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Drafting a New Penal Law for New York

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DRAFTING A NEW PENAL LAW FOR NEW YORK

An Interview with RICHARD DENZER*

Prior to his appointment as Executive Director of the New York Temporary Commission on Revision of the Penal Law and Criminal Code in 1961, Richard Denzer served for 23 years with the New York County District Attorney's office. During the last 11 years of that period, he was in charge of the office's appeals bureau.

Conducting the interview are Herman Schwartz, Visiting Professor of Law at the University of Michigan Law School and Jerome Skolnick, author of Justice Without Trial.

The date is June 24, 1968.

I. INTRODUCTION

Schwartz: The purpose of this interview is to give New Yorkers some insights into the work you have done on the Penal Law and other states some advice on the problems that are encountered in such work. In this regard, would you tell us how many other states have already looked to New York's work for guidance on their revisions?

Denzer: Delaware, Maryland, Texas, California, Kentucky, Michigan, and Connecticut have consulted us.[1] Connecticut's product is very close to ours in almost every aspect, and Michigan follows our definitions of crimes very closely.

Schwartz: First, I'd like to ask some technical questions that may be useful to other states that may be considering the revision of their criminal laws. Were there any basic drafting procedures which the Commission followed or developed that are peculiar to such a large-scale revision?

Denzer: Under the old Penal Law, crimes were grouped alphabetically. Most other criminal codes followed a categorical arrangement, and we adopted this approach.[2] Now, for example, offenses involving fraud are contained in one title[3] of the Penal Law, while offenses involving theft are in another.[4]

We placed much emphasis on definitions. This is seen not only in the General Provisions which are, of course, applicable throughout the Penal Law, but also in many of the articles. For example, section 130, which is the first section in the article on sex offenses, lists eight definitions applicable only to that article. This technique simplifies the drafting of an article and saves space.

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1. Texas has enacted a new Code of Criminal Procedure. Texas Acts 1965, ch. 722. Michigan has prepared a final draft of its new Criminal Code. *See* George, *A Comparative Analysis of the New Penal Laws of New York and Michigan, infra* this symposium. Connecticut has enacted a new Criminal Code. Connecticut General Statutes, §§ 53-1—53-379 (1968).
2. N.Y. Legis. Doc., 1964, No. 14, pp. 3-4.
3. N.Y. Pen. Law, Title K (McKinney 1967) [hereinafter cited as N.Y. Pen. Law].
4. *Id.*, Title J.

Another technique which we used and which is unusual is that, in defining degree crimes, we would always start with the lowest degree and then proceed in an ascending order. The fundamental reason for this is that under the old law, the various degrees of the degree structure crimes were considered mutually exclusive. For example, grand larceny in the second degree was considered exclusive of grand larceny in the first degree. They were completely independent crimes. With the new definitional scheme, grand larceny in the first degree includes petit larceny and grand larceny in the third and second degrees also. A person charged with an advanced degree of a crime is considered chargeable with each lesser degree of the same crime. Not only is this scheme a more accurate statement of the law, but it is also helpful in the plea bargaining process.[5]

II. Influence of the Model Penal Code

Schwartz: Would you evaluate in general how much the Model Penal Code was used in your work?

Denzer: The principal influence of the Model Penal Code on the Penal Law can be seen in Part One, that is, the General Provisions articles. We especially used the Model Penal Code in drafting the Principles of Criminal Liability.[6] Outside of the General Provisions, we did not borrow as extensively. This is reflected in our sentencing structure, which is very different from the Model Penal Code,[7] and also our definitions of crimes which are not based on the Model Penal Code.[8]

Skolnick: Why didn't you borrow more extensively? Did you find the Model Penal Code unsatisfactory?

Denzer: The Model Penal Code, excellent as it is, was not drafted or designed to be adopted by any state or federal jurisdiction. It is written in very general language, too general, in my opinion, for an operable penal law. I believe that its architects, including Professor Herbert Wechsler,[9] agree with me that it was not to be taken whole, so to speak, and placed in a state code. It is more of a guideline than anything else.

Skolnick: Did you use it as a "guideline" then?

Denzer: As I said earlier, most of the ideas we did take from it are in our General Provisions. The biggest part of the Penal Law, that is, Part Three, dealing with specific crimes, is not modeled on the Model Penal Code.

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5. *See infra* note 29 and accompanying text.
6. *Compare* N.Y. Pen. Law, arts. 15, 30, 35 *with* Model Penal Code (Proposed Official Draft, 1962), arts. 2, 3 [hereinafter cited as MPC].
7. *Compare* N.Y. Pen. Law, arts. 55-70 *with* MPC, arts. 6, 7, and Pts. 3, 4.
8. *Compare* N.Y. Pen. Law, Pt. 3 *with* MPC, Pt. 2.
9. Wechsler, *The Challenge of A Model Penal Code*, 65 Harv. L. Rev. 1097, 1130 (1952); Wechsler, *Foreward to Symposium On the Model Penal Code*, 63 Colum. L. Rev. 589 (1963).

