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Some Legislative History and Comments on Ohio's New Criminal Code *Harry J. Lehman* and Alan E. Norris***

ON JUNE 23, 1965, THE HOUSE OF REPRESENTATIVES of the 106th Ohio General Assembly adopted House Resolution No. 81, introduced by State Representative Edmund G. James of Noble County, then Chairman of the House Judiciary Committee. H.R. No. 81 requested a comprehensive study of both criminal laws and procedures by the Ohio Legislative Service Commission.

The Ohio Legislative Service Commission is the professional staff of the Ohio General Assembly.¹ It provides the full range of services necessary in the legislative process to members of the General Assembly and its committees. The Commission itself consists of fourteen members of the General Assembly, seven from the House of Representatives and seven from the Senate.² As part of its function to "conduct research, make investigations, and secure information or data on any subject and make reports thereon to the General Assembly,"³ the Legislative Service Commission may "appoint committees consisting of members of the General Assembly and such citizens having special knowledge on a particular subject as the commission may determine, to study and report on assigned subjects."⁴

In response to H.R. No. 81 and pursuant to this statutory authority, the Legislative Service Commission appointed the Committee to Study Ohio Criminal Laws and Procedures, a committee composed of legislators, and a Technical Committee to Study Ohio Criminal Laws and Procedures, a committee composed of members of the bench and

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¹ OHIO REV. CODE ANN. §103.11 (Page 1969).

² *Id.*

³ OHIO REV. CODE ANN. §103.13 (Page Supp. 1972).

⁴ OHIO REV. CODE ANN. §103.12 (Page 1969).

bar from throughout the state, to conduct a survey of current problems in Ohio's criminal laws and procedures. This study committee was assisted by the professional staff of the Commission. The results of this initial study were published in Ohio Legislative Service Commission Staff Research Report No. 82, *Criminal Laws and Procedures: An Interim Report* in February, 1967. This report recommended that a complete revision of Ohio statutory law covering crimes and procedures was in order. However, at the May, 1968 Primary Election, the voters in Ohio approved what is generally referred to as the Modern Courts Amendment.⁵ Under Article IV, section 5 of the Ohio Constitution, the responsibility of promulgating rules of practice and procedure was vested in the Ohio Supreme Court.

Thereupon, the focus of the Technical Committee became substantive criminal law. During the next three years the Technical Committee devoted its time to consideration of drafts of proposed sections of a new criminal code, prepared by the staff of the Commission. In its deliberations and as a guide, the Technical Committee and its staff relied on the Model Penal Code of the American Law Institute, as well as the revised criminal codes from Illinois, New York and Wisconsin.⁶

The final report of the Technical Committee consisted of a proposed criminal code in bill form, together with comments to each proposed new section, consisting of a review of existing statute and case law and a discussion of the "operation and effect" of each proposed section. The report was prepared by the Legislative Service Commission staff, approved by the Technical Committee and the Legislative Service Commission, and published in March, 1971.⁷ The proposed criminal code was introduced into the 109th General Assembly on March 31, 1971, as H.B. 511, sponsored by State Representative Alan Norris of Franklin County and eleven other representatives.

The proposed code repealed 440 statutes in the twelve existing chapters of the Ohio Revised Code from 2901 through 2923, and recommended 29 new chapters consisting of 157 new sections, plus 25 new sections and amendments to 49 existing sections in other parts

⁵ The Modern Courts Amendment affected most of Article IV of the Ohio Constitution. See Milligan, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 OHIO ST.L.J. 811 (1968) for an excellent discussion of the background and impact of the amendment.

⁶ OHIO LEGISLATIVE SERVICE COMMISSION, PROPOSED OHIO CRIMINAL CODE, viii (March, 1971).

⁷ The *Ohio Legislative Service Commission, Proposed Ohio Criminal Code*, was printed in its entirety and made available to the public by Banks-Badlwin Law Publishing Company and The W. H. Anderson Company. This was the only occasion during the 109th General Assembly, and one of the few occasions during recent decades, that a bill under consideration by the General Assembly was available in this form to the legal profession and general public.

of the Code. Altogether, H.B. 511, as introduced, proposed to repeal 536 existing sections, and replace them with 231 new or amended statutory provisions.

House Bill 511 was referred to the House Judiciary Committee on April 6, 1971. Over the next ten months, the Criminal Law Section of the Judiciary Committee, under the Chairmanship of Representative Alan Norris, received testimony and examined the proposed code on a line-by-line basis.⁸ Amendments were made by both the Criminal Law Section and the full Judiciary Committee, and a substitute bill was reported by the Judiciary Committee on March 14, 1972, with a recommendation for passage. Two full days of floor debate followed, and on March 22, 1972, the substitute bill, with additional amendments, was passed by the House of Representatives.⁹

Substitute H.B. 511 was referred to the Senate Judiciary Committee on March 27, 1972, and extensive hearings were conducted in a subcommittee chaired by State Senator Howard Cook of Toledo. After further amendment, the Senate Judiciary Committee recommended H.B. 511 for passage on November 29, 1972, and the bill was acted upon and passed by the Senate, with a few additional amendments, on December 6, 1972.¹⁰

When the House of Representatives refused to concur in Senate amendments, as customary on bills of major import, a Committee of Conference, consisting of three members of the House and three members of the Senate, was appointed to reconcile the differences.¹¹ The

⁸ Generally, testimony from members of the criminal bar, jurists, prosecutors, police officials, court personnel and others involved in the criminal justice system on a day-to-day basis, and other professionals and professional groups such as the state and local bar associations, law school professors, private organizations and commentators, was surprisingly sparse during consideration of H.B. 511 by the House Judiciary Committee. The Ohio Association of Prosecuting Attorneys did a conscientious job of monitoring the hearings and made many constructive recommendations. A member of the Adult Parole Authority also regularly attended hearings and participated in discussions. The Ohio State Bar Association made a presentation during the final hours of consideration of a substitute bill by the full committee. Some organizations, such as the American Civil Liberties Union of Ohio, made appearances on selective provisions of the bill, such as capital punishment. Most of the time, however, was spent in discussion of the sections of the proposed code, one by one, by members of the committees, with considerable assistance by staff personnel of the Legislative Service Commission and particularly Thomas R. Swisher, who had served as Project Officer to the Technical Committee and as counsel to the Judiciary Committee. After Sub. H. B. 511 was received by the Senate Judiciary Committee in March of 1972, and it then appeared that action on the bill would be taken during that session of the legislators, there was greater response, comment, and criticism on various parts of the bill by persons who had a vital interest in such legislation.

⁹ 134 OHIO H. R. JOUR. 1782-1810 (1972). Twenty-one substantive amendments were considered by the House of Representatives during floor debate.

¹⁰ 134 OHIO SEN. JOUR. 1865-76 (1972). Nine substantive amendments were considered by the Senate during floor debate.

¹¹ Pursuant to Rule 10 of the Joint Rules, the membership of the Conference Committee consists of three State Representatives and three State Senators; a Conference Committee Report, to be accepted, must be signed by two from each body. Serving on the Conference Committee for the House of Representatives were Rep. William G. Batchelder of Medina,

(Continued on next page)

Conference Committee's report was signed by all members and submitted to the House of Representatives and Senate and approved by both on December 14, 1972. H.B. 511 was signed by the Governor on December 22, 1972, and except for eight sections which became effective March 23, 1973, the provisions of the Act became effective January 1, 1974.

