, 1963 Leg. Doc. No. 8, pgs. 16-26.

Another highly controversial subject of a fundamental nature is that which deals with the proper standard to be predicated for the defense of insanity. In the majority of American jurisdictions, including New York, the old and familiar principle known as the McNaghten rule prevails. The validity of this standard has frequently been challenged, and this Commission has given considerable attention to re-examination of that rule and of the entire area of insanity as a defense to a criminal charge.

A public hearing on this subject was held by the Commission on November 30, 1962, in Albany to elicit the opinions and positions of individuals and organizations. Previously, the problems posed by the present standard were explored by a Study Committee of the Governor's Conference on the Defense of Insanity designated by former Governor Harriman and continued by Governor Rockefeller. The members of the Committee were Richard V. Foster, M.D., David Abrahamsen, M.D., Christopher F. Terrence, M.D., Rev. S. Oley Cutler, S. J., Hon. Edward S. Silver, Francis E. Shaw, M.D., Hon. John Van Voorhis and Professor Herbert Wechsler. The Committee issued a report in 1958, known as the Foster Report, in which all the members concurred in making certain recommendations. That report reads, in part, as follows:

"1. The Statutory Criterion of Criminal Responsibility.

The criterion of criminal responsibility as affected by mental disease, disorder or defect is defined in New York by statute.

Section 1120 of the Penal Law provides as follows:

An act done by a person who is an idiot, imbecile, lunatic or insane is not a crime. . . .

A person is not excused from criminal liability as an idiot, imbecile, lunatic or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as:

1. Not to know the nature and quality of the act he was doing; or
2. Not to know that the act was wrong.

Section 34 of the Penal Law further provides:

A morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor.

These statutory provisions bind the New York courts to the criterion of criminal responsibility declared by McNaghten's case in 1843, without the possibility of adaption in the light of modern scientific knowledge of the nature and effects of mental disease or defect. 'Whatever the views of alienists and jurists may be, the test in this state is prescribed by statute and there can be no other.' (Cardozo, J. in *People v. Schmidt*, 218 N.Y. 324, 339). As the Court of Appeals has repeatedly said, if there is reason for dissatisfaction

with the law, the argument must be addressed to the legislature, not the courts. See e. g. *People v. Horton*, 308 N.Y. 1, 13.

Dissatisfaction with the McNaghten rule as the sole test of criminal responsibility when insanity is interposed as a defense has been widespread for many years in both England and in the United States. In some seventeen states, in our federal law and in our military law it has long been supplemented by other criteria, making some allowance for the case where the actor knows the nature and the wrongfulness of his behavior but is otherwise bereft by reason of disease of the capacity for self-control. In many other states the problem is receiving fresh attention now. In this state, speaking ex-judicially, Judge Cardozo said thirty years ago of our statute (*Law and Literature* 106-108):

Every one concedes that the present definition of insanity has little relation to the truths of mental life. There are times, of course, when a killing has occurred without knowledge by the killer of the nature of the act. A classic instance is the case of Mary Lamb, the sister of Charles Lamb, who killed her mother in delirium. There are times when there is no knowledge that the act is wrong, as when a mother offers up her child as a sacrifice to God. But after all, these are rare instances of the workings of a mind deranged. They exclude many instances of the commission of an act under the compulsion of disease, the countless instances, for example, of crimes by paranoiacs under the impulse of a fixed idea. . . . If insanity is not to be a defense, let us say so frankly and even brutally, but let us not mock ourselves with a definition that palters with reality. Such a method is neither good morals nor good science nor good law. . . .

We are unanimously of the view that there are compelling practical, ethical and religious reasons for maintaining the insanity defense; and that the time has come to frame a definition which does not palter with reality. We believe, moreover, that it is entirely feasible to cast a formulation which, without resolving every aspect of the difficulty, will sufficiently improve the statute to meet working standards of good morals, good science and good law.