Skolnick: Why?

Denzer: Well, their definitions of crimes are painted with too broad a brush.

Schwartz: Could you give us an example?

Denzer: Well, take their larceny provisions.[10] They are highly theoretical and academic.

Another example of my objections relates to the homicide provisions.[11] Altogether too much emphasis is placed on the word "reckless." For example, felony murder is brought in through the back door of the Model Penal Code by means of a rebuttable presumption of recklessness.[12]

Schwartz: Do you mean that under the Model Penal Code approach, felony murder would be a crime of relatively rare occurrence?

Denzer: I don't know if it would be rare, but there is no provision for felony murder *as such.* There is only a presumption that a killing in the course of the commission of an independent felony is reckless. Perhaps, that's all right as regards the actual killer, but what about the non-killer? How can you presume recklessness on the part of a non-killer when he isn't even the person who committed the homicidal act? How would you ever charge a jury according to these principles? For example, if *A* and *B* were charged with felony murder, and it were proven that *A* was inside the building and actually committed the homicidal act there, while *B* remained outside as a lookout, how is the court ever going to charge the jury that *B* is presumed to have killed the victim inside recklessly? The jury can't make a determination of this realistically. It is too theoretical.

Schwartz: Aside from the Model Penal Code, did you do any comparative studies of the codes of other states?

Denzer: We adopted little, if anything, from other states. Let me point out, though, that until the early 50's there weren't any new codes, and most of the

10. MPC, art. 223.
11. MPC, art. 210.
12. MPC § 210.2(1)(b). "We should have liked . . . [to have dispensed] with constructive murder wholly, but such a course was thought to be unpolitic, given the weight of prosecutive opposition. The case made for felony-murder always is, however, that the actor who engages in a felony of violence is recklessly endangering the lives of others, even though he does not mean to kill. The point suggested to us what we thought to be a viable solution; namely, the creation of a rebuttable presumption of recklessness manifesting extreme indifference to the value of human life, if the actor was engaged in the commission, attempted commission or flight after commission of forcible intercourse, arson, burglary, kidnapping or felonious escape. The presumption rests on an empirical foundation and accords all that can be said for the prevailing law. Since it is rebuttable, the defendant has the opportunity to establish, if he can, that this was the unusual case in which the death was really a fortuity. The absence of that opportunity is certainly the major vice of the old rule. Even this degree of relaxation may well prove too great to be acceptable. It was not passed in New York. . . ." Wechsler, *Codification of Criminal Law In the United States: The Model Penal Code*, 68 Colum. L. Rev. 1425, at 1446, 1447 (1968) (citations omitted).

old codes are simply atrocious, anyhow. Although Minnesota[13] made considerable technical changes, the substance of their code remained much the same. Too much of Wisconsin's code[14] was taken from its predecessor. I thought the Illinois code[15] left something to be desired. A prime example of this point is their presentation of the sex crimes. In one subdivision of this area, they treat both rape and some petty fondling offenses.[16] In terms of classification, the draftsmen lumped together and ascribed the same penalty to offenses which were too different from one another.

Schwartz: Were you impressed with any part of the Illinois work?

Denzer: Yes, we were very impressed with their justification provisions.[17] The Model Penal Code is a bit difficult to follow in this area.[18] Illinois was able to boil down this part of the Model Penal Code, and we used some of the language from their justification provisions.

III. The Major Procedural Problems

A. *Sentencing Provisions*

Schwartz: Looking at all of your work on the Penal Law, what were your most difficult problems?

Denzer: Sentencing was probably our toughest problem. The old Penal Law's approach was archaic, and we knew the area needed a complete re-evaluation and analysis.[19] In fact, one member of the staff did nothing for five years but research and analyze this area.

Skolnick: Yet, the National Council on Crime and Delinquency has strongly criticized the sentencing provisions of the Penal Law. Much of the criticism is contained in Sol Rubin's article[20] in which he argues that the penalties are by and large not significantly different from before and in some instances are even harsher. How do you respond to this criticism?

Denzer: Rubin's position in that article is too close to that of an advocate in the sense that he gives the reader what I consider less than the complete picture. I'll give you an example. Grand larceny in the first degree under the old Penal Law is not the same crime as grand larceny in the first degree today. The latter

13. Minn. Stat. Ann., §§ 609-624 (1964).
14. Wis. Stat. Ann., §§ 439-447 (1958).
15. Ill. Stat. Ann., ch. 38 (Smith-Hurd 1964).
16. *Compare* Ill. Stat. Ann., ch. 38, § 11-4 (Smith-Hurd 1964) *with* N.Y. Pen. Law, §§ 130.35, 130.65.
17. Ill. Stat. Ann., ch. 38, art. 7 (Smith-Hurd 1964).
18. MPC, art. 3.
19. *See generally* N.Y. Legis. Doc., 1963, No. 8, pp. 27-31; N.Y. Legis. Doc., 1964, No. 14, pp. 16-21; Proposed New York Penal Law, app. A (Edward Thompson Co. ed. 1964) [hereinafter cited as Prop. Pen. Law].
20. Murrah and Rubin, *Penal Reform and the Model Sentencing Act*, 65 Colum. L. Rev. 1167 (1965).