Having briefly outlined the history of the formal development of the Act, it is the purpose of this Article to discuss in narrative form the legislative process on certain key provisions which were the subject of much debate and disagreement.

Murder and Felony Penalties

As introduced, H.B. 511 retained the principle of indeterminate sentences for felonies. Instead of retaining fixed minimum and maximum terms, however, the bill established a fixed maximum and variable minimum for each degree of offense,¹² as follows:

(Continued from preceding page)

Rep. Harry J. Lehman of Shaker Heights, and Rep. Alan E. Norris of Westerville; serving for the Senate were Sen. Howard C. Cook of Toledo, Sen. Max H. Dennis of Wilmington, and Sen. Jerry O'Shaughnessy of Columbus.

¹² The following is an illustrative list of the newly enacted statutory crimes denominated as felonies according to the degree of offenses:

Felony 1st: Kidnapping (without release of victim), §2905.01; rape, §2907.02; aggravated arson, §2909.02; aggravated robbery, §2911.01; aggravated burglary, §2911.11; conspiracy (where object is murder or aggravated murder), §2923.01; attempt to commit murder or aggravated murder, §2923.02; engaging in organized crime, §2923.04; voluntary manslaughter, §2903.03; involuntary manslaughter (relating to attempted felony); §2903.04.

Felony 2nd: Kidnapping (with release of victim), §2905.01; child stealing, §2905.04; robbery, §2911.02; burglary, §2911.12; carrying concealed weapon aboard aircraft, §2923.12; felonious assault, §2903.11.

Felony 3rd: Involuntary manslaughter (regarding attempt to commit a misdemeanor), §2903.04; aggravated vehicular manslaughter (with prior vehicular manslaughter charge); §2903.06; abduction, §2905.02; extortion, §2905.11; sexual battery, §2907.03; corruption of a minor (where offender is four or more years older than minor), §2907.04; gross sexual imposition (on person less than 13), §2907.05; compelling prostitution, §2907.21; promoting prostitution (with regard to person under 16), §2907.22; arson (causing harm to statehouse), §2909.03; disrupting public services, §2909.04; safecracking, §2911.31; corrupting sports (with previous theft or gambling offense), §2915.06; inciting to violence, §2917.01; aggravated riot, §2917.02; bribery, §2921.02; intimidation, §2921.03; perjury, §2921.11; tampering with evidence, §2921.12; carrying concealed weapon (with previous conviction of any violent offense or if weapon is loaded), §2923.12.

Felony 4th: child stealing (by natural or adoptive parent), §2905.04; gross sexual imposition, §2907.05; promoting prostitution, §2907.22; disseminating obscene material to juveniles, §2907.31; pandering obscenity (with previous offense), §2907.32; compelling acceptance of objectionable materials, §2907.34; arson, §2909.03; vandalism, §2909.05; breaking and entering, §2911.13; tampering with coin machines (with previous conviction), §2911.32; grand theft, §2913.02; unauthorized use of vehicle (with previous conviction or removal of car from state), §2913.03; passing bad checks (with either previous conviction or amount involving \$150), §2913.11; misuse of credit cards (with either \$150 amount or previous conviction of theft), §2913.21; forgery, §2913.31; criminal simulation, §2913.32; defrauding a livery or hostelry (with previous conviction of this offense or theft), §2913.41; tampering with unrevoked will or governmental record, §2913.42; securing writings by deception (with regard to amount above \$150), §2913.43; receiving stolen property (involving \$150 amount or previous theft conviction), §2913.51; gambling (with previous conviction), §2915.02; cheating (with previous theft or gambling offense or amount involving \$150), §2915.05; corrupting sports, §2915.06; aggravated

(Continued on next page)

<i>Degree of Offense</i>	<i>Minimum Sentence</i>	<i>Maximum Sentence</i>
Capital Murder ¹³	Life	Death
Murder ¹⁴	15 years	Life
Felony — 1st ¹⁵	5, 6, 7, 8, 9 or 10 years	25 years
Felony — 2nd ¹⁶	3, 4, 5 or 6 years	15 years
Felony — 3rd ¹⁷	2, 3, or 4 years	10 years
Felony — 4th ¹⁸	1 or 2 years	5 years

This proposed schedule of penalties was approved by the House of Representatives. In addition, proposed section 2929.05(D) provided that for purposes of sentencing, an offense could be reduced one degree by the court, and the penalty specified for that lower degree used in sentencing.¹⁹ Guidelines were included in proposed section 2929.05(A)-(C) for imposing longer or shorter terms.²⁰ The idea of the drafters was to give a degree of flexibility to trial judges in fitting the punishment not only to the crime, but to the criminal. Thus, the trial judge, when dealing with a first offender, could select a lower minimum term than he would select for a repeat offender; and, if mitigating factors were present, the court might reduce the sentence even further by selecting one of the penalties provided for by the next lower degree.

While the criteria set forth in proposed section 2929.05, which is section 2929.12 of the Act, for imposing longer or shorter terms of imprisonment were retained throughout the legislative process, the

(Continued from preceding page)

riot, §2917.02; inducing panic (where physical harm results), §2917.31; criminal abortion, §2919.11; endangering children, §2919.22; obstructing justice (where crime aided is a felony), §2921.32; escape, §2921.34; aiding escape or resistance, §2921.35; having an unlawful interest in a public contract, §2921.42; having weapon while under disability, §2923.13; unlawful transactions in weapons, §2923.20; aggravated assault, §2903.12; aggravated vehicular manslaughter, §2903.06; negligent vehicular manslaughter (with prior conviction), §2903.07.

¹³ Ohio House Bill No. 511, 109th Ohio General Assembly, §2929.01(A) (1971-1972) [hereinafter cited as H.B. 511].

¹⁴ H.B. 511 §2929.01(B).

¹⁵ H.B. 511 §2929.04(B) (1).

¹⁶ H.B. 511 §2929.04(B) (2).

¹⁷ H.B. 511 §2929.04(B) (3).

¹⁸ H.B. 511 §2929.04(B) (4).

¹⁹ H.B. 511 §2929.05(D). This proposed section provided:

Regardless of the penalty ordinarily provided, the court, in imposing sentence for a felony of the first or lesser degree, may impose sentence upon an offender according to the degree of offense next below that for which sentence is being imposed, when the offender is not a repeat or dangerous offender, and the lesser penalty appears in the interests of justice and sufficient for the protection of the public and the correction and rehabilitation of the offender. In such case, if the offense for which sentence is being imposed is a felony of the fourth degree, the court may impose the penalty ordinarily provided for a misdemeanor of the first degree.

This specific subsection was deleted by the Senate, Am.Sub. H.B. No. 511, 109th Ohio General Assembly (1971-1972).

²⁰ Subsections (A), (B) and (C) of the House proposal provided:

(Continued on next page)

terms of imprisonment varied substantially between the House and Senate versions, and reconciliation was required by the Conference Committee.

The Senate Judiciary Committee determined early in its deliberation to lower the minimum penalties. Reacting to testimony that some crimes were classified such that the minimum sentence exceeded that under corresponding provisions in existing law,²¹ and mindful of the penalty provisions in federal law, the Senate Subcommittee at one point in its deliberations completely eliminated minimum penalties. However, the final Senate Judiciary Committee structure for the felony penalties, approved by Senate floor action, was:

(Continued from preceding page)

(A) In determining the minimum and maximum terms of imprisonment to be imposed for felony, and in determining whether to impose a fine for felony and the amount and method of payment of a fine, the court shall consider the risk that the offender will commit another crime and the need for protecting the public therefrom, the nature and circumstances of the offense, the history, the character, and condition of the offender, and the need for correctional or rehabilitative treatment, and the ability and resources of the offender and the nature of the burden that payment of a fine will impose on him.

