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THE NEW YORK PENAL LAW: A PROSECUTOR'S EVALUATION

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I. INTRODUCTION

THE New York Penal Law became effective September 1, 1967. Even cursory comparison of this statute with the 224 articles and more than 1200 sections of specific provisions in the former law leads one to view as an understatement Governor Rockefeller's description of the new law as "the first major and comprehensive revision of the Penal Law since 1881."[1] The extended lack of attention to criminal law revision in New York was surprising in that the substantive law of crime of any society must be considered its most fundamental and basic instrument of social control. As Professor Herbert Wechsler, Chief Reporter for the American Law Institute's Model Penal Code, and a charter member of the New York State Temporary Commission on Revision of the Penal Law and Criminal Code has recently stated:

> The aim of the whole process after all is to define and within reasonable limits to enforce what Professor Henry M. Hart aptly calls "those minimum obligations of conduct which the conditions of community life impose upon every participating member if community life is to be maintained and to prosper."[2]

This writer has served continuously as a prosecutor since 1961 in an industrialized community, having a population of roughly 160,000. The city is fairly typical of up-state urban counties. During this experience, ample opportunity has been afforded to form a professional opinion of New York's attempt to redefine and enforce those "minimal obligations of conduct." Of course, since the new Penal Law is still in the infancy of its operation, any conclusion must still be tentative. Judicial interpretation of the new law's provisions must be awaited to determine how well it will actually operate. Also, interdisciplinary analyses of crime rate statistics, trends and other pertinent data should be undertaken and continued to determine whether the new law is fulfulling an overall deterrent purpose.

This article is an evaluation of the new Penal Law based on the above experience. Initially, the structural draftsmanship of the new law is discussed. This is followed by an analysis of the practical importance of the substantive changes which the new law has enacted. Finally, some questions, criticisms, and general conclusions concerning the new Penal Law are offered.

The basic premise of this evaluation is that a penal law cannot be successful unless it can be understood and applied with reasonable ease. Obviously

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1. N.Y. Penal Law, Governor's memorandum at XXXV (McKinney 1967) [hereinafter cited as N.Y. Pen. Law]. *See also,* Legis. Doc., No., 41, p. 8 (1962).

2. Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code,* 68 Colum. L. Rev. 1425, 1431 (1968).

these considerations are important to a prosecutor. Modern realities have also made them abundantly important to society as a whole.

Recently, the President's Commission on Law Enforcement and Administration of Criminal Justice reported on the undue delay in the disposition of criminal cases in the United States.[3] As much as two years has been found to have elapsed between arrest and trial.[4] This problem appears to be most acute at the lower court levels.[5] Delays in these courts in the District of Columbia, for example, have produced a high rate of rearrests of persons released while awaiting trial.[6] As a result, recent proposals have been made to institute the drastic remedy of "preventive detention."[7] These situations are consistent with what has been experienced in this writer's relatively small county in upstate New York. The reasons behind the delays are the modern realities of increased case loads, pre-trial procedures on confessions and searches and seizures, and preliminary examinations in felony cases. These facts, combined with limited prosecutorial and judicial manpower, have greatly increased the time necessary to dispose of cases. A clear and consistent penal law is indispensable if one is to swiftly apply the lengthy criminal process to its conclusion and thus fulfill the value inherent in our society's maxim: "Justice delayed is justice denied."

II. Structure and Organization

In terms of its number of provisions, the new Penal Law is justifiably smaller than its predecessor. The many archaic provisions of the former law, such as those dealing in detail with the heating of railroad cars by stove or furnace, and dueling challenges, have been eliminated. In addition, the many provisions of the former law which were basically regulatory, such as those dealing with conservation, business, agriculture and banking, and to which criminal sanctions had been attached but rarely enforced by police officers, were shifted to the specific bodies of law dealing with their particular subject matter.

The alphabetized arrangement of the former Penal Law—starting with "Abandonment," then to "Abduction" and ending with "Women" and "Wrecks" —was a trap for the unwary or harried prosecutor who had to submit charges to a grand jury or had to advise police officers on the charges to make in a booking following arrest. Under that arrangement, related crimes dealing with the same or factually related subject matter were rarely found in the same place. For example, if a public official had engaged in misconduct involving the use of his public office for personal gain under the former law, the possibly applicable provisions were in numerically disparate locations. Section 372—Officer Accepting Bribe, section 855—Public Officer Taking Illegal Fees Commits Extortion,

3. The President's Commission Report on Law Enforcement and Administration of Criminal Justice, Task Force Report: The Courts (1967).
4. *Id.* at 80.
5. *Id.* at 31.
6. *Id.* at 39.
7. *Id. See also,* Proposed New York Criminal Procedure Law § 275.30(2)(b) (Edward Thompson Co. ed., 1967); Williamson v. United States, 184 F.2d 280, 282 (1950).