is the crime of extortion which we thought should be incorporated within the larceny provisions. In looking at the old and new penalties for extortion, you will see that the new penalty, that is, the Penal Law's penalty for grand larceny in the first degree, is less than the prior penalty for extortion. The weakness of Rubin's position is that he proves his point by disregarding the important distinction I have just made. The result is that he is able to say that the penalty for grand larceny in the first degree is harsher than before.

Schwartz: Would you say that the Penal Law brings about a substantial decrease in penalties?

Denzer: Yes, I would. Of course, we have to recognize that we are dealing with an entirely new system of penalties, and therefore the arithmetical aspect is not our only focal point. In contrast to the old Penal Law's mandatory minima for a great number of crimes, we have mandatory minima only for murder and kidnapping in the first degree.[21] The changes on the whole are not drastic, but they are substantial.

B. *The Legacy of the Old Penal Law and Politics*

Schwartz: Would you describe some of the other difficulties you encountered in drafting the Penal Law?

Denzer: We worked very hard to solve two other big problems: one was technical and the other was political.

Well over 300 sections of the old Penal Law dealt with regulatory crimes and other specialized matters, and, although we clearly realized that these laws were in an inappropriate chapter, we could not simply eliminate many of them. But, we felt that if we were to eliminate some and retain others—either partially or completely—it would entail a long and careful study to determine what parts should remain on our books, and what parts should be eliminated.

Our solution was not an easy task, but it avoided the problems we did not have the time to solve. We prepared a bill, which was larger than the old Penal Law itself, and transferred all of these laws to more appropriate chapters.[22] To give you an idea of the difficulty of preparing such a bill, one staff member spent an entire six months just drawing these sections and parts out of the old Penal Law. Then, of course, we had to locate the best chapter into which these provisions could be transferred. Also, we had to conform all of the references to the old Penal Law that were contained throughout other chapters of New York laws.

The political problems, some would say, were never solved. As you know, we wanted to abolish the crime of consensual sodomy,[23] but the Legislature

21. N.Y. Pen. Law, § 70.00(3)(a).
22. N.Y. Sess. Laws 1965, ch. 1031.
23. Prop. Pen. Law, § 135.50, comm'n staff notes.

forced us to include it.[24] We also wanted to change the old Penal Law's provisions on firearms, but we were told that we couldn't touch them. As is clear now, the National Rifle Association would not allow you to change a comma. So, standing out like a sore thumb, the Sullivan Law provisions remain in the Penal Law.[25] These were poorly drafted, and we chose to put them as far back in the Penal Law as possible.

Another difficult area was the justification provisions. We leaned a little too far to the left, to the civil libertarians' approach, and the roof fell in on us.[26]

C. *Individual Philosophies in the Commission*

Skolnick: As a Commission, did you develop a philosophy as you went along—where to lean to the left or where to lean to the right?

Denzer: We didn't have a definite left or right philosophy. Some members of the Commission leaned to the left and some to the right, but we went down the middle on most provisions.

Skolnick: Does this mean that one could predetermine the nature of the finished product by initially selecting the members of the Commission on the basis of their political philosophies?

Denzer: Yes, I believe that would be true. Since we had a mixture of defense-oriented and prosecution-oriented philosophies, we made many compromises in the interest of completing our work.

Schwartz: Along the same lines, how would you characterize Professor Wechsler's drafting of the Model Penal Code?

Denzer: In some respects, it's very liberal, but in others it's more conservative than one would expect. I don't think their sentencing provisions are liberal; in fact, those sections are much more conservative than the counterparts in our Penal Law. We differed from the Model Penal Code on the significance of the psychiatrist's role as it affects the sentence.[27] The Model Code places too much emphasis on the psychiatrist's testimony, and we didn't think this was proper.

Skolnick: Were you interested in drafting the Penal Law in such a manner that the officer on the beat could understand it?

Denzer: Yes. However, because we borrowed rather heavily from the Model Penal Code in drafting our justification provisions, we knew that there might be difficulty in understanding them. This was an instance where the Model Penal Code contingent in our Commission was successful.

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24. N.Y. Sess. Laws 1965, ch. 1038.
25. N.Y. Pen. Law, §§ 400.00, 400.05.
26. N.Y. Sess. Laws 1968, ch. 73.
27. *See generally* Prop. Pen. Law, art. 70, comm'n staff note; Wechsler, *Sentencing, Correction, and The Model Penal Code*, 109 U. Pa. L. Rev. 465 (1961); Model Sentencing Act, 9 Crime & Delinquency 339 (1963).