(B) If the offender is a repeat or dangerous offender, it does not control the court's discretion, but shall be considered in favor of imposing longer terms of imprisonment for felony.

(C) The following do not control the court's discretion, but shall be considered in favor of imposing shorter terms of imprisonment for felony:

- (1) The offense neither caused nor threatened serious physical harm to persons or property, or the offender did not contemplate that it would do so;
- (2) The offense was the result of circumstances unlikely to recur;
- (3) The victim of the offense induced or facilitated it;
- (4) There are substantial grounds tending to excuse or justify the offense, though failing to establish a defense;
- (5) The offender acted under strong provocation;
- (6) The offender has no history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial time before commission of the present offense;
- (7) The offender is likely to respond quickly to correctional or rehabilitative treatment.

Although subsection (D) was eventually discarded by the Senate (see *supra* note 19), subsection (A) and the concomitant criteria of subsections (B) and (C), as proposed by the House, and subsequently proposed by the Senate, were substantially incorporated into the new OHIO REV. CODE ANN. §2929.12 (A), (B), and (C) (Page Supp. 1973). See note 29 *infra*, as to the changes in subsection (A) from the proposed to the final version.

²¹ A comparative examination of some of the House provisions to the corresponding pre-1974 Code sections will indicate the possible substance of the testimony. The following is a partial list of the apparent minimum penalty disparities between the House proposal and the pre-1974 law:

- a) voluntary manslaughter: H.B. 511 §2903.03 (felony one, minimum 5 years); prior code §2901.06 (minimum 1 year).
- b) rape: H.B. 511 §2907.02 (felony one, minimum 5 years); prior code §2905.01 (minimum 3 years).
- c) aggravated robbery: H.B. 511 §2911.01 (felony one, minimum 5 years); prior code §2901.12 (minimum 1 year). *But see* prior §2901.13 relating to armed robbery, which carried a minimum 10 year sentence:
- d) aggravated arson: H.B. 511 §2909.02 (felony one, minimum 5 years); prior code §2907.02 (minimum 2 years);

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<i>Degree of Offense</i>	<i>Minimum Sentence</i>	<i>Maximum Sentence</i>
Capital Murder ²²	Life	Death
Murder ²³	15 years	Life
Felony — 1st ²⁴	3, 4 or 5 years	25 years
Felony — 2nd ²⁵	2, 3 or 4 years	15 years
Felony — 3rd ²⁶	1, 1½ or 2 years	10 years
Felony — 4th ²⁷	1 or 1½ years, or definite term of not more than 6 months in jail.	5 years

Because of the substantially reduced penalty schedule, the Senate Judiciary Committee determined that it was not necessary to retain the House provision permitting the trial judge to reduce the offense one degree for purposes of sentencing, and, accordingly, deleted proposed section 2929.05 (D).²⁸

In the give and take of Conference Committee deliberations, the final schedule of felony penalties which was adopted represented a middle position between the House and Senate versions, and included

(Continued from preceding page)

e) felonious assault: H.B. 511 §2903.11 (felony, second degree, minimum 3 years); prior code §2901.241, assault with a dangerous or deadly weapon, carried minimum imprisonment of 1 year.

f) robbery: H.B. 511 §2911.02 (felony two, minimum 3 years); prior code §2901.12 (minimum 1 year).

g) extortion: H.B. 511 §2905.11 (felony three, minimum 2 years); prior code §2907.01 (minimum 1 year). *But see* prior code §§2901.27 and 2901.32 relating respectively to abducting for purpose of extortion and threatening to abduct for extortion, the former imposing a minimum sentence of 20 years or life, the latter imposing a 5 year minimum.

h) sexual battery: H.B. 511 §2907.03 (felony three, minimum 2 years); prior code §2901.24, assault with intent to commit rape or to kill (minimum 1 year).

i) compelling prostitution: H.B. 511 §2907.11 (felony three, minimum 2 years); prior code §2905.17 (minimum 1 year); the prior procuring statute, §2905.18, however, carried a minimum 3 year sentence.

j) perjury: H.B. 511 §2921.11 (felony three, minimum 2 years); prior code §2917.25 (minimum 1 year).

k) bribery: H.B. 511 §2921.02 (felony three, minimum 2 years); prior code §§2917.01 and 2917.06 (1 year and 60 days respectively), the latter provision relating to bribery of a witness.

l) aiding escape: H.B. 511 §2921.35 (felony four, minimum 1 year); prior code §2917.12 (maximum 90 days).

CAVEAT: Section 2929.05 (D) of the House proposal, which provided that an offense could be reduced one degree by the court for purposes of sentencing, would have further reduced the extent to which these proposed new minimum penalties would have exceeded the old.

²² Am.Sub. H.B. No. 511, 109th Ohio General Assembly, §2929.02(A) (1971-1972) [hereinafter cited as Am. Sub. H.B. 511]; now termed "aggravated murder" by §2929.02(A) OHIO REV. CODE (Page Supp. 1973).

²³ Am.Sub. H.B. 511 §2929.02(B).

²⁴ Am.Sub. H.B. 511 §2929.11(B) (1).

²⁵ Am.Sub. H.B. 511 §2929.11(B) (2).

²⁶ Am.Sub. H.B. 511 §2929.11(B) (3).

²⁷ Am.Sub. H.B. 511 §2929.11(B) (4).

²⁸ See *supra* notes 19 and 20.

recognition of the minimum sentence House provision permitting the lowering of the offense one degree for sentencing.²⁹ The Conference Committee reported the following:

<i>Degree of Offense</i>	<i>Minimum Sentence</i>	<i>Maximum Sentence</i>
Aggravated Murder ³⁰	Life	Death
Murder ³¹	15 years	Life
Felony — 1st ³²	4, 5, 6 or 7 years	25 years
Felony — 2nd ³³	2, 3, 4 or 5 years	15 years
Felony — 3rd ³⁴	1, 1½, 2 or 3 years	10 years
Felony — 4th ³⁵	½, 1 1½ or 2 years	5 years

Capital Punishment

Capital punishment for murder and other crimes has been an issue of great public interest and debate and, therefore, one with political overtones. As introduced, H.B. 511 retained the death penalty, but limited its imposition to only three species of murder, whereas current law provides the death penalty for nine separate offenses. The three classes contained in proposed section 2903.01 were premeditated murder, intentional killing using an illegally concealed firearm or other dangerous weapon, and felony murder. In addition, the proposed section also provided that imprisonment was to be an al-

²⁹ With regard to the lessening of the minimum sentence, the Senate proposal, §2929.05(C), Am.Sub. H.B. No. 511, had read:

"The following do not control the court's discretion, but shall be considered in favor of imposing *shorter terms* of imprisonment for felony . . ." (emphasis added). The enacted legislative counterpart, as previously altered and recommended by the Committee of Conference, now reads:

"The following do not control the court's discretion, but shall be considered in favor of imposing a *shorter minimum term* of imprisonment for felony . . ." (emphasis added). OHIO REV. CODE ANN. §2929.12(C) (Page Supp. 1973).