section 1823—Asking or Receiving Bribes, were all possible relevant provisions. Also, myriad other sections dealing with specific officials, such as judicial officers,[8] legislators[9] and public service commissioners[10] might have been applicable. Under the new Penal Law, such conduct in all its variations is covered under two articles comprising a total of some 15 sections. Arranged consecutively, these sections also cover the crimes committed by the "giver" of the illegal benefit.[11]

Self-defense sections under the former law were found in the General Provisions[12] and the assault and homicide articles.[13] The insanity defense, applicable to all crimes, was not found in the General Provisions, but instead under article 104—Incompetent Persons. Disorderly conduct[14] and riots and unlawful assemblies,[15] obviously and expressly concerned with the same general threatened or actual breaches of the "public peace," were located hundreds of sections apart. Even such clearly related crimes as burglary[16] and criminal trespass[17] were kept separate under the former law. This grouping probably explains why the criminal trespass provisions were rarely employed as an alternative charge in burglary trials.

The practice of continuous piecemeal amendment of the former Penal Law also resulted in a tendency toward a prolixity of provisions which were too narrow and specific and which covered basically the same proscribed conduct. Malicious injury to property, for example, was covered by twenty-five detailed sections and many more subdivisions.[18] These were replaced under the new Penal Law by a mere seven sections.[19] Gambling offenses under the pre-1967 Penal Law included some fifty-four sections within two articles, gambling and lotteries.[20] Without any basic change in coverage, the new law substitutes nine sections, including a definition of terms.[21] The simplification and generalization employed in drafting provisions in the latter areas, and many others under the new law, can be expected to avoid the wasted time and effort brought about by

8. Former N.Y. Penal Law § 372 (McKinney 1944) [hereinafter cited as former N.Y. Pen. Law].

9. *Id.* § 1328.

10. *Id.* § 1981(2).

11. N.Y. Pen. Law arts. 195 and 200. These articles are respectively entitled "Official Misconduct and Obstruction of Public Servants Generally" and "Bribery Involving Public Servants and Related Offenses."

12. Former N.Y. Pen. Law § 42.

13. *Id.* §§ 246(3) and 1055 respectively.

14. *Id.* art. 70.

15. *Id.* art. 188.

16. *Id.* art. 38, §§ 400-08.

17. *Id.* § 1425(9): Unlawful intrusion into a building located in a city or village; *id.* § 2036: unlawful intrusions upon land located in a city or village. Intrusions into buildings or upon land located in a *town* were technically not covered by the former Penal Law.

18. *Id.* art. 134, §§ 1420-38.

19. N.Y. Pen. Law art. 145, §§ 145.00-145.30.

20. Former N.Y. Pen. Law arts. 88 and 130.

21. N.Y. Pen. Law art. 225, §§ 225.00-225.40.

over-specificity and prolixity. The case of *People v. Costello*[22] is illustrative of the problems which arose under the former law. In *Costello*, the defendant was accused of maliciously deflating automobile tires. He was able to reverse his conviction only after a full trial in the district court and succeeding appeals to the highest court in New York. The ground for reversal was that the "catch-all" malicious mischief section[23] was employed in framing the charge, rather than the specific section dealing with damaging an automobile.[24]

The shortcomings of the organization and structure of the former law were compounded by the fact that the two principal textual sources used by most prosecutors and police[25] were poorly indexed. As a result, except in dealing with the most common crimes, an inordinate amount of time was spent leafing through possible articles. In addition, this procedure made it quite possible for pertinent charges to be omitted.

In contrast, the arrangement of the new Penal Law is far more sensible and has proven far more workable. A tight analytical arrangement has been substituted for the haphazard alphabetical order in the former law. First, the overall division of the new law into four parts—General Provisions, Sentences, Specific Offenses and Administrative Provisions—has been accurately and consistently adhered to. Second, the definitions of specific offenses have been logically arranged by subject matter. This arrangement, to a great extent, eliminates the danger of inadvertently omitting pertinent charges and provides a far greater probability of finding all of the crimes which may have some applicability to particular conduct. Third, a tightly knit and consistent organization with respect to the degrees of each individual crime has been employed. Starting with the least serious degree, constituting the basic crime, the new law derives higher degrees by the addition of further aggravating factors to the basic crime.

The analytical organization of subject matter by grouping related offenses and providing an orderly, systematic and consistent arrangement of degrees of crimes at least affords a more rational basis in the substantive law for the practice of negotiating pleas to lesser crimes. Such organization must be the first step toward imposing some order and standards upon the "plea bargaining" process. In addition, the experience of this writer in teaching the new Penal Law in police training courses for recruits and experienced officers—both for the New York State Municipal Police Training Council and in local training programs immediately before the new law went into effect—has demonstrated the advantage of the foregoing organization in terms of its comprehensibility by enforcement personnel.