D. *Staffing*

Schwartz: Mr. Denzer, let's turn to some of the other problems, for instance, staffing. How many people worked on your staff?

Denzer: Originally there were about five, including myself. At various times since then, we added two or three more.[28]

Schwartz: Where were these people from?

Denzer: Peter Preiser, Peter McQuillan, and I were from the New York County District Attorney's office. Arnold Hechtman was a practising lawyer who had done some revision on the New York Sanitary Code. Charles Torcia was from the Dickinson Law School Faculty.

Schwartz: Was this adequate manpower?

Denzer: It's difficult to say. During the early years, Governor Rockefeller asked us to work in a number of miscellaneous areas, and this prevented us from working exclusively on the Penal Law. In my opinion, though, most of this kind of work is too specialized to be partitioned out, and all I wanted was two or three men well versed in criminal law and experienced with criminal courts.

Schwartz: Does this mean that you do not favor reliance on the academic world in this work?

Denzer: No. But there is no substitute for knowing the crimes and courts in a live context; the ivory tower approach is too often unworkable.

Another aspect of this question should be cleared up. Lest we be accused of having hired too many prosecutors, it should be understood that prosecutors were hired because they had the experience that was thought necessary. Defense lawyers do not appear in court nearly as often as prosecutors. Also, the prosecutors were from New York County, because, in my opinion, the proper type and degree of experience is gained in that county. Finally, it should be noted that in addition to Professor Torcia, who served on the staff, Professor Wechsler of Columbia served on the Commission.

Schwartz: How did you assign the allocable work?

Denzer: Sentencing was in a class by itself, and Peter Preiser did all of that. I drafted much of the rest, and then went over it with the group. Before it was submitted to the Commission, the staff and I drafted and redrafted and made numerous changes. The Commission scrutinized it then, and again we redrafted many provisions. Then it was resubmitted to the Commission, and this cycle continued until we were all satisfied.

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28. *See* N.Y. Legis. Doc. 1968, No. 29, p. 3.

E. *Consideration of External Matters*

Schwartz: Did the prevalence of guilty plea bargaining[29] have a significant bearing on your drafting of any sections of the Penal Law?

Denzer: Decidedly! We were very conscious of the negotiation process, and that's the reason for our extensive degree structure. In criminal prosecutions, especially in New York County it's very important that one can take the negotiating process right down the line through the degrees.

Schwartz: Aside from what you mentioned before, I take it that you did not submit your early drafts to the academic legal community. Did you consult any sociologists or psychologists?

Denzer: No, but we had quite a few meetings with psychiatrists on the insanity provisions. Originally, we used the Model Penal Code's treatment, but we anticipated opposition from the prosecutors on its second subdivision, which excuses a party if he is unable to conform his conduct to the requirements of law.[30] Consequently, the prosecutors attended our meetings with the psychiatrists. Since the prosecutors vowed to oppose the package if it contained the Model Penal Code's version of the insanity defense,[31] and because we knew that we needed their support to win the approval of the Legislature, we struck a compromise between the views of the psychiatrists and the prosecutors.[32]

Skolnick: Why didn't you consult sociologists and psychologists? Did you consider their opinions on deterrence, for example, irrelevant?

Denzer: We knew of the work they were doing, and we hope that their work, in twenty years or so, will result in a decrease in crime and perhaps a change in our entire penal system. However, we had to create a workable penal system for the present, and we didn't think that they could be very helpful in this task.

Schwartz: In addition to the prosecutors and psychiatrists, whom else did you consult?

Denzer: We spoke with the police quite frequently, particularly on the gambling provisions.[33] We also spoke with the Legal Aid Society, but not as frequently as with the prosecutors. We were in constant touch with the District Attorney's office, since they were located in the same building with us.

Schwartz: Before you introduced the study bill in 1964, how much of a contribution to your drafting work did such groups as the Judicial Conference, bar associations, civil rights organizations, and Negro organizations make?

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29. *See generally* Note, *Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas*, 112 U. Pa. L. Rev. 865 (1964).
30. MPC § 4.01(1).
31. N.Y. Legis. Doc. 1963, No. 8, p. 25.
32. N.Y. Legis. Doc. 1963, No. 8, pp. 16-27.
33. N.Y. Pen. Law, art. 225.

Denzer: We had to prepare the study bill in about one and one-half years, and therefore we could not engage in extensive consultation with any of these organizations. Occasionally, we received suggestions from different groups.

Schwartz: Were there any major social problems in the community which you felt the penal revision had to deal with?

Denzer: Well, the sentencing provisions reflect a more enlightened approach to criminal reformation; the changes reflect an awareness of the social problems of our time. Most of our work, however, was directed toward organizing and defining the criminal law, toward making the codification workable.

IV. The Major Substantive Problems

A. *Narcotics*

Skolnick: Turning now to some of the substantive problems in drafting the Penal Law, what changes did you make in the narcotics area?