This language substantially effectuates the legislative intent of discarded House proposal §2929.05(G) discussed *supra* note 19.

There is a further noticeable distinction between the House and Senate versions of felony determination, on the one hand, and that of the Conference Committee's report. Both the House and Senate provisions, §2929.05(A), provided criteria with respect to the court's "determining the minimum and maximum terms of imprisonment to be imposed . . ." In contrast, the Conference Committee's recommendation, 134 OHIO H.R. JOUR. 2428 (1972), and the newly enacted Code provision, OHIO REV. CODE ANN. §2929.12 (Page Supp. 1973), have related the criteria to the court's "determining the minimum term of imprisonment . . ."

³⁰ 134 OHIO H.R. JOUR. 2428 (1972); OHIO REV. CODE ANN. §2929.02(A) (Page Supp. 1973). See *supra* note 22.

³¹ 134 OHIO H.R. JOUR. 2428 (1972); OHIO REV. CODE ANN. §2929.02(B) (Page Supp. 1973).

³² 134 OHIO H.R. JOUR. 2428 (1972); OHIO REV. CODE ANN. §2929.11(B)(1) (Page Supp. 1973).

³³ 134 OHIO H.R. JOUR. 2428 (1972); OHIO REV. CODE ANN. §2929.11(B)(2) (Page Supp. 1973).

³⁴ 134 OHIO H.R. JOUR. 2428 (1972); OHIO REV. CODE ANN. §2929.11(B)(3) (Page Supp. 1973).

³⁵ 134 OHIO H.R. JOUR. 2428 (1972); OHIO REV. CODE ANN. §2929.11(B)(4) (Page Supp. 1973).

ternative to death in every case, while pre-1974 law provided that there was no alternative to the death penalty upon conviction for assassination of the president³⁶ or the governor.³⁷

In addition, the bill attempted to introduce into Ohio law the concept of "bifurcated" proceedings, that of having separate hearings, one on the question of guilt and one on the question of the penalty. The procedure, if adopted, would have been confined to capital offenses only, although some other jurisdictions employ it for all offenses.³⁸

The bill also provided guidelines for use by a jury or panel of judges in determining whether a convicted murderer should live or die.³⁹ These guidelines were based on standards found in the American Law Institute's Model Penal Code.⁴⁰ Under pre-1974 Ohio law, juries were simply instructed that whether or not they recommended mercy was a weighty matter to which they should give their most careful consideration.⁴¹

In recommending that there be a separate proceeding for determining the penalty in a capital case following the verdict or plea of guilty, the Technical Committee relied upon several considerations:

[T]he present system for imposing the death penalty presents substantial difficulties, growing out of the fact that the question of guilt and the question of the penalty are considered by the jury at the same time. First, the procedure places the defense in the position of having to plead for the accused's life at the same time he is trying to convince the jury that he is not guilty in the first instance. The two arguments are not always compatible, and in a given case a plea for mercy can subtly incline the jury toward rendering a verdict of guilty. Further, when all the jurors are finally

³⁶ OHIO REV. CODE ANN. §2901.09 (Page 1954).

³⁷ OHIO REV. CODE ANN. §2901.10 (Page 1954).

³⁸ *E.g.*, Texas employs a bifurcated jury proceeding for *all crimes*. TEXAS CODE CRIM. PROC. ANN. art. 37.07 (1966); *see also* the provisions in other states which employ bifurcated proceedings for *capital crimes only*: CAL. PEN. CODE §§190, 190.1 (West Supp. 1970); CONN. GEN. STAT. ANN. §53a-46 (West 1972); N.Y. PEN. LAWS §125.30 (McKinney Supp. 1973) and §125.35 (McKinney 1967).

³⁹ H.B. 511 §2929.03.

⁴⁰ A.L.I. MODEL PENAL CODE §210.6 (Proposed Official Draft 1962).

⁴¹ *E.g.*, use of the following jury instruction was affirmed by the Supreme Court of Ohio in *State v. Eaton*, 19 Ohio St.2d 145, 160 n. 4, 249 N.E.2d 897, 907 n. 4 (1969):

If you find the defendant guilty of murder in the first degree, you must determine whether or not you will extend mercy. This matter is *solely within your discretion* (emphasis added), and it requires the exercise of your most profound judgment. You must not be motivated by sympathy or prejudice, or as a means of escaping a disagreeable duty. The issue of mercy must be resolved in the light of *all the facts and circumstances* (emphasis added) of the case with respect to the crime and the circumstances surrounding this defendant as disclosed by the evidence.

convinced of the accused's guilt, they might, in the atmosphere of the moment, feel themselves so revolted by the crime that they refuse to recommend mercy when they might recommend mercy if given time to reflect. Accordingly, [the proposed section] provides a procedure whereby the guilt or innocence of the accused is separately determined, and if a guilty verdict is returned, a second hearing is held solely on the question of the penalty which ought to be imposed. The technical committee feels that this will permit the jury to consider the question more dispassionately, and armed with better information than they can get under the present system, i.e., testimony and evidence bearing on the question can be elicited which one side or the other would not have the temerity to use during the trial proper. Finally, the death penalty can be imposed only if the jury or panel of judges unanimously, and affirmatively, vote for it. In the absence of a vote for the death penalty, or with only one vote dissenting against the death penalty, life imprisonment is mandatory. This, in effect, is an about-face from the present procedure, under which the death penalty is mandatory in the absence of an affirmative recommendation of mercy.⁴²

Public testimony before the House Judiciary Committee revealed little public support from either prosecution or defense oriented witnesses for the "bifurcated" procedure. Accordingly, since a majority of that committee opposed that approach, the bill was amended to eliminate the separate hearing. The committee did, however, retain the suggested criteria to be used by the jury or panel of judges in determining whether to impose death or imprisonment for capital offenses,⁴³ and upon motion of State Representative Joseph Tulley of Mentor, kidnapping for ransom was reinserted as a capital offense.⁴⁴ The House Judiciary Committee, by a vote of eight to seven, rejected an amendment by State Representative Harry Lehman of Shaker Heights, to eliminate capital punishment.

During the first day of floor debate on Sub. H.B. 511, there were four amendments on capital punishment offered and debated. An effort by Representative Lehman to reverse the Judiciary Committee classification of kidnapping for ransom as a capital offense and to treat it in the same manner as other kidnapping offenses, was defeated by voice vote.⁴⁵ The next amendment to eliminate capital punish-

⁴² OHIO LEGISLATIVE SERVICE COMMISSION, PROPOSED OHIO CRIMINAL CODE 282 (1971).

⁴³ Sub. H.B. 511, 109th Ohio General Assembly, §2929.03 (1971-1972) [hereinafter cited as Sub. H.B. 511].

⁴⁴ Sub. H.B. 511 §2905.01(c).