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22. 305 N.Y. 63, 110 N.E.2d 880 (1963).
23. Former N.Y. Pen. Law § 1433.
24. *Id.* § 1425(11-a).
25. Gilbert Criminal Law and Practice of New York (Bender c.1918, annually revised); former N.Y. Pen. Law.

III. Important Substantive Changes

A. *Gradations of Crimes and Punishments*

The new Penal Law reflects important changes in the gradations of crimes and punishments which will have an impact upon the work of the prosecutor. With the exception of attempts[26] and to some degree conspiracy,[27] the significant changes in gradation were in a downward direction. The downgrading of offenses and punishments in several important areas were by and large desirable, since they now more accurately reflect the degree of seriousness of the offense and the severity of its condemnation by contemporary society. In these areas, the new gradations will also enhance the expeditious disposition of offenders through the criminal process.

The harshness of some of the provisions and punishments of the former Penal Law did not necessarily lead to successful enforcement and prosecution. Often, the severity boomeranged to produce jury resistance to conviction. Also, judges sometimes sought to circumvent the harsh statutes by strictly construing them so as to avoid their applicability to a particular situation. Illustrative of the latter point was the treatment of the crime of kidnapping, which carried a sentence of 20 years to life under the former law. In *People v. Levy*[28] and *People v. Lombardi*,[29] the Court of Appeals was confronted with abductions which were basically incidental to the commission of other crimes. *Levy* primarily involved a robbery, while *Lombardi* was principally concerned with a rape. In a previous decision, *People v. Florio*,[30] these types of asportations or confinements which were incidental to another crime were nevertheless held to constitute kidnapping. As the opinions in both *Levy* and *Lombardi* expressly concede, the literal language of the statute made no exceptions based on whether the kidnapping was "subsidiary" or "incidental" to another crime. The Court, however, overruled *Florio* and ignored the literal language of the statute in reversing the convictions for kidnapping when thus "incidental" to other crimes. The opinions of reversal were quite candid in disclosing that the reason for this

26. Attempts, except in relation to capital offenses, were covered under former N.Y. Pen. Law § 261. Those who were convicted of an attempted crime under this section could be imprisoned for not more than one half of the maximum term of confinement for the completed offense attempted.

Under the new Penal Law, the gradation classification for attempt is one degree lower than the completed crime. *See* N.Y. Pen. Law § 110.05. Thus, under the new law's provision, an attempt may be criminally classified as any of four types of felonies or two types of misdemeanors. *Id.*

Under the latter system, it is acknowledged that, in some instances, the penalty for an attempted crime may be more severe than it was under the former law. *Id.* Comm'n. staff notes.

27. Conspiracies to commit kidnapping in the first degree or murder were previously punishable by a maximum of seven years imprisonment. Former N.Y. Penal Law § 580-a. Such conspiracies are now regarded as Class C felonies, punishable by fifteen years imprisonment. N.Y. Pen. Law §§ 105.15, 70.00(2)(c).

28. 15 N.Y.2d 159, 256 N.Y.S.2d 793, 204 N.E.2d 842 (1964).

29. 20 N.Y.2d 266, 282 N.Y.S.2d 519, 229 N.E.2d 206 (1967).

30. 301 N.Y. 46, 92 N.E.2d 881 (1950).

severe judicial tailoring of the statute was the harsh penalties for kidnapping.

The new Penal Law has removed the objectionable features of the former law by breaking down asportative and confining crimes into two degrees of kidnapping, two degrees of custodial interference and two degrees of unlawful imprisonment.[31] The distinctions between each degree are based on the relevant factors of the length of and purpose of confinement, the danger to the victim and the use of force perpetrated by the offender.

In the treatment of offenses formerly covered under the assault provisions of the former Penal Law, the revisers carved out offensive, provocative but non-injurious conduct. The push, slap, shove and menacing gesture had constituted misdemeanor assault under the old law. These acts will now generally be subject to the petty offense of harassment, a violation.[32]

Many difficulties had been encountered in prosecuting these cases as misdemeanor assaults under the former Penal Law. These acts are ordinarily spontaneous and unpremeditated. The neighborhood quarrel or bar-room scuffle was the typical situation which led to the assault charge. Furthermore, the defendant had the right to a jury trial, which merely prolonged the proceedings, delayed speedy disposition, and further exacerbated the feelings of the parties. Jury resistance to imposing a criminal record on the defendant was also often evident. The ultimate disposition in most instances was acceptance of a plea to a reduced charge of disorderly conduct. The harassment charge for this kind of conduct has been an effective alternative. It has permitted far more expeditious handling of the cases and appears to satisfy the reasonable expectations of the parties.