Without attempting a full statement of the defects of the McNaghten rule, in the rigid form in which the statute fastens it upon the state, we are agreed that an amendment should be drawn to overcome the following objections:

(1) There is, first, the difficulty that inheres in the ordinary meaning of the word 'know,' as applied to persons suffering from serious mental disease. The fact that the defendant is able to verbalize the right answer to a question, to respond, for example, that murder or stealing is wrong, or the fact that he exhibited a sense of guilt as by concealment or by flight, is often taken as conclusive evidence that he knew the nature and the wrongfulness of his behavior. Yet one of the most striking facts about the abnormality of many psychotics is that their way of knowing is entirely different from that of the ordinary person. In psychiatric terms, their knowledge is usually divorced from all affect, which is to say that it is like the knowledge children have of propositions they can state but cannot understand; it has no depth and is divorced from comprehension. The present statute makes it very difficult to put this point before the jury, though it often is the crucial point involved. See e. g. the extracts from the record in *People v. Roche*, 309 N.Y. 678, quoted in Morris, *Criminal Insanity: The Abyss Between Law and Psychiatry*, 12 *THE RECORD* 471 at 483-84; *People v. Horton*, 308 N.Y. 1. The great student of the

English criminal law, Sir James Fitzjames Stephen thought that properly construed McNaghten did not force this limited conception of the nature of the requisite knowledge. See History of English Criminal Law, Vol. II, p. 171. Other students have embraced his view. See e. g. Jerome Hall, Principles of Criminal Law, p. 518. The point had not, however, received explicit recognition by the New York courts and should, in our view, be met by an amendment of the statute. The knowledge that should be deemed material in testing responsibility is more than merely surface intellection; it is the appreciation sane men have of what it is that they are doing and of its legal and its moral quality.

(2) The McNaghten rule improperly confines the inquiry to the effect of mental disease or defect upon the actor's cognitive capacity; the finding must be that he did not know the nature or wrongfulness of the act. The limitation is, as Judge Cardozo pointed out, faithful neither to the facts of mental life nor to the demands of legal, ethical or social policy.

Mental disease, even in its extreme forms, may not destroy the minimal awareness called for by McNaghten, while destroying power to employ such knowledge in determining behavior, the capacity that rational human beings have to guide their conduct in the light of knowledge. The point is a related one to that which we have made respecting the impairment of capacity to know. Capacity to know the nature and wrongfulness of conduct may not have been discernibly destroyed and yet the transformations in ability to cope with the external world, worked by severe psychosis, may have otherwise destroyed the individual's capacity for self-control. In cases such as this McNaghten decrees legal responsibility. But since it is precisely the destruction of capacity for self-control, in consequence of mental disease or defect, which from the point of view of morals and of legal policy warrants the special treatment of the irresponsible, the statute forces a discrimination which is neither logical nor just. We think that the discrimination should be rectified by an amendment of the statute.

(3) A final difficulty which we think demands attention turns on the degree of the impairment of capacity to know or to control that ought to be demanded before irresponsibility may be acknowledged. Taken on its face, the present statute calls for an impairment that is total; the actor must not know. This extreme conception poses what some have thought the largest problem in the just administration of the test.

Even in the most extreme psychoses, there is often some residual capacity to know or to control; and, judging after the event, the psychiatric expert hardly can declare on oath that at the time of the disputed action the actor was totally bereft of knowledge or control. Yet this is a dilemma that it certainly is not deliberate legal policy to pose. In other situations, where the facts of life do not submit to any absolute appraisal, the law has been content to recognize that it must tolerate distinctions of degree. We think that such recognition is required here. People of relative sanity, on whom the threats of penal law can exert a deterrent force and who are within the range of influence of programs for correction, differ from the seriously deranged in the respect that theirs is an appreciable or substantial capacity to know and to control. We think the statute should be framed to recognize that this is so and to avoid a finding of responsibility for those psychotics who may have some remnant of capacity, however grossly it has been impaired by their disease.

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The foregoing appraisal of the defects of McNaghten is substantially that made by the American Law Institute in the process of the formulation of its *Model Penal Code*. See A. L. I. *Model Penal Code*, Tentative Draft No. 4, (1955) pp. 156-159. The remedy that we propose also is adapted from the formulation which has had the tentative approval of the Institute. We recommend that Section 1120 of the Penal Law be modified to read substantially as follows:

(1) A person may not be convicted of a crime for conduct for which he is not responsible.

(2) A person is not responsible for criminal 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.

The changes that this formulation would effect may be summarized as follows:

1. The present statutory reference to a person who is an "idiot, imbecile, lunatic or insane" would be superseded by reference to mental disease or defect, the modern terms which designate mental disorders of the most serious kind and undeveloped intellectual capacity.

2. With respect to the question which now is material under McNaghten and the present statute, the inquiry would be not merely whether the actor lacked *knowledge* of the nature and the wrongfulness of his behavior but also whether he was lacking in capacity to *appreciate* its wrongfulness. By adding the requirement of appreciation to that of knowledge, we would expect the courts to grant some leeway to an explication of the distinction between mere verbalization and a deeper comprehension, which we have discussed above. Moreover, since a person who is lacking in capacity to know or to appreciate the *nature* or the *quality* of his action, as those terms are understood in law, is necessarily incapable of an appreciation of its wrongfulness, we have thought it unnecessary to deal with the former possibility explicitly in statement of the principle, as the present statute does.