Denzer: The vast majority were changes in form, not in substance. The 1962 amendments to the Mental Hygiene Law[34] were based on the premise that an addict is an ill person, not a criminal. Furthermore, that same legislation set up a Council on Drug Addiction which is trying to find answers to the narcotics problem in civil, rather than criminal, terms. Therefore, we did not see it as our function to engage in an extensive analysis of the substantive issues; instead, we merely redrafted and clarified the principal narcotics crimes.[35]

Schwartz: How do you respond to the argument that addicts should not be prosecuted for possession of narcotics[36] since this is an almost unavoidable aspect of their addiction?

Denzer: While I may agree in theory that addicts should not be penalized under this provision, if the situation is looked at practically, I think you'll agree that the provision should not be abolished. First, if this provision were abolished, the New York addicts would be prosecuted under the federal law, the Harrison Act.[37] This Act calls for a felony prosecution and carries a five-year sentence, rather than a maximum of one year. Moreover, our provision is a valuable asset in the plea bargaining process. Of course, it's probably more valuable in this context to the pusher than the addict, but, too often, the factual distinction between the pusher and the addict is not clear, and, without this provision, the addict might be penalized beyond his culpability.

B. *Felony Murder*

Skolnick: What does the Penal Code provide regarding felony murder?[38]

Denzer: It is to some extent different from the concept in the old Penal Law.

34. N.Y. Mental Hygiene Law, §§ 200-216.
35. Prop. Pen. Law, art. 220, comm'n staff notes.
36. N.Y. Pen. Law, § 220.05.
37. 26 U.S.C. §§ 4701-4707, 7201.
38. N.Y. Pen. Law, § 125.25(3).

It is a rather detailed provision now. Simply put, it provides that when one or more people commit a felony, and, in the course of and in furtherance of the crime or in immediate flight therefrom, one of the perpetrators causes the death of someone other than one of the perpetrators, both he and his confederates are guilty of murder. However, this provision is triggered only by six or seven of the more violent crimes, and they are listed in the provision.

Skolnick: Did you ever consider abolishing the felony murder rule entirely?

Denzer: During the initial discussions of the Commission, some thought it might be a good idea. However, the majority of the Commission thought otherwise.

Skolnick: Would you describe some of the arguments that were voiced toward abolishing the rule?

Denzer: Some members of the Commission thought that the felony murder rule was too harsh in that one who does not pull the trigger may be deemed guilty of murder. They also felt that the rule was rigid to the point of being arbitrary. In respect to this, they pointed out that a lookout in a robbery situation or other defendant of lesser culpability, who didn't think anyone would be killed, is made guilty of the same crime as the robbery accomplice who, with intent, kills someone.

Skolnick: Yet, the Commission nevertheless adopted the rule?

Denzer: The classic arguments on this subject are well-known.[39] Actually, felony murder is looked upon as a rule of deterrence more than anything else. However, suffice it to say that the Commission drafted a felony murder provision because the consensus was that when a person commits a serious crime—particularly where firearms are involved—and a homicide is one of the results, then he should suffer the consequences.

Skolnick: What line of reasoning led to this consensus?

Denzer: Practically every jurisdiction in this country accepts the felony murder doctrine. It certainly would have been drastic for us to eliminate it completely.

Schwartz: England has abolished the felony murder doctrine.[40]

Denzer: Yes, and most of the arguments against it are from England.

Skolnick: Was it retained by the Commission because it was felt that to eliminate it would have been "drastic"? Or that it simply deserved to remain?

Denzer: Surely, the Commission would have omitted it had the majority felt the equities were for its abolition. The majority felt the equities were for its retention.

39. *See generally*, M. Paulsen and S. Kadish, Criminal Law and Its Processes, 609-631 (1962); Comment, *A Survey of Felony Murder*, 28 Temp. L.Q. 453 (1955). *See also* Morris, *The Felon's Responsibility For The Legal Acts of Others*, 105 U. Pa. L. Rev. 50 (1956).

40. English Homicide Act (1957), 5 & 6 Eliz. II, ch. 15, §§ 1, 5.

Schwartz: Were you with the majority?

Denzer: Yes, I was.

Skolnick: Was your position based on the equities or did you really feel the rule deterred crime?

Denzer: In terms of culpability, felony murder deserves treatment equivalent to that of murder. This is particularly true if the rule comes into play only upon the perpetration of the more violent and dangerous crimes. Something is bound to happen, for instance, in the classical armed robbery situation. When it does, even out of panic, or during escape, a severe penalty is merited.

Skolnick: Why aren't the penalties for the simple armed robbery greater? Who deserves the greater penalty—a man who is part of an accident during a robbery or a man who goes out and intends to commit a murder?

Denzer: Now you're raising a philosophical problem, that is, how much of a part should result play in determining the punishment for a crime. Under the Model Penal Code, result means virtually nothing, and the determination of punishment is made largely on culpability.[41] Thus, in many situations, the Model Penal Code punishes intent to the same degree as the crime itself. There's something to be said for this position. But we tried to be realistic in terms of what the community was ready to accept. Therefore, we struck a balance and permitted the result to play its part.