B. *Creation of New Crimes and Expansion of Existing Ones*

Comprehensive revision of a statute which was basically the product of the Victorian era required not only the elimination of outdated provisions, but also expansion of the substantive law of crime to include forms of conduct viewed as less serious or even unheard of eighty years ago. Thus, the new Penal Law has recognized that the ubiquituous credit card has become the equivalent of cash for a variety of services which are not covered under the larceny provisions of the former law. Therefore, the new law has extended the coverage of the theft of services provision to include the fraudulent use of this device.[33] In the area of consumer fraud, prosecutors have recently been receiving many more complaints by the public concerning the modern phenomena of the "fly-by-night" contractor and the "door-to-door" repairman. These artists had avoided the reach of the former penal law, which required a misrepresentation of an existing material fact before a charge of larceny by false pretenses could be established.[34] The new law affords some promise of subjecting the "con man"

31. N.Y. Pen. Law art. 135.
32. *Id.* § 240.25.
33. *Id.* § 165.15(1).
34. *See* People v. Karp, 298 N.Y. 213, 81 N.E.2d 817 (1948).

to criminal sanctions under section 155.05(2)(d). This provision adds to the definition of larceny, the obtaining of property "by false *promise*" through misrepresentation of future conduct.[35]

In addition to being a significant advancement in the area of gradations of crimes and punishment,[36] the new provision covering harassment is an important contribution to substantive criminal law. This provision has recognized that citizens are entitled to penal law protection from harm which may be neither economic nor technically physical. Thus, this section prohibits conduct calculated to vex, annoy or place an individual in fear.[37] Basically, it penalizes the abhorrent person who attempts to create psychological insecurity in another. If an individual engages in a more serious and sophisticated form of vexatious behavior which is difficult to control, he may be guilty of the misdemeanor of "aggravated" harassment.[38] The typical conduct which the latter provision proscribes is the repeated "dunning" or obscene phone call.

Previously, the orientation of the law was such that little could be done about the above type of conduct, unless the state's interests were endangered by a threatened or intended breach of the public peace. The only significant applicable provision under the former Penal Law was disorderly conduct.[39] This provision required proof of "intent to provoke a breach of the peace . . . [or circumstances by which] a breach of the peace may be occasioned . . . ."[40] Consequently, it had to be shown that the conduct had occurred in a public place and that the external circumstances at the time were such that a specific intent or potential public disturbance was present. The new harassment provision negates these problems by specifically covering the *private* disturbance, *i.e.*, disturbance of an individual which does not constitute a *public* disturbance. However, this provision is desirable not only because a right to be free from calculated harassing ought to be protected in our advanced society, but also because of the possibility that an even more violent response may be made to such conduct. Thus, as a deterrent provision, the harrassment section may nip the potential *public* disturbance in the bud.

Two other significant crimes created by the new law are criminal facilitation[41] and criminal solicitation.[42] These provisions penalize the person who

35. In order to distinguish criminal theft by false promise from civil breach of contract, however, the new law's formulation requires proof *"wholly* inconsistent with innocent intent or belief, and *excluding to a moral certainty every hypothesis* except that of the defendant's intention or belief that the promise would not be performed." N.Y. Pen. Law § 155.05(2)(d) (emphasis added).

Strict application of this very high standard of proof will make successful prosecution of such conduct most difficult. *See infra* notes 58-61 and accompanying text.

36. *See supra* note 32 and accompanying text.

37. N.Y. Pen. Law § 240.25(5).

38. *Id.* § 240.30.

39. Former N.Y. Pen. Law §§ 720, 722.

40. *Id.* § 722. *See* People v. Perry, 265 N.Y. 362, 193 N.E. 175 (1934); People v. Douglas, 29 N.Y.S.2d 206 (Nassau Cty. Ct. 1941).

41. N.Y. Pen. Law art. 115.

42. *Id.* art. 100.

attempts to cause in any way, and who intends that another person commit, a substantive crime.[43] Also covered is the individual who engages in conduct which he believes will probably aid the commission of a crime, but does not specifically intend to cause, partake in, or profit from the crime.[44] It is clear that these provisions provide a sanction against conduct which is sufficiently dangerous and contra the social order to subject the actor to penal control. Under the former law, however, such acts could not be penalized because prosecutors were required to show that the person actually *intended to be a part of the commission* of the substantive crime which he solicited or aided.[45] If such intent could not be proven, the defendant had to be found completely innocent. With the addition of facilitation and solicitation provisions, alternative charges may be brought, and, when the evidence is insufficient to establish the requisite intent to partake in the crime solicited or aided, the defendant may be found guilty of the lesser new crimes.