3. Instead of asking whether the defendant did not know, we think the legal inquiry should be addressed to his *capacity* to know or to appreciate. The reason is that any testimony by the psychiatric expert, addressed to the actor's mental state at a time in the past, will necessarily involve an inference upon his part from his judgment as to the actor's powers or capacity. We think the statute gains in clarity by making this explicit.

4. The inquiry is not confined to the impairment of capacity to know or to appreciate the wrongfulness of the defendant's conduct. For reasons stated earlier, it extends also to the capacity of the actor to conform his conduct to the requirements of law.

5. Finally, both in dealing with capacity to know or to appreciate and with capacity to conform, the question posed is not whether the actor wholly lacked the requisite capacity but whether he lacked *substantial* capacity—meaning, thereby, the quantum of capacity that represents a fair appraisal of the wide range that in our culture excludes a diagnosis of severe mental disease or defect. The scope of that range is essentially a problem for the psychiatric sciences, to be reflected in the testimony of the expert witness, but sifted and evaluated by the court and jury in the light of common sense.

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We also recommend in this connection the repeal of Section 34 of the Penal Law. In substitution for this formulation we propose a further paragraph for Section 1120, as follows:

(3) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

The purpose of this paragraph is to exclude from the concept of 'mental disease or defect' and thus from the standard of irresponsibility so-called psychopathic or sociopathic personalities. These terms are employed by some psychiatrists to categorize persons who are insensitive to moral and social norms, as evidenced by their persistent and repeated conduct. Those psychiatrists who would regard such persons as the victims of disease proceed upon the theory that capacity for law-abiding living in society is a constituent of mental health, with the conclusion that its absence is disease; or else on the hypothesis that psychical disorder underlies all maladjustment of this kind, although the present state of knowledge may not serve to explicate the nature of the psychical disorder except in terms of its results.

It seems quite clear, however, that McNaghten cannot safely be relaxed, as we propose to recommend, unless a stricter view of mental disease underlies the principle to be applied. For it is wholly circular in reasoning, as many psychiatrists agree, to define the concept of disease solely by reference to the phenomena which must be the product of disease for irresponsibility to be established. Thus whether the matter is viewed in terms of its intrinsic logic or, even more clearly, in terms of social policy, the statute must make clear that diagnoses of psychopathy shall not suffice to lay the basis for a claim of irresponsibility. In the present state of knowledge we are satisfied that there is no escape from treating persons of this order as subject to conviction and a problem for the organs of correction.

It should be added that in framing our recommendation we gave consideration to the principle formulated in the Durham case, which would refer responsibility solely to whether the criminal act was the product of mental disease or defect. While we appreciate the value of this concept as opposed to strict McNaghten, and its usefulness in freeing psychiatric testimony from the arbitrary limits now imposed, no member of the Study Committee would prefer its adoption to the formulation we propose. We think, indeed, that our more specific formulation, delineating as it does the type of causal relationship between disease and act that is required to negate responsibility, will lend itself more readily to fair administration. We also are quite clear that it will prove to be far more acceptable to lawyers and to laymen as a basis for amendment of the law.

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2. *The Scope of Psychiatric Expert Testimony When Responsibility Is Drawn in Issue*

So long as the defense of irresponsibility by reason of insanity is recognized in any form, the law needs to be aided in its administration by psychiatric expert testimony. The problems posed to the psychiatrist in the performance of this vital public function have been acutely felt for many years. Psychiatric disaffection with the legal criterion determining responsibility, the complex, technical vocabulary of psychiatry which does not easily translate to terms of common speech, the strain which cross-examination puts upon expert witnesses, the use of long and involved hypothetical ques-

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tions, the histrionics that so commonly accompany a trial for crime—these are all factors which contribute to creation of the difficulty.

We do not undertake to frame a panacea for these ills. Nor have we yet been able to agree on all the palliatives that have been proposed. There is one point, however, as to which we have no disagreement; and it goes some distance towards alleviating the deep tension that prevails. We think it plain that if the legal process calls for psychiatric expert testimony, as it obviously must, the expert must be given reasonable leeway in presenting his conclusions in his own scientific terms. Obvious as this is, we do not hesitate to say that there is ample evidence that it is far from universal practice to conduct proceedings in this way.