⁴⁵ 134 OHIO H.R. JOUR. 1788 (1971-1972). The Senate Judiciary Committee, however, did adopt this amendment, and all kidnapping offenses were treated as a first degree felony. Am. Sub. H.B. 511 §2905.01(c).

ment in Ohio, also offered by Representative Lehman, would have substituted life imprisonment for capital punishment, and required a minimum of thirty-five years of imprisonment under proposed section 2967.13(B) before parole consideration.⁴⁶ State Representative Donald Maddux submitted an amendment to this amendment to require that anyone convicted of murder "shall be imprisoned for the remainder of his natural life." Both amendments were defeated by a voice vote, by use of a standard parliamentary technique of tabling the motions to amend.⁴⁷

The final attempt to amend Ohio's archaic laws on capital punishment was an amendment to proposed section 2929.01 offered by Representative Marcus Roberto of Ravenna. This amendment would have changed the burden of judgment in the jury proceedings to provide that there was a presumption of mercy and life imprisonment unless "the jury or panel of judges trying the accused recommends that no mercy be shown him, in which case he shall suffer death."⁴⁸ This amendment was defeated by a vote of thirty-eight for, fifty-seven against.⁴⁹

After Sub. H.B. 511 passed the House, and while pending before the Senate Judiciary Committee, the Supreme Court of the United States, on June 29, 1972, decided *Furman v. Georgia*,⁵⁰ the effect of which was that the death sentences of most if not all prisoners currently housed in this country's prisons, including Ohio's, were in violation of the eighth and fourteenth amendments to the United States Constitution.

Soon thereafter, on July 19, 1972, as anticipated, the Ohio Supreme Court responded in *State v. Leigh*,⁵¹ a case involving a defendant convicted of first degree murder and sentenced to death. In referring to the *Furman* case, the Court held that:

Under that holding, which we are required to follow, the infliction of any death penalty under the existing law of Ohio is now unconstitutional (with the possible exception of the taking of a life or attempting to take the life of the Presi-

⁴⁶ 134 OHIO H.R. JOUR. 1791 (1971-1972).

⁴⁷ During the two day debate on Sub. H.B. 511 it was the practice of Speaker Charles Kurfess to act on amendments by voice vote, unless the sponsor of the amendment insisted on a roll call vote and was supported by five members in accordance with Rules of the House of Representatives. Rule 48, Rules of the House of Representatives, 134 OHIO H.R. JOUR. 59 (1971-1972).

⁴⁸ 134 OHIO H.R. JOUR. 1792 (1971-1972).

⁴⁹ *Id.* at 1792-93.

⁵⁰ 408 U.S. 238 (1972).

⁵¹ 31 Ohio St.2d 97, 285 N.E.2d 333 (1972).

dent * * * (R.C. 2901.09) or of the Governor * * * (R.C. 2901.10) which statutes purport to impose a mandatory penalty of death.⁵²

The Ohio Supreme Court's hesitation in ascribing unconstitutionality to Ohio's only mandatory death statutes appeared to be justified in light of the evident focus of the majority opinions in the *Furman* case, for it was the life-versus-death sentencing discretion permitted by statutes to juries in most capital cases that was the focus of attention in the opinions of the five justices supporting the majority decision. The five justices constituting the majority in the *Furman* case appeared to agree that this discretion was being exercised in an arbitrary or prejudicial manner.⁵³

Further, a review of the opinions of Justices Stewart, White, and Douglas, who wrote that only existing capital punishment practices were unconstitutional, suggested the possibility of two basic approaches to the problem of discrimination. One such solution would be elimination of the sentencing discretion, or imposing strict limitations on this discretion by legislative enactment. The second solution would be legislative narrowing of the range of criminal acts punishable by death to those acts likely to produce a death sentence from a jury retaining unlimited sentencing discretion.⁵⁴

The Senate Judiciary Committee, in the midst of its consideration of Sub. H.B. 511, could not await the analyses, standards, and guidance that would come from law review and bar association articles and comments that follow major decisions of the Supreme Court.⁵⁵ At this point, working from models prepared by the staff of the Legislative Service Commission, there appeared to be four basic choices under the *Furman* case available to the Committee:

- (1) Abolish the death penalty.
- (2) Retain the death penalty, but make its imposition mandatory in specified cases.

⁵² *Id.* at 99, 285 N.E.2d at 334-35.

⁵³ *Furman v. Georgia*, 408 U.S. 238 (1972). The opinions are replete with statistical evidence on these points. Concurring Justice Douglas, *Furman*, *supra*, at 250 n. 15 cites to H. BEDAU, *THE DEATH PENALTY IN AMERICA* (1964) for the proposition that something more than chance accounts for racial differences in infliction of the death penalty. Concurring Justice Brennan, *Furman*, *supra* at 292-93, is equally concerned with the arbitrary execution among those arbitrarily sentenced.

⁵⁴ Even these suggested solutions entail a perplexing discretionary problem: "jury nullification" (failure of a jury to convict where it does not wish the death sentence to be imposed); see *Furman v. Georgia*, 408 U.S. 238, 246-47 (1972) (Douglas, J., concurring).

⁵⁵ E.g., Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP.CT.REV. 1; Meltsner, *Litigating Against the Death Penalty: The Strategy Behind Furman*, 82 YALE L.J. 1111 (1973); *Five-to-Four Vote Kills Capital Punishment Almost*, 58 A.B.A.J. 972 (1972); Note, *Constitutional Law — Eighth Amendment — Death Penalty as Currently Administered Constitutes Cruel and Unusual Punishment*, 47 TUL.L.REV. 1167 (1973).

(3) Retain the death penalty and permit the jury or judge to decide if it is to be imposed in a given case, but provide criteria to guide the jury or judge in making the decision. This had been, in essence, the approach of the House of Representatives.⁵⁶

(4) Refine the House position by retaining the death penalty, but remove from the judge and jury as much discretion as possible in the punishment determination procedure.

Mindful of the action taken by the House of Representatives in retaining capital punishment and sensing a similar attitude by the members of the Senate, the Senate Judiciary Committee opted for the last described alternative. In amending the House version, the committee provided what may be described as a three-step procedure. First, it determined that only premeditated murder and felony murder would be capital offenses. Second, it directed that the death penalty be imposed if any of nine listed "aggravating circumstances" was specified in the indictment and proved beyond a reasonable doubt. Third, it created a set of three "mitigating factors" which, if established by a preponderance of the evidence, would result in a sentence of life imprisonment. The proposal provided that the presence or absence of aggravation would be determined by the jury or panel of judges during the trial, and the presence or absence of mitigating factors would be determined by a three-judge panel following the verdict of guilty of both the principal charge and specification of an aggravating circumstance.

The nine aggravating circumstances delineated by the Senate Judiciary Committee were:

(1) The offense was the assassination of the President of the United States or Governor of the State, or person in line of succession to either, or of a member of Congress or of the Chief Justice, or judge of a court of record of this state or of the United States, or of a candidate for any of the foregoing offices.

(2) The offense was committed with purpose to facilitate an activity of a criminal syndicate, as defined elsewhere in the proposed Code.

(3) The offense was committed for hire or for personal gain or aggrandizement.

(4) The offense was committed for the purpose of escaping detection, apprehension, trial or punishment of another offense.

⁵⁶ Sub. H.B. 511 §2929.03.

(5) The offense was committed while the offender was a prisoner in a detention facility.

(6) The offender had previously been convicted of an offense of which the gist was the purposeful killing or an attempt to kill another committed prior to the offense at bar, or the offense at bar was a part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(7) The offender killed the victim from ambush.

(8) The victim of the offense was a law enforcement officer whom the defendant knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(9) The victim was substantially defenseless at the time of the offense by reason of being completely in the offender's power or by reason of youthful immaturity, the infirmities of age, or physical and mental impairment resulting from defect, disease or injury.⁵⁷

The three "mitigating factors" adopted by the Senate Judiciary Committee were:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, collusion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.⁵⁸

Senate debate did not probe or modify the new capital punishment determination procedure. An amendment offered by State Senator Harry Meshel of Youngstown to delete the "Governor" and insert the "Vice President of the United States" in the first number of the aggravating circumstances was defeated by voice vote.⁵⁹ An amendment by State Senator Oliver Ocasek of Akron to eliminate capital punishment and substitute life imprisonment "with or without hope of parole," to be determined by a set of standards set forth in the amendment, was defeated by a vote of six for, twenty-two against.⁶⁰

⁵⁷ Am.Sub. H.B. 511 §§2901.95(A) & 2929.04(A).