Finally, what should prove to be one of the most significant innovations in the new law is its expanded coverage of the area of conduct wherein the state of mind of the actor is *reckless* rather than *intentional.* Under the former Penal Law, reckless conduct was penalized only in the case of homicide[46] and in cases of actual physical injury resulting from the operation of an automobile[47] or the use of a weapon while hunting.[48] Under the new Penal Law, a reckless state of mind is sufficient under all three degrees of assault, two degrees of reckless endangerment, three degrees of homicide and three crimes involving the actual or threatened destruction of property.[49]

The expansion of substantive criminal law to include more types of reckless conduct represents a value judgment. Given the modern means of destruction available to the public in our complex technological society, it is proper to impose a greater duty to avoid a clearly foreseeable risk of harm. An actor who "consciously disregards" such risks and grossly deviates from normal standards of conduct is sufficiently dangerous to be subjected to the controlling and rehabilitative processes of the criminal law.

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43. *Id.* §§ 100.00, 100.05, 100.10.

44. *Id.* §§ 115.00, 115.05.

45. *See* former Pen. Law. § 2 (par. 6). This provision covered what was termed the "accessory before the fact" at common law. The substance of this provision is adopted and stated much more clearly in the new Penal Law. In addition, the new law's brief provision covers the common law "principal" in the first and second degrees. N.Y. Pen. Law § 20.00. Apparently, the revisers felt that since the culpability in each of the three categories was essentially the same, they all should be covered by the same provision.

46. *See* former N.Y. Pen. Law §§ 1052(3) (manslaughter in the second degree), 1053-a (death caused by negligent operation of a vehicle), 1053-c (death due to negligent use of a weapon by another while hunting), 1053-e (death caused by negligent operation of a vessel).

47. *Id.* § 244(2).

48. *Id.* § 247.

49. The crimes which cover destruction of property are N.Y. Pen. Law §§ 145.00(2) (criminal mischief), 145.25 (reckless endangerment of property), 150.05 (arson in the third degree).

IV. Some Questions and Criticisms

Any product of human endeavor as far-reaching and comprehensive as a complete revision of a state's penal law cannot be expected to have covered every possible problem of both substance and draftsmanship. The following is this writer's view of the new Penal Law's shortcomings in those areas.

A. *Draftsmanship*

1. *Entrapment*

The New York revisers, following the lead of the Model Penal Code and the new codes of other jurisdictions, created the statutory defense of entrapment.[50] Previously, such a defense was non-existent in the statutory criminal law of New York. The defense is most significant in prosecutions involving commercialized vice and organized crime. The most prevalent offenses which fall under the latter headings involve gambling and drugs. These offenses normally connote a "victim" who is the willing, factual accomplice of the offender. In addition, the general public is usually not strongly motivated to aid in the enforcement of the sanctions against these crimes. As a result, an increased use of under-cover agents has been necessitated in order to obtain sufficient evidence for conviction. These agents place "bets" and make "buys" in order to secure the proper proof.

When evidence is obtained in the above manner, the entrapment defense is inevitably raised and submitted to the jury. As an affirmative defense, the accused must maintain the burden of establishing it by a preponderance of the evidence.[51] The elements of entrapment which the defendant must prove are: 1) "active" inducement or encouragement by a police officer; and 2) that the methods of inducement were "such as to create a *substantial risk that the offense would be committed by a person not otherwise disposed to commit it.*"[52] Because the second element is phrased in terms of *"a person,"* rather than *the person,* it may be argued that this provision imposes a uniform standard of behavior on the police. Therefore, if the police created a "substantial risk that the offense would be committed" by *any* person, rather than the particular defendant, the accused would be acquitted. Under this interpretation, the predilections of the individual defendant who raised the defense would be irrelevant. Evidence of such predilection, such as proof of previous similar acts of misconduct, would be inadmissible to rebut the defense.

However, it is submitted that there is another interpretation of this provision which is more in accord with the traditional concept of entrapment. Apparently, the cases of *Sorrells v. United States*[53] and *Sherman v. United States*[54] form the basis for this New York provision.[55] The majority opinions in

50. *Id.* § 35.40.
51. *Id.* § 25.00(2).
52. *Id.* § 35.40 (emphasis added).
53. 287 U.S. 435 (1932).
54. 356 U.S. 369 (1958).
55. *See* N.Y. Pen. Law § 35.40, comm'n staff notes.

these cases focused on the individual defendant who raised the defense. As such, the Court approached the matter by inquiring whether *this particular defendant* would have committed the crime he was accused of absent the inducements of the police. Under this approach, the defendant's "predispostion and criminal design" are relevant, and may be proven by his prior record in order to rebut the defense.[56] This interpretation is buttressed by a statement of the New York revisers: "As a practical matter, therefore, the defense of Entrapment would not be available to the person who regularly engages in illegal enterprise."[57]