Skolnick: What do you mean by "community"? Not the man on the street who has never heard of the felony murder rule?

Denzer: The Legislature of New York. They would never, at least in these times, have enacted a penal law without the felony murder rule.

Schwartz: Suppose the Legislature had been open-minded in this matter. And, suppose further that the Legislature would have acted according to your recommendations. If this had been the case, would you have retained the felony murder rule?

Denzer: Yes. The culpability involved is still sufficient.

Schwartz: When the Penal Law was drafted, did you feel that it was not the time for leniency in the criminal laws?

Denzer: No, I don't think that was a major consideration. In fact, when we drafted the provision in 1965, the mood of the people and the legislature was quite different from the mood today. We have moved from what might have been called an era of civil liberties to an era of street crimes and riots. The latter era has caused the Legislature to stiffen its back. So it is clear that we didn't have the considerations then that we do now. But, even then, we did not eliminate the felony murder doctrine.

41. *See* MPC § 2.03. *See also* Model Penal Code (Tent. Draft No. 4, 1955), 132.

C. *Justification*

Skolnick: Do you approve of the justification provisions that replaced the original provisions and are now in force?[42]

Denzer: No, I stood firmly for that Article in its original form. The police damned the original provisions, but when all the drum-beating was over, there was only one significant change.

Skolnick: Which one?

Denzer: Section 35.30. In its original form,[43] this provision caused a lot of interpretation headaches for the police, especially when applied to muggings.

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42. N.Y. Sess. Laws 1968, ch. 73.

43. § 35.30. Justification; use of physical force in making an arrest or in preventing an escape.

1. Except as provided in subdivision two of this section, a peace officer is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary:

(a) to effect an arrest or to prevent the escape from custody of a person whom he reasonably believes to have committed an offense, unless he knows that the arrest is unauthorized; or

(b) to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect such an arrest or while preventing or attempting to prevent such an escape.

2. A peace officer is justified in using deadly physical force upon another person for a purpose specified in subdivision one of this section only when he reasonably believes that such is necessary:

(a) to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) to effect an arrest or to prevent the escape from custody of a person whom he reasonably believes (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 paragraph shall be deemed to constitute justification for reckless or criminally negligent conduct by such peace officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.

3. For purposes of this section, a reasonable belief that a person has committed an offense means a reasonable belief in facts or circumstances which if true would in law constitute an offense. If the believed facts or circumstances would not in law constitute an offense, an erroneous though not unreasonable belief that the law is otherwise does not render justifiable the use of physical force to make an arrest or to prevent an escape from custody. A peace officer who is effecting 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 such officer to be invalid.

4. Except as provided in subdivision five of this section, a person who has been directed by a peace officer to assist such peace officer to effect an arrest or to prevent an escape from custody is justified in using physical force when and to the extent that he reasonably believes such to be necessary to carry out such peace officer's direction, unless he knows or believes that the arrest or prospective arrest is not or was not authorized.

5. A person who has been directed to assist a peace officer under circumstances specified in subdivision four of this section may use deadly physical force to effect an arrest or to prevent an escape from custody only when:

(a) he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) he is directed or authorized by such peace officer to use deadly physical

The revised provision[44] eliminates much of this problem by removing the requirement of "deadly" physical force. Now, it is simply "physical force." In

force and does not know that, if such happens to be the case, the peace officer himself is not authorized to use deadly physical force under the circumstances.

6. A private person acting on his own account is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary to effect an arrest or to prevent the escape from custody of an arrested person whom he reasonably believes to have committed an offense and who in fact has committed such offense; but he is justified in using deadly physical force for such purpose only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

7. A guard or other peace officer employed in a detention facility, as that term is defined in section 205.00, is justified in using physical force when and to the extent that he reasonably believes it necessary to prevent the escape of a prisoner from such detention facility.

44. § 35.30. Justification; use of physical force in making an arrest or in preventing an escape.

1. A peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he reasonably believes to have committed an offense, may use physical force when and to the extent he reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force; except that he may use deadly physical force for such purposes only when he reasonably believes that:

(a) The offense committed by such person was:

(i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person; or

(ii) kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or

(b) The offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefor or attempting to escape from custody, such person is armed with a firearm or deadly weapon; or

(c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.

2. The fact that a peace officer is justified in using deadly physical force under circumstances prescribed in paragraphs (a) and (b) of subdivision one does not constitute justification for reckless conduct by such peace officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.

3. A person who has been directed by a peace officer to assist such peace officer to effect an arrest or to prevent an escape from custody may use physical force, other than deadly physical force, when and to the extent that he reasonably believes such to be necessary to carry out such peace officer's direction, unless he knows that the arrest or prospective arrest is not or was not authorized and he may use deadly physical force under such circumstances when:

(a) He reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) He is directed or authorized by such peace officer to use deadly physical force unless he knows that the peace officer himself is not authorized to use deadly physical force under the circumstances.