If illustration is required it is readily at hand. In *People v. Horton*, 308 N.Y. 1, the dissenting opinion of Judge Van Voorhis, a member of our Committee, summarizes a part of the record as follows (308 N.Y. at 20-21):

" . . . The testimony offered by Dr. Brancale was to the effect that appellant's act was the product of persecution by his father and that being actuated by such a delusion, appellant did not understand that his act was wrong. He testified that, although apparently aware that he was killing his father, only 'seemingly' did appellant even know what he was doing. This answer was stricken out by the trial court. The next question was: 'Q. Doctor, did he know what he was doing when he committed those acts? A. The answer is no. He was psychotic at the time and did not know the nature and quality of his acts.' This answer also was stricken out. In response to a similar question, the answer was: 'A. No, he was in a schizophrenic state.' All but 'no' was stricken out. This doctor then said: 'I wish to qualify my responses.' In answer to the next question of similar import, the doctor said he was still responding to his delusional idea. This answer was also stricken out by the court. Finally, the doctor was compelled to answer categorically 'No'. He added, however: 'Your Honor, I think I should be permitted to qualify my answers on this in all fairness.' The Court: You should answer the question.' Defendant's attorney took an exception to holding the witness to a 'yes' or 'no' answer. A little later the District Attorney stated: 'You concede, then, Doctor, that this series of connected activities seemed to be rational? A. Seemed to be rational just as the case of a paranoid praecox. They are a whole series of connected activities, yet they are a most serious and most malignant form of schizophrenia. Just the ability to rationalize doesn't make it rational.' This answer was stricken out and the jury instructed to disregard it."

As Judge Van Voorhis pointed out, the trial court in the Horton case felt obliged to rule as he did by sections 34 and 1120 of the Penal Law. The problem posed by such obstruction of the explanations of the witness will, therefore, be lessened if our recommendation for the relaxation of McNaghten is enacted into law. Enlargement of the psychiatric inquiry that is material for legal purposes will necessarily enlarge the freedom of the witness to present the facts that in his scientific view describe the mental state of the accused. We agree, however, with the American Law Institute that there is need for a specific legislative formulation on the point involved. See Model Penal Code, Tentative Draft No. 4 (1955) § 4.07(a) and Comments p. 198. To defer a solution to the courts is to insist upon progressing only at the cost of the reversal of convictions in protracted trials. Accordingly, we recommend that a

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provision be added to the Code of Criminal Procedure substantially as follows:

When a psychiatrist who has examined the defendant testifies concerning his mental condition at the time of the conduct charged to constitute a crime, he shall be permitted to make a statement as to the nature of his examination, his diagnosis of the mental condition of the defendant and his opinion as to the extent, if any, to which the capacity of the defendant to know or to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law or to have a particular state of mind which is an element of the crime charged was impaired as a result of mental disease or defect at that time. He shall be permitted to make any explanation reasonably serving to clarify his diagnosis and opinion and may be cross-examined as to any matter bearing on his competency or credibility or the validity of his diagnosis or opinion.

With such a statute on the books, the courts, the public and the medical profession may be confident that psychiatric expert testimony will proceed without obstruction or arbitrary limitation, while preserving every reasonable safeguard of its relevancy and materiality as well as the time-honored test of its validity afforded by the cross examination. The expert will have no excuse for shamming testifying in the courts. And court and jury both will be assisted in arriving at a judgment on the evidence, which is the final and high purpose of a trial."

Opinions on the recommendations of the Foster Report were sought from individuals and groups throughout the State. The following supported the formulation on the defense of insanity: Hon. Sydney F. Foster; Daniel Gutman, Dean of New York Law School; Andrew V. Clements, Dean of Albany Law School; Rev. Joseph T. Tinnelly, C.M., Dean of St. John's University Law School; J. D. Hyman, Dean of The School of Law, University of Buffalo; William C. Warren, Dean of Columbia University School of Law; Monrad S. Paulsen, Professor of Law, Columbia University School of Law; Saul Touster, Professor of Law, The School of Law, University of Buffalo; Solomon A. Klein, Professor of Law, Brooklyn Law School; Sheldon Glueck, Professor of Law, Law School of Harvard University; Arthur W. Pense, M.D., State Department of Mental Hygiene; Henry Brill, M.D., State Department of Mental Hygiene; Benjamin Apfelberg, M.D., Associate Director, Psychiatric Division, Bellevue Hospital; Thomas J. McHugh, Director of the New York State Committee for the 1960 White House Conference on Children and Youth; Manfred S. Guttmacher, M.D., Chief Medical Officer of the Medical Service of the Supreme Bench of Baltimore; A. B. Fisher, M.D., LL.B., Chairman of the Legal Committee of the Brooklyn Psychiatric Association; G. E. Winkler, M.D., Chairman of the Committee on Forensic Aspects of Psychiatry; Arthur N. Seiff, Esq.; and Alfred Berman, Esq., New York County Lawyers' Association. Also unqualifiedly endorsing the recommendation on the defense of insanity were the Committee on Mental Hygiene of the New York State Bar Association, the Committee on Penal Law and Criminal Procedure of the New York State Bar Association, and the Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York. The recommendation on the scope of psychiatric testimony received the unanimous support of those mentioned above and many others.