2. *Larceny by False Promise*

Another question of interpretation, which is left unanswered by the new Penal Law, may arise in connection with the newly created crime of larceny by false promise.[58] In order to differentiate this crime from civil breach of contract, the new Penal Law imposes a rigorous standard of proof. It must be established "that the facts and circumstances of the case are wholly consistent with guilty intent or belief and wholly inconsistent with innocent intent or belief. . . ." Typically, such fraudulent intent can best, if not solely, be shown through evidence that the perpetrator has victimized a host of other parties under similar circumstances. For example, if a sham contractor is charged with this crime, it could be shown that he has completely defaulted in performance under many similar contracts after receiving a cash deposit. Clearly, such evidence is highly probative of guilty intent in the particular case in which he was charged with the crime. However, since the previous acts may not have been proven to be "crimes" involving such intent, and since those acts may not have been closely related in time to the particular situation being litigated, such evidence may not be admissible under the traditional categories allowing evidence of prior crimes to show guilty intent.[59] To comply with the high standard of proof required by the new provision, such evidence will certainly be needed. A strong argument for admissibility of this type of proof can be advanced by analogizing to the federal rule in criminal receiving cases. This rule permits proof of prior receipts of stolen goods for the purpose of proving guilty knowledge.[60] Evidence of such receipts is admissible even though proof of guilty knowledge as to the *prior* receiving is *absent*.[61]

3. *Extreme Emotional Disturbance*

Still another interpretation problem under the new Penal Law may arise in connection with the affirmative defense of "extreme emotional disturbance"

56. *See* Sorrells v. United States, 287 U.S. 435, 451, (1932).
57. N.Y. Pen. Law § 35.40, comm'n staff notes.
58. *Id.* § 155.05(2)(d).
59. *See* Richardson on Evidence §§ 175-82 (Prince ed. 1964). *See also* People v. Fiori, 12 N.Y.2d 188, 200, 237 N.Y.S.2d 698, 701, 188 N.E.2d 130, 132 (1963).
60. *See* United States v .Brand, 79 F.2d 605 (2d Cir. 1935), *cert. denied,* 296 U.S. 655 (1935).
61. 79 F.2d at 606.

which reduces murder to manslaughter in the first degree.[62] Apparently, the main purpose of this provision is to include the common law doctrine of mitigation in the Penal Law.[63] This doctrine reduces *intentional* homicide from murder to "voluntary manslaughter" when the killing was the result of "heat of passion" or "provocation." The former Penal Law did not clearly contain this doctrine.[64] Manslaughter in the first and second degrees had been defined as killings "committed without a design to effect death,"[65] which under no circumstances would have constituted murder.[66]

Under the new Penal Law, murder is reduced to manslaughter in the first degree if the defendant proves, as an affirmative defense, that he

> . . . acted under the influence of *extreme emotional disturbance* for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation *under the circumstances as the defendant believed them to be* . . .[67]

At common law, the "provocation" or "heat of passion" which would mitigate a homicidal act from murder to manslaughter was determined on the basis of an objective standard of reasonableness or "adequate" cause.[68] Since the main purpose of the new law's provision is to adopt this doctrine, its standard should have been adopted also. However, the new law's dual phraseology of "extreme emotional disturbance" and "under the circumstances as the defendant believed them to be" raises the possibility that the defense will be applied on the basis of a *subjective* rather than *objective* standard. This would open the door for psychiatric evidence as to the particular defendant's powers of self-control and perception. In turn, this would result in common law voluntary manslaughter being changed to the concept of "diminished responsibility."

A strong argument can be made for the admissibility of the above type of psychiatric testimony in those jurisdictions having two degree of murder.[69] Whether a defendant whose mental state falls short of qualifying for the insanity defense, was nevertheless incapable of premeditation at the time of his act, is certainly a relevant question in determining whether he is guilty of murder

62. N.Y. Pen. Law §§ 125.20(2), 125.25(1)(a).
63. *Id.* § 125.20. comm'n staff notes.
64. *See* former N.Y. Pen. Law. §§ 1050, 1052.
65. *Id.*
66. Felony murder and a homicide accomplished "by an act imminently dangerous to others, and evincing a depraved mind" also constituted murder in the first degree. *Id.* § 1044(2). Thus, although these killings could be accomplished "without a design to effect death," they could not constitute manslaughter if, under the circumstances, they amounted to murder. Even this type of murder could not be reduced to manslaughter by any provisions similar to N.Y. Pen. Law §§ 125.20(2), 125.25(1)(a).
67. N.Y. Pen. Law § 125.25(1) (emphasis added).
68. *See* 1 O. L. Warren and B. M. Bilas, Warren on Homicide §§ 92-100 (1914); Michael and Wechsler, *A Rationale of the Law of Homicide II,* 37 Colum. L. Rev. 1261, 1281-82 (1937).
69. *See* Weihofen and Overholser, *Mental Disorder Affecting the Degree of a Crime,* 59 Yale L.J. 951 (1947). *See also* Fisher v. United States, 328 U.S. 463, 476-95 (1945) (dissenting opinions of Frankfurter, Murphy, and Rutledge, JJ.).