⁵⁸ Am.Sub. H.B. 511 §§2901.95(B) & 2929.04(B).

⁵⁹ 134 OHIO SEN. JOUR. 1875 (1971-1972).

⁶⁰ *Id.* at 1871-73.

The rules of procedure of the legislature required that all of the Senate amendments to Sub. H.B. 511, including those pertaining to capital punishment, be presented to the House of Representatives as a package and be accepted or rejected in their entirety.⁶¹ As is the custom on major substantive legislation, the House of Representatives refused to concur in the Senate amendments, so as the rules further provide, the bill was submitted to a Committee on Conference.⁶² The effect of the application of the rules was that the House of Representatives, acting through the committee system, floor debate, and amendment process, did not have the opportunity to objectively scrutinize the capital punishment system designed by the Senate. This responsibility rested with the three House members appointed by the Speaker to serve on the Conference Committee. In this instance the House conferees could not act in the traditional role as "defenders" of the House "position" on this issue, as this position had been abrogated by the *Furman* case.

The six-member Conference Committee devoted several hours to discussion of the capital punishment sections, and several substantial modifications were contained in the Conference Committee Report. First, the Conference Committee decided to eliminate the procedure requiring the appointment of a three-panel judge to try the issue of mitigation, substituting the trial judge in its place.⁶³ The theory that brought about this result was recognition of the fact that the two additional judges would not have the benefit of the evidence given at the trial, and the hearing on the issue of mitigation could result in a retrial of the case in its entirety.

Second, the Conference Committee eliminated altogether the second and ninth aggravating circumstances described above, and substantially altered several others.⁶⁴ Application of the first aggravating circumstance was reduced to the assassination of the President, Vice President, Governor, Lieutenant Governor, or a person who has been elected to or is a candidate for any such office.⁶⁵ The third aggravating circumstance was limited to offenses committed for hire.⁶⁶

In addition, the seventh aggravating circumstance calling for the offender to have killed the victim from ambush was eliminated, and there was substituted in its place the following language:

⁶¹ Rule 9, Joint Rules of 108th General Assembly.

⁶² 134 OHIO H.R. JOUR. 2372 (1971-1972); 134 OHIO SEN. JOUR. 1885 (1971-1972).

⁶³ 134 OHIO H.R. JOUR. 2427 (1971-1972).

⁶⁴ *Id.* at 2427-28.

⁶⁵ *Id.* at 2427.

⁶⁶ *Id.*

The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.⁶⁷

In essence, this last change, urged on the Conference Committee by the Ohio Prosecutors Association, adopts the felony murder rule, with the result that the death penalty will be imposed in all cases of felony murder, unless one of the three mitigating circumstances is found to be present.

Finally, the Conference Committee recommended that the effective date for reinstating capital punishment in Ohio be deferred until January 1, 1974, the date when the principal provisions of the new criminal code were to be effective.⁶⁸ Having acted on a most difficult issue in a novel manner and in relative haste, dictated by the circumstances of the legislative process, the conferees believed that there should be a period of time not only for retrospection of their decisions, but to examine legislative enactments in other states confronted with the same issue.

Parole Eligibility: Life Imprisonment for Capital Offense

Under pre-1974 law, an offender serving a life sentence for a capital offense was not eligible for parole.⁶⁹ However, he was entitled to a commutation hearing after serving twenty years (twenty-five years in some cases) at which hearing the Adult Parole Authority was required to determine whether or not his sentence should be commuted and to make the appropriate recommendations to the Governor. If the Governor commuted the sentence, an offender immediately became eligible for parole consideration. If the Governor failed to commute the offender's sentence, he was entitled to further commutation hearings at five-year intervals.

As introduced, section 2967.13 of H.B. 511 provided that a prisoner serving life imprisonment for a capital offense would become eligible for parole after serving a minimum term of twenty years, diminished by time off for good behavior, thus eliminating the commutation procedure. As a result, "lifers" would have become eligible for parole after having served twelve years, nine months and fifteen days in the penitentiary.

The House Judiciary Committee did not react affirmatively to the provision providing for time off for good behavior, and amended the bill to provide for initial parole eligibility after having served

⁶⁷ *Id.* at 2428.

⁶⁸ *Id.* at 2429; section 4 of the Act (Am.Sub. H.B. 511, as enacted and signed by the Governor).

⁶⁹ OHIO REV. CODE ANN. §2967.13 (Page Supp. 1972) as enacted in Am.Sub. H.B. No. 28, 130 LAWS OF OHIO, Pt. 2, 154 (1964) [repealed by Am.Sub. H.B. 511 (1974)].

twenty full years.⁷⁰ The Committee did, however, reject an amendment that would have retained the former commutation proceedings in lieu of parole considerations.

Section 2967.13 was the subject of considerable debate on the floor of the House of Representatives, and was successfully amended by State Representative Richard Christianson of Mansfield by a vote of fifty-nine for, thirty against, to raise the initial term of parole eligibility from twenty years to thirty-five full years.⁷¹ While few House members were willing to defend this amendment in private discussion, the prevailing attitude appeared to be that they were unwilling to vote against such a "get tough" amendment on a recorded vote.

Members of the Senate Judiciary Committee, in response to strong opposition testimony from prison and parole authorities, made it clear early in their deliberations that there was little support for the thirty-five year provision. After considerable debate, the committee opted for the standard of section 2967.13 as introduced, thus permitting parole for those serving life imprisonment for a capital offense after twenty years, with time off for good behavior. That provision was supported by the full Senate.

Because of the wide disparity between the versions of section 2967.13 as passed on the House and Senate floors, this section was the obvious subject for compromise in the Conference Committee. The recommendation of the Conference Committee, ultimately accepted by both Houses, was to provide for parole eligibility after serving fifteen full years.⁷²

Early Release on Parole ("Shock Parole")

Early in its deliberations, the House Judiciary Committee amended the parole sections of H.B. 511 to provide that notwithstanding other provisions for parole eligibility, an offender serving a felony sentence may be paroled after serving six months, provided his offense was not murder or capital murder, it was his first felony conviction, he was not a repeat or dangerous offender, he did not need further institutionalization, and his history, character, and condition indicated he was likely to respond affirmatively to early release and was unlikely to commit another crime.⁷³ In providing a procedure for granting "shock parole," this amendment complemented the then existing statute on "shock probation," which was not changed by H.B. 511.

⁷⁰ Sub. H.B. 511 §2967.13(B).

⁷¹ 134 OHIO H.R. JOUR. 1797 (1971-1972).

⁷² OHIO REV. CODE ANN. §2967.13 (Page Supp. 1973).

⁷³ Sub. H.B. 511§2967.26.

Members of the Senate Judiciary Committee determined to broaden shock parole, and accordingly set aside the House provision which limited shock parole to first offenders, providing instead that a prisoner would be eligible if he had not been previously convicted of a felony for which he was confined for thirty days or more in a penal or reformatory institution.⁷⁴ The Conference Committee retained this latter version.