The Foster Report, along with numerous other reports and studies, were carefully and thoroughly examined by this Commission; and, as indicated, it held a public hearing on the subject. The ultimate conclusion of the Commission was that the recommendations of the Foster Re-

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port are eminently sound and, accordingly, it has prepared bills incorporating these recommendations and proposing a new standard of responsibility which would replace the McNaghten rule.*

It is noteworthy that, at the Commission's public hearing, the support previously given to the Foster Report recommendation was reiterated by the New York State Department of Mental Hygiene and the Committee on Mental Hygiene of the New York State Bar Association.

On the other hand, support for retention of the McNaghten doctrine was voiced by the District Attorneys' Association of New York State.

The position of that Association is as follows: that McNaghten remain the law of New York for the reason that any other test is unrealistic in a traditional jury trial setting, and that McNaghten is a practical, workable rule couched in everyday language which jurors can understand. However, the Association does recognize that, under the rules of evidence, many forms of psychiatric testimony are irrelevant and immaterial to the narrow issue of responsibility as set forth by the McNaghten rule. Therefore, the Association would broaden the scope of psychiatric testimony admissible in evidence in order to give the jurors a more complete picture of the defendant's personality, even though, technically speaking, such evidence might not be relevant.

It is, perhaps, in order to note that, in the course of its study, the Commission gave considerable attention to the previously mentioned Durham rule, which has prevailed in the District of Columbia since 1954. The adoption of this standard has been frequently considered and consistently rejected by other jurisdictions. As a matter of fact, the United States Attorneys for the District of Columbia who were in office during the years following the Durham decision have expressed dissatisfaction with the rule and have been urging that it be interpreted or modified in accordance with the formulation proposed by this Commission. It is also worthy of mention that the latter formulation has been adopted, in nearly identical form, in two states, Vermont and Illinois. [Vermont Stats. Ann. Title 13, § 4801 (1959); Ill. Crim. Code, § 6-2 (1961)]. A variation thereof has been enunciated by the United States Court of Appeals, Third Circuit [United States v. Currens, 290 F.2d 751 (1961)].

Turning to the specific proposals drafted by the Commission, the first contains the standard of criminal responsibility. It provides that 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 either to know or to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law. As used in the bill, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

A second bill is concerned with the scope of psychiatric testimony when the defense of insanity is in issue. A psychiatrist who has examined the defendant as to his mental condition at the time of the allegedly criminal conduct shall be permitted to make a statement as to the nature of the examination, his diagnosis of the mental condition of the defendant and his professional opinion concerning the impairment of the defendant's capacity in terms of the criteria enunciated in the standard described above.

A third bill requires that the defendant give certain notice to the District Attorney in order to avail himself of the defense of insanity. In the present state of the law, the defendant may, as a matter of right, raise such defense at any time whatsoever, including the final stages of the trial. This, manifestly, may place the People at a great and unfair disadvantage in that, surprised by the sudden interposition of this col-

* Commissioner Conway dissented, favoring no change in the present New York law.

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lateral defense, they may have insufficient opportunity to obtain the psychiatric and other evidence necessary to refute it and to establish, as they must, the defendant's sanity beyond a reasonable doubt. The proposed provision rectifies this situation by requiring notice to the People within twenty days after a plea of not guilty to the indictment, or at any time thereafter as the court may permit for good cause shown.

In summary, the Commission is convinced that the vigorous demand for abandonment of the antiquated McNaghten rule and its replacement by a more enlightened standard is well merited; that the test here proposed recognizes the advancement of modern psychiatric thinking while preserving a workable standard to measure criminal responsibility, geared to traditional concepts of our criminal law; and that the legislative action essential to abrogation of McNaghten and replacement thereof with a fairer and more enlightened standard is long overdue and should not be further delayed.

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