in the first or second degree. However, since his *intent* is to effect death, his crime should be nothing short of murder. This view is consistent with that of the overwhelming majority of American jurisdictions which have rejected any other application of the diminished responsibility concept.[70] Since New York now has only one degree of murder,[71] the diminished responsibility concept should not be "read into" the defense of "extreme emotional disturbance." Rather, such "disturbance" should be judged by the objective standard followed at common law.

B. *Substance*

Under the former Penal Law, the temporary taking of a motor vehicle without the permission of the owner was deemed a larceny.[72] Since most of the vehicles so taken were obviously worth more than $100, the majority of these thefts constituted the felony of second degree grand larceny.[73] Therefore, most of these cases required prosecution by grand jury indictment. Typically, the defendant in these cases was a youth out for a "joy-ride." Consequently, the normal final disposition was a conviction and sentence under the Youthful Offender Law.[74]

The new law has at least enabled the prosecutor to cut short the indictment stage. In the absence of provable intent to permanently deprive the owner of his vehicle, and irrespective of the value of the car taken, the new law characterizes common "joy-riding" as a misdemeanor.[75] Youthful offender treatment, if warranted, can still be obtained in the lower courts where the range of alternative sentencing provisions is quite lenient and narrow, except for the possible maximum term of commitment.

Although the new provision is advantageous in that it saves time and manpower, its true value may better be measured by careful scrutiny of crime statistics. From January, 1968 to September, 1968, during which unauthorized use of a vehicle was a *misdemeanor*, a substantial amount of auto thefts took place in this writer's city of Schenectady. In fact, during the same period in 1967, when the crime was a felony, 50% *fewer* auto thefts were reported. For the 1968 period, there was a national overall increase over 1967 of only 22%.[76] However, in the seven cities of New York State having more than 100,000 people, there was an aggregate increase in 1968 of 38% over 1967.[77] Based on these few figures, it would seem that the deterrent effect of the law on auto

70. *See* H. Weihofen, Mental Disorder as a Criminal Defense 189-94 (1954).
71. *Compare* former N.Y. Pen. Law §§ 1044, 1046 *with* N.Y. Pen. Law § 125.25. *See* N.Y. Pen. Law § 125.25, comm'n staff notes.
72. Former N.Y. Pen. Law § 1293-a.
73. *Id.* § 1296(1). In many other cases, the vehicle taken was worth $500 or more. Therefore, such thefts became grand larceny in the first degree. *Id.* § 1294(3). Furthermore, regardless of the value of the car, if it was stolen "in the night time," first degree grand larcency could be charged. *Id.* § 1294(1).
74. N.Y. Code Crim. Proc., tit. VII-B, §§ 913-e—913-r (McKinney 1958).
75. N.Y. Pen. Law § 165.05.
76. *See* Uniform Crime Reports (Federal Bureau of Investigation pamphlet ed. 1968).
77. *Id.*

thefts has been significantly lessened by the new provision. If this trend continues, the change in gradation must be deemed a mistake.

The major substantive shortcoming of the new Penal Law is its treatment of sentences for violations. Under the present statutory scheme, the only alternative penalties for convicted violators are fines of up to $250,[78] incarceration for up to 15 days,[79] and a conditional[80] or unconditional discharge.[81]

Probation has been eliminated as a possible disposition under the new law. While the "conditions" which may be imposed for conditional discharge are the same as those which might have been imposed under a sentence of probation,[82] the experience has been that such conditions are not *self-executing*. Under a sentence of probation, a violator could be periodically examined to insure that he is complying with the conditions of his sentence. While the latter process creates a high probability that the offender will be completely rehabilitated, the same cannot be said for the conditional discharge procedure which includes no periodic examination.

Another serious fault in the new sentencing for violations is the lack of a provision for increases in punishment for repeated conviction for the same type of criminal conduct. The effect of this omission is graphically illustrated by the existing prostitution situation. The continually convicted prostitute faces a maximum of only 15 days imprisonment for each offense. In New York City, in 1968, there occurred a 27% increase in arrests for prostitutions over 1967.[83] In comparison to 1966, the last *full* year under the old law, there occurred a 70% increase in 1968.[84] On the basis of these statistics, it may be strongly argued that "one of the nation's most lenient laws" on prostitution[85] is fulfilling neither a deterrent nor a rehabilitative purpose. If the reason for this increase is indeed due to rearrests of the same offenders, recidivist provisions in the new law are mandated.