4. A private person acting on his own account may use physical force, other than deadly physical force, upon another person when and to the extent that he reasonably believes such to be necessary to effect an arrest or to prevent the escape from custody of a person whom he reasonably believes to have committed an offense and who in fact has committed such offense; and he may use deadly physical force for such purpose when he reasonably believes such to be necessary to:

(a) Defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) Effect the arrest of a person who has committed murder, manslaughter in the first degree, robbery, forcible rape or forcible sodomy and who is in immediate flight therefrom.

addition, a few other specific crimes were added which permit the officer's use of deadly physical force even though these crimes may not involve deadly physical force by the perpetrator: kidnapping, arson, escape in the first degree and burglary or attempted burglary in the first degree.

Skolnick: Under your original provision, suppose an officer had shot someone escaping from a mugging. Do you think any District Attorney in the state of New York would have prosecuted the officer for that act?

Denzer: No, probably not. This makes this change even less significant. Theoretically, of course, the officer *could* have been prosecuted.

Skolnick: Are you saying that the one important revision finds its importance in theory only and not at all in practice?

Denzer: That's right.

Schwartz: What precipitated the addition of section 35.27, the "no-sock" provision, in the 1968 amendments?[45] I heard nobody clamoring for that inclusion.

Denzer: Originally the "no-sock" provision was going to be part of the entire package which we presented to the Legislature in 1965. However, they rejected it before the Penal Law was approved.[46] With the amendments in 1968, we saw our opportunity to put it back in. Although it was the Codes Committee's bill that was enacted, that provision was substantially our idea.

Schwartz: Could you give the Commission's reasons for advocating this provision?

Denzer: The Commission thought this was a sound doctrine. I might add that I, personally, am absolutely convinced of its soundness. The old law—*People v. Cherry*[47]—encouraged arrestees to start a street brawl with the arresting officer. I don't see anything wrong with submitting to a doubtful arrest. If it turns out to have been a mistake, there is redress in the Court of Claims, and, as you know, there are plenty of recoveries there.

We advocated adoption of the provision in the 1968 amendments because we wanted to take advantage of the new climate of public opinion which we talked about earlier.

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5. A guard or peace officer who is charged with the duty of guarding prisoners in a detention facility, as that term is defined in section 205.00, or while in transit to or from a detention facility, may use physical force when and to the extent that he reasonably believes such to be necessary to prevent the escape of a prisoner from a detention facility or from custody while in transit thereto or therefrom.

45. Section 35.27 provides: "A person may not use physical force to resist an arrest, whether authorized or unauthorized, which is being effected or attempted by a peace officer when it would reasonably appear that the latter is a peace officer."

46. N.Y. Sess. Laws 1965, ch. 1039.

47. 307 N.Y. 308, 121 N.E.2d 238 (1954).

D. *Other Problem Areas*

Schwartz: How do you explain the Legislature's action in 1965? They eliminated the "no-sock" provision, but forced the inclusion of adultery[48] and sodomy.[49]

Denzer: The Commission had to make some careful political decisions here. We knew that if we submitted the results of our work on these three controversial areas as part of the entire package in 1965, a majority of the Legislature would have voted against the whole Penal Law, just on objections to one or two or three of these provisions. Consequently, we decided to submit these individual controversial provisions before the submission of the package. In effect, we were activating bills to amend the Penal Law before it was passed. No matter how strong our feelings were about these provisions, we had to employ this strategy in order to avoid jeopardizing all of our other work.

Skolnick: Were the sentencing provisions submitted in this manner?

Denzer: No. It would have been too difficult to sort out those parts of the sentencing title which were more controversial than others.

Schwartz: Wasn't the capital punishment section separated out?

Denzer: Well, that involved a different technique. Capital punishment was submitted as an amendment to the old Penal Law.[50] Technically, therefore, it was not a part of the 1965 package.

Skolnick: Would you personally have supported or opposed capital punishment?

Denzer: I feel lukewarm on that issue. I don't think it's really that important. No one is going to the electric chair today, and this is true all across the country. In my view, the capital punishment issue is becoming an intellectual toy. Of course, it's true that if one person is executed, it's not a toy anymore. But, my point is that, on an overall basis, crimes such as assault in the third degree and disorderly conduct are more important considerations. These occur in substantial numbers every day; capital punishment practically never occurs.

Skolnick: You're speaking of the practical effects. What about the symbolic effects—that is to say, the kind of position a commission takes on capital punishment may affect its position on other aspects of the criminal law.

Denzer: I agree with you. But I don't think our other work was affected; the reason is that these arguments have been so hashed and rehashed that they have become cut and dried.

Schwartz: What is your personal position on the deterrence argument used in support of capital punishment?