Probation

Under pre-1974 law, the determination of eligibility for probation was generally based upon the consideration of the type of offense committed. The Ohio Revised Code provided that there were certain non-probationable offenses and that those who were convicted of those offenses were not eligible for probation, regardless of the circumstances surrounding the offense, and regardless of the history, character and condition of the offender.⁷⁵ As introduced, H.B. 511 sought to shift the emphasis from non-probationable *offenses* to non-probationable *offenders*.⁷⁶ Accordingly, except for aggravated murder and murder, all offenses were considered probationable, but "repeat" and "dangerous" offenders, as defined in the code,⁷⁷ were not eligible for probation. Further, in pursuance of the objective and in an effort to achieve more uniformity in the use of probation, new section 2951.02 (B) details ten criteria to be "considered in favor of placing the offender on probation."

The basic shift in philosophy was carried intact throughout the legislative consideration of H.B. 511, except in one area. During the time the new criminal code was under consideration, the General Assembly on May 17, 1972 enacted H.B. 143, providing that any person convicted of a violation of any of twenty-nine listed felonies who had a firearm in his possession during the commission of those felonies, would receive an additional sentence and not have the benefit of probation.

Accordingly, in the final version of Am. Sub. H.B. 511, it was deemed necessary to incorporate the provisions of H.B. 143 as another exception to the general rule that all offenses are probationable. As a result, section 2951.02(F) (3) of the new criminal code reads as follows:

⁷⁴ Am.Sub. H.B. 511 §2967.31.

⁷⁵ OHIO REV. CODE ANN. §2951.04 (Page 1954). This section was originally enacted as §13452.2, OHIO GENERAL CODE by Am. S.B. No. 8, 113 LAWS OF OHIO 123, 201 (1929) [repealed by Am.Sub. H.B. 511 (1974)]. These non-probationable offenses are murder, arson, burglary of an inhabited dwelling house, incest, sodomy, rape without consent, assault with intent to rape, and administering poison.

⁷⁶ H.B. 511 §2951.02(A).

⁷⁷ OHIO REV. CODE ANN. §2929.01 (Page Supp. 1973).

(F) An offender shall not be placed on probation when any of the following applies: . . . (3) The offense was committed while the offender was armed with a firearm or dangerous ordnance as defined in Section 2923.11 of the Revised Code.

Reasonable Doubt

In its final form, Am. Sub. H.B. 511, in defining "reasonable doubt" combines elements of the former Ohio and existing federal definitions, with changes in style that should assist juries in understanding the term.

The pre-1974 section 2945.04 of the Ohio Revised Code defined "reasonable doubt," and required that the statutory definition be read to the jury as part of the court's charge in criminal cases. As introduced, H.B. 511 defined "reasonable doubt" in language almost identical to former section 2945.04, Ohio Revised Code.

However, the initial version of the bill discarded the requirement that the statutory definition be read to the jury, since in the Technical Committee's view, a failure to instruct the jury on the meaning of reasonable doubt would result in reversible error.⁷⁸ In addition, the committee did not wish to discourage trial courts from explaining the meaning of reasonable doubt with as much detail as seemed necessary in a given case, believing that the reading requirement tended to promote rigidity in instructing the jury on this point.

As introduced, the definition of "reasonable doubt" reads:

'Reasonable doubt' is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in such condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt.⁷⁹

This definition, as well as the elimination of the requirement that it be read to a jury, remained intact as the bill came to the floor of the House. On the second day of debate, State Representative Arthur Wilkowski of Toledo was successful in amending the definition.⁸⁰ Representative Wilkowski's stated reasons for his amendment was his belief that the federal court definition of "reasonable doubt" was clearer than that used by the state, and that accordingly he wished to

⁷⁸ OHIO LEGISLATIVE SERVICE COMMISSION, PROPOSED OHIO CRIMINAL CODE 29 (1971).

⁷⁹ H.B. 511 §2901.05 (c).

⁸⁰ 134 OHIO H.R. JOUR. 1806 (1971-1972).

introduce into Ohio law some aspects of the federal definition.⁶¹ The amendment was approved by a vote of forty-two for, thirty-four against, and it changed the definition appreciably:

'Reasonable doubt' is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in such condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. It is a doubt based upon reason and common sense, the kind of a doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must be proof of such convincing character that an ordinary person would be willing to rely and act upon it unhesitatingly in the most important of his own affairs.⁶²

The House floor amendment generated considerable debate and public testimony before the Senate Judiciary Committee. As a result, the Senate Judiciary Committee attempted to formulate a definition that would adopt the best parts of the former Ohio and existing federal definitions, and to rework language to make it more comprehensible to lay jurors. The committee also reinserted into the bill the requirement that the definition be read to jurors as part of the charge in a criminal case.⁶³ The Senate Judiciary Committee's work was approved by the full Senate and the Conference Committee, and provides as follows:

'Reasonable doubt' is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based upon reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a

⁶¹ *E.g.*, a detailed instruction which the D.C. Circuit has termed an "exemplary charge" reads as follows:

Now reasonable doubt, as the name implies, is a doubt based on reason, a doubt for which you can give a reason. It is such a doubt as would cause a juror, after careful and candid and impartial consideration of all the evidence to be so undecided that he cannot say that he has an abiding conviction of the defendant's guilt. It is such a doubt as would cause a reasonable person to hesitate or pause in the graver or more important transactions of life. However, it is not a fanciful doubt nor a whimsical doubt, nor a doubt based on conjecture. It is a doubt which, as I say, is based on reason. The government is not required to establish guilt beyond all doubt, or to a mathematical certainty or a scientific certainty. Its burden is to establish guilt beyond a reasonable doubt.

Moor v. United States, 345 F.2d 97, 98 n. 1. (D.C. Cir. 1965). Note the close similarity between this instruction and that adopted by the Ohio Legislature.

⁶² 134 OHIO H.R. JOUR. 1806 (1971-1972).

⁶³ OHIO REV. CODE ANN. §2901.05 (B) (Page Supp. 1973).

reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.⁸⁴

Affirmative Defenses

As introduced, H.B. 511 included definitions of a number of affirmative defenses, in many cases enlarging existing common law definitions. Those statutorily defined defenses were: coercion,⁸⁵ entrapment,⁸⁶ ignorance or mistake of fact or law,⁸⁷ intoxication,⁸⁸ insanity,⁸⁹ justifiable use of deadly force⁹⁰ and justifiable use of force.⁹¹ While several of these definitions were materially restructured by the House Judiciary Committee, all seven remained in the proposed Code as passed by the House of Representatives.

Then, before the Senate Judiciary Committee, witnesses representing both prosecution and defense interests, complained at length about the wording of the definitions, for different reasons. Members of the Senate Judiciary Committee accepted their argument that affirmative defenses would best be left to developing case law, and deleted all definitions from the bill. The Senate Committee action was accepted by the Conference Committee.

Sex Offenses

Sex offenses, like capital punishment, compose an area of human behavior attracting considerable public interest, and, therefore, received detailed attention by legislators, who offered many amendments to this part of the proposed Criminal Code.

Chapter 2907, as recommended by the Technical Committee, represented a substantial restructuring of the criminal law in this area. For example, the offense of rape, which included the traditional concept of intercourse with a female by force, was expanded to include offenses committed by a female on a male or by persons of the same sex, offenses in which the offender deliberately impairs the victim's judgment through the use of drugs or intoxicants, and offenses when the victim is under thirteen years of age.⁹² State Representative Donna Pope offered a floor amendment to the penalty section for rape, imposing life imprisonment on any offender who "purposely compels" a

⁸⁴ OHIO REV. CODE ANN. §2901.05 (D) (Page Supp. 1973).