In the abstract, one may agree with the attitude of the revisers that, when an offense is not deemed to be grave enough to be a crime, a sentence of imprisonment is a "severe sanction" and "the term should be no more than a token that will serve as a deterrent in cases where a fine might be considered by the offender to be a tax or license fee."[86] However, in the case of recidivism, it is appropriate to focus upon control and rehabilitation of the offender. This cannot possibly be accomplished under the present sentencing scheme for violations. An increase in punishment for recidivism or a raising of the repeated offense to misdemeanor status is necessary. Such action would be consistent with a basic purpose of the new Penal Law:

78. N.Y. Pen. Law § 80.05(4).
79. *Id.* § 70.15(4).
80. *Id.* § 65.05(3).
81. *Id.* § 65.20.
82. *Id.* § 65.10.
83. *See* N.Y. Times, Jan. 27, 1969, at 1, col. 6.
84. *Id.*
85. *Id.*
86. N.Y. Pen. Law § 70.15, comm'n staff notes.

> To insure the public safety by *preventing the commission of offenses through* the deterrent influence of a sentence if authorized, *the rehabilitation of those convicted,* and their confinement when required in the interests of public protection.[87]

V. Conclusion

Despite the aforementioned shortcomings, the new Penal Law is a valuable and important contribution to the criminal process in New York. From a prosecutor's standpoint the new statute, on the whole, satisfies the two crucial considerations—administrative effectiveness and enforceability.

Basically, as to the first consideration, the new Penal Law has been found to be workable. The new statute contains precise definitions of crime which are nevertheless broad enough to encompass those forms of conduct which should be controlled through penal sanctions. Also, on the whole, the new law is free of "bugs" in the form of anomalies, inconsistencies and uncertainties. Finally, the new Penal Law can be easily applied and understood. This consideration is most important to law enforcement personnel since, based on the new law's provisions, they must draft charges and make hurried decisions which will withstand possible challenge in the courts.

As to the second consideration—enforceability—the new law is certainly of sufficient clarity. Jurors, who have received only a single exposure to the legalistic language of the new statute in the form of court instructions at the end of a trial, have nevertheless been able to follow and apply the new law with comparative ease. In addition to clarity, the new law, on the whole, provides sensible gradations of offenses. These permit jurors to choose among reasonable alternatives in arriving at a verdict and allow prosecutors to accept reduced charges. The latter procedure has become absolutely necessary because of the current prevalence of heavy caseloads and clogged criminal calendars.

Most importantly, in terms of enforceability the substance of the new Penal Law conforms to standards of justice in the community and thereby has gained the support of the public. Without such support, any codification and revision of the criminal law must fail as an instrument of social control. This is so because a penal law is only one element in the continuing process of criminal justice in a society. In this process, a penal law must interact at succeeding stages with other laws, notably, procedural provisions. However, its most crucial interaction is with people—the general public, the offender, the police, juries and judges.

A prime example of the latter interaction was the treatment of the justification provisions under the new law. Specifically, the provisions on the use of "deadly physical force" by the home occupant and police officer[88] caused a problem. As originally drafted, these sections were prolix and unclear. As a

87. *Id.* § 31.05(5) (emphasis added).
88. *Id.* §§ 35.15, 35.20, 35.30.

result, they were widely misunderstood and attacked both by law enforcement personnel and the general public. Undoubtedly, if these provisions had had to be applied to a particular case, they would have generated interpretative difficulties for the accused, the judge, and the jury. Consequently, and correctly, these provisions were substantially revised and reorganized by the 1968 New York Legislature.[89] Whether the changes made were merely as to drafting, or also as to substance, is not clear. It was believed that the original provisions prevented the policeman and the homeowner from using "deadly physical force" *in defense* in many dangerous situations. The 1968 revision has at least dissipated this belief, even if it was unfounded. Thus, the support of the public has been won and a high probability now exists that these provisions will be a significant instrument of social control.

It is apparent in terms of societal value, that it is abundantly important that the provisions of a penal law conform to the standards of justice in the community. Also significant is the simplicity, consistency, clarity and completeness of the law, since these factors will determine whether the law will enhance or detract from the promptness and efficiency of criminal justice according to the community standard. A question of much less consequence is whether a new Penal Law's abstract principles or doctrines are pure enough to cover the unusual problem, the rare set of circumstances which will undoubtedly arise. It is hoped that the latter consideration will not, as it has in the past, cause the New York Legislature to destroy the success of this new panel statute by the practice of piecemeal amendment. Such amendments may satisfy the needs of the moment or the demands of special interest groups. However, at the same time, they are likely to confuse the overall philosophy and destroy the internal consistency of the law.

89. *See* N.Y. Sess. Laws 1968, ch. 73, *amending* N.Y. Sess. Laws 1965, ch. 1030, art. 35.