48. N.Y. Sess. Laws 1965, ch. 1037.
49. *Id.* ch. 1038.
50. N.Y. Sess. Laws 1963, ch. 994. *See generally*, N.Y. Legis. Doc. 1963, No. 8, pp. 13-16.

Denzer: My position is very simple. If someone can prove it has no substantial deterrent effect, I'm all in favor of its abolition. If someone can prove it does have a substantial deterrent effect, I'm all in favor of its retention. Of course, I don't think anyone can prove either side.

Schwartz: Why were the new concepts of solicitation[51] and facilitation[52] added to the Penal Law?

Denzer: Each sought to close a gap under prior law in New York. If *A* solicits *B* to kill *C* and *B* refuses, under former law, *A* is chargeable with no crime. We felt that this was criminal conduct, assuming the *mens rea* requirements are satisfied, and we drafted Article 100 to cover it.

Facilitation creates an intermediate liability where a party does not deserve to be held as an accessory to a crime but does deserve to be held for some degree of criminal accountability. If *A,* in the course of a legitimate business, sells a gun to *B,* even though *B* convinces *A* that the gun will be used to murder *C, A* should be charged with some crime. However, the former law gave only a choice between holding him as an accessory, which requires an intent not present here, or letting him go entirely. With Article 115, *A* can be held criminally liable, assuming the *scienter* requirement is satisfied.

Schwartz: Did the Penal Law try to deal in any way with the problem of organized crime?

Denzer: There is a lot of misinformation about ways in which a penal code can deal with organized crime. I don't believe a penal code can have any substantial impact in dealing with organized crime. The problems involved in this area concern the gathering of evidence; once that condition is met, you can always find a crime on our books under which to prosecute. We've never suffered from a lack of crimes on our books.

Schwartz: The reason I asked that question was that you remarked on another occasion that much of the Penal Law is built around the District Attorney's fight against organized crime. Did you try to make that fight easier?

Denzer: Yes, we tried to fill gaps; for instance, there was always a problem in extortion cases involving a public official. The difficulty was whether he should be charged with bribery or extortion. The two crimes were said to be mutually exclusive,[53] and, to eliminate this problem, we took away the mutual exclusiveness.[54]

Schwartz: Were there any areas that needed improvement that could be considered peculiar to New York?

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51. N.Y. Pen. Law, art. 100.
52. *Id.* art. 115.
53. *See* People v. Dioguardi, 8 N.Y.2d 260, 203 N.Y.S.2d 870 (1960).
54. N.Y. Legis. Doc. 1965, No. 25, pp. 55-58.

Denzer: The manslaughter provisions had become unintelligible. The courts had completely lost track of the basic voluntary manslaughter doctrine—mitigating murder to manslaughter.[55]

We also changed the whole concept of assault. Under the old Penal Law, you never knew if an assault included a battery; some crimes of assault did and some didn't, but no one could perceive any rationale behind the distinctions. Now, an assault is really an actual physical injury.[56]

Another improvement was the elimination of the "breaking" requirement in burglary. The meaning of this requirement had lost its significance; since only a minimal "force" was needed to satisfy this element of burglary,[57] we decided to drop the requirement entirely.[58]

V. Some General Conclusions

Schwartz: The revision of the Penal Law was completed before the revision of the Criminal Procedure Law. First, would you follow the same sequence if you were to do this work again, and second, how do you make the Penal Law work effectively during the present time while we are still under the old Code of Criminal Procedure?

Denzer: Without getting too deeply into the full range of considerations involved, I would not only say that I would follow the same sequence again, but that this is the only sequence that can be followed. The main function of a penal code is to define the crimes, defenses, and so forth. When you enter procedural revision, though, you step into a much more controversial subject. For example, every aspect of discovery is fraught with controversy—how much are you going to allow the defendant in each area? How much are you going to give to the prosecutor? Keeping all of these thoughts unified is particularly difficult.

To answer your second question, we made amendments wherever necessary to conform the Code of Criminal Procedure to the Penal Law.[59]

Schwartz: What other advice would you offer to states considering criminal law reform?

Denzer: I would advise them to obtain a staff and budget similar to ours. These aspects of our experience are of course directly related to one another. Since we had a $150,000 annual budget, we could afford to hire a staff of experienced attorneys. If you are forced to rely on the academic world for your staff, you certainly get the best minds; but an academic staff usually is more interested in substantive change than creating a workable, easy-to-use body of law.

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55. *Id.* at p. 36; N.Y. Pen. Law, § 125.20.
56. N.Y. Pen. Law, art. 120.
57. *See,* People v. Krevoff, 11 A.D.2d 1053, 206 N.Y.S.2d 290 (2d Dep't 1960).
58. N.Y. Pen. Law, art. 140.
59. *See,* N.Y. Sess. Laws 1967, ch. 681.

Schwartz: Was your outlook mainly pragmatic?

Denzer: Yes, this is probably the most important criterion for determining success or failure. The Penal Law has to be easy to use. Although we made numerous, significant substantive changes, we placed a higher value on making the law understandable.