⁸⁵ H.B. 511 §2901.32.

⁸⁶ H.B. 511 §2901.33.

⁸⁷ H.B. 511 §2901.34.

⁸⁸ H.B. 511 §2901.35.

⁸⁹ H.B. 511 §2901.36.

⁹⁰ H.B. 511 §2901.37.

⁹¹ H.B. 511 §2901.38.

⁹² H.B. 511 §2907.02.

victim less than thirteen years of age "to submit by force or threat of force."⁹³ This amendment was adopted by a vote of seventy-six for, eight against.⁹⁴

After approving general definitions of "sexual conduct," "sexual contact," and "sexual activity," the legislature accepted new offenses for which there was no analogous section under existing law, including gross sexual imposition,⁹⁵ sexual imposition,⁹⁶ and importuning or solicitation.⁹⁷ A floor amendment to proposed section 2907.07 by Representative Pope extended the offense of importuning to prohibit solicitation of "a person of the same sex to engage in sexual activity with the offender when the offender knows such solicitation is offensive to the other person, or is reckless in that regard."⁹⁸ On a recorded vote, it was approved by a vote of seventy-three for, thirteen against.⁹⁹

The General Assembly also enacted a "peeping Tom" prohibition, accepting the Technical Committee's recommendation that voyeurism be a misdemeanor of the third degree.¹⁰⁰

The House Judiciary Committee accepted proposed section 2907.05, which made sexual contact with another not the spouse of the offender under certain defined conditions a felony offense, but tempered its impact and the possibility for abuse by adopting an amendment that "no person shall be convicted of a violation of this section solely upon the victim's testimony unsupported by other evidence."¹⁰¹

Bestiality and necrophilia, copulation with an animal or dead human body, respectively, had been criminal offenses under former law,¹⁰² but not included in H.B. 511, as introduced. State Representative Joseph Tulley of Mentor successfully amended proposed section 2907.03 of the H.B. 511 in Judiciary Committee to restore this conduct as criminal under the offense of sexual battery, a felony of the

⁹³ 134 OHIO H.R. JOUR. 1789 (1971-1972).

⁹⁴ *Id.*

⁹⁵ H.B. 511 §2907.05.

⁹⁶ H.B. 511 §2907.06.

⁹⁷ Sub. H.B. 511 §2907.07.

⁹⁸ 134 OHIO H.R. JOUR. 1795-96 (1971-1972).

⁹⁹ *Id.* at 1796.

¹⁰⁰ OHIO REV. CODE ANN. §2907.08 (Page Supp. 1973).

¹⁰¹ Sub. H.B. 511 §2907.05 (B).

¹⁰² The prohibition against bestiality remained in effect until January 1, 1974. OHIO REV. CODE ANN. §2905.44 (Page 1954), originally enacted as §13043, OHIO GEN. CODE by S.B. No. 508, 82 LAWS OF OHIO 241 (1885) [repealed by Am.Sub. H.B. 511 (1974)].

third degree.¹⁰³ Representative Harry Lehman, in a floor amendment adopted by voice vote, removed this language from section 2907.03 and placed this offense in a new section, 2907.10, reducing the penalty to a first degree misdemeanor.¹⁰⁴ Although the Senate did not modify this section, this proposed offense was reconsidered by the Conference Committee and deleted from the bill altogether.¹⁰⁵

Representative Tulley offered several other amendments in the Judiciary Committee and during floor debate to restore to the bill offenses which were recognized under former laws. His amendment to make fornication (cohabitation with a person of the opposite sex not the spouse of the offender) a misdemeanor of the third degree failed both in the Judiciary Committee and on the floor, the latter by a voice vote.¹⁰⁶ Another amendment offered by Representative Tulley would have created separate offenses prohibiting any person from engaging in "fellatio or cunnilingus with another" or having "anal intercourse."¹⁰⁷ This amendment was rejected both by the committee and during floor debate, again by voice vote.¹⁰⁸ Representative Tulley's amendment to make homosexual acts a criminal offense under the new code was also defeated in the Judiciary Committee, and was not offered during floor debate.

Conclusion

The authors question whether there are any dramatic conclusions that may be drawn from this work. We note that the starting point of the legislative consideration of House Bill 511 was substantially different from most bills dropped into the legislative hopper. H.B. 511, in its original form, was the result of five years of effort by legislators, prosecutors, defense attorneys, judges, and academicians, supported by qualified professional staff. The bill was precisely drafted and properly organized, accompanied by case analysis and explanation of substantive changes proposed by the Technical Committee. Over an 18-month period a small group of State Representatives and State Senators, many serving and becoming deeply involved by reason of committee assignment, devoted hundreds of hours to reviewing, understanding, probing, debating, and amending this comprehensive

¹⁰³ Sub. H.B. 511 §2907.03(B).

¹⁰⁴ 134 OHIO H.R. JOUR. 1789 (1971-1972).

¹⁰⁵ *Id.* at 2425.

¹⁰⁶ *Id.* at 1797.

¹⁰⁷ *Id.* at 1795. It was the view of the Technical Committee that anal intercourse, cunnilingus, and fellatio "carry a high risk of psychic or physical harm to the victim, and should, in defining sex offenses, be considered in the same category as vaginal intercourse." OHIO LEGISLATIVE SERVICE COMMISSION, PROPOSED OHIO CRIMINAL CODE, p. 100. Accordingly, these acts are included in the definition of "sexual conduct." Newly enacted OHIO REV. CODE ANN. §2907.01(A) (Page Supp. 1973).

¹⁰⁸ 134 OHIO H.R. JOUR. 1795 (1971-1972).

measure. Professional staff support was consistent and strong throughout, which is not always the case in consideration of proposed legislation at the state level.

Although there were several issues on which the members of the Judiciary Committees were deeply divided, the divisions were on a philosophical, historical, or legal basis, and never on a political basis. No votes, either in committee or on the floor, were along party lines, and neither the Republicans or Democrats caucused to make "policy" on any issue or vote on the bill.

Public interest and response, as we have indicated, and that of legislators generally, was modest and focused on major policy decisions, such as the retention or elimination of capital punishment and sex offenses. A state income tax, financing of educational programs, environment protection, strip mine regulation, and election law reforms were among those issues which had higher legislative priorities and greater public attention during the lengthy sessions of the 109th General Assembly in 1971 and 1972. Comprehensive revisions of the Ohio Criminal Code were made and accepted "in stride," in part because it was generally acknowledged that recodification was long overdue. The substantive modifications of law incorporated in H.B. 511 were consistent with reforms adopted in other states and, while innovative in some respects, were neither radical in content nor particularly liberal in attitude. Further, it may be said that the policies underlying the decisions which eliminated some activities from, and added others to, the schedule of human behavior which is now characterized as criminal were consistent with the attitudes of most Ohioans in the 1970's. Finally, the work of the Judiciary Committees was undertaken and performed in a professional and harmonious manner.

We recognize that in the years ahead, the Ohio General Assembly will undertake consideration of amendments to the new criminal code, but we believe that these will focus on technical corrections that may be required, and amendments dictated by a legislative response to court decisions interpreting the language of the new criminal code.