

# Buffalo Law Review

---

Volume 18  
Number 2 *Symposium: New York's New Penal  
Law*

---

Article 1

1-1-1969

## Introduction

Herman Schwartz  
*University of Michigan Law School*

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>

---

### Recommended Citation

Herman Schwartz, *Introduction*, 18 Buff. L. Rev. 211 (1969).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol18/iss2/1>

This Symposium Introduction is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact [lawscholar@buffalo.edu](mailto:lawscholar@buffalo.edu).

## Introduction

FOR over 80 years, New York lived under a penal law created for the late 19th century. It was kept up to date by individual additions and subtractions which rarely had any relationship to each other and never to any rational overall scheme. As a result, our penal law was a mass of inconsistencies, archaisms, and irrationalities, with gaps and redundancies.

New York, of course, was not alone in this situation, and by the same token, New York is not the only state which is reforming its law. Indeed, New York's effort is part of what may fairly be called a great wave of penal law reform. Stimulated by the Model Penal Code of the American Law Institute, over half the states have recently undertaken revision of their penal codes. Among them all, New York's revision may well be the most significant. Not only is New York law generally looked to by other states, but the New York effort is probably the best-financed, and one of the few, if not the only one, with a full-time professional staff. This highly competent and experienced staff, under the leadership of chairman Richard Bartlett of the Temporary Commission and of Staff Director Richard Denzer, has put together a code which will probably be a model for many other states. Hopefully, the interviews and articles in this Symposium will be of use to others undertaking such reforms.

It should of course be understood that the substantive reforms are not radical: gambling, drug use, homosexuality, and similar victimless offenses are rationalized and restructured, but not really changed; New York's penalties remain extremely harsh; the Code still contains dubiously constitutional vagrancy provisions, now renamed loitering,<sup>1</sup> which afford numerous opportunities for police abuse and harassment.<sup>2</sup>

On the other hand, there are some quite significant improvements. The General Part contains a presumption against strict liability for misdemeanors and felonies; there is a good deal more flexibility in sentencing, and the barbaric Baumes law, which mandated heavy sentences for habitual felons regardless of the individual circumstances, has been replaced by a provision allowing the judge wide discretion; conspiracy has been limited to conspiracies to commit a felony or misdemeanor. Several other attempts by the Commission at improvement were either defeated in the legislature—*e.g.*, the attempt to repeal the prohibitions on adultery and on consensual adult homosexuality—or repealed after enactment—*e.g.*, the justification provisions.

The Commission's failures in these and other areas indicate part of the reason why a more thoroughgoing substantive reform was not achieved or even attempted. Another reason may be that at least part of the fundamental rethinking, primarily in the General Part, was accomplished through use of the Model Penal Code as a substantive guideline. One cannot help wondering, however, whether greater participation by academic lawyers and sociologists might

---

1. See N.Y. Penal Law § 240.35 (6) and § 240.35 (9) (McKinney 1967).

2. See W. LaFave, Arrest 354-60 (1965); P. Chevigny, Police Power 209, 222-35 (1969).

not have provided perspectives and outlooks not usually common among those who spend their lives in the day-to-day process. Of course, Columbia's Professor Herbert Wechsler was on the Commission, but that is not quite the same as having academic lawyers and sociologists steadily working with the staff on a daily basis.

It is nevertheless unlikely that political reality would have permitted more thoroughgoing reform. This may be a permanent situation and perhaps this is as it should be—many of the desired reforms are highly controversial and a package proposal may prevent adequate consideration of the individual provisions. Indeed, the Commission itself acted on this assumption in several ways: the insanity defense, consensual homosexuality and a few other controversial issues, like the right to resist an unlawful arrest, were presented separately, and their defeat did not endanger the rest of the package. On the other hand, when the clamor for a change in the justification provisions made it clear that legislation was inevitable, the Commission tried again with a provision prohibiting resistance to an unlawful arrest and this time it went through as part of a bigger package.

Where then can we expect really significant substantive law reform? As things stand at the moment, it depends on the subject: abortion reform may be legislatively achieved; other changes are however less likely. It may well be that in substantive criminal law, as in procedural law, the most significant hope for real change is with the courts, particularly the Supreme Court. So far the Court has tended to neglect substantive criminal law except for a few cases like *Robinson v. California*,<sup>3</sup> *Griswold v. Connecticut*,<sup>4</sup> and *Trop v. Dulles*.<sup>5</sup> If the Court will extend the due process and cruel and unusual punishment clauses of the Constitution to some of the gross injustices of our substantive law, like the current penalties for marijuana possession, capital punishment, and our grossly discriminatory gambling laws, truly fundamental reform of the substantive criminal law may result in the same way that it has in the procedural area.

Until that day, however, we must be grateful for what we have, and in the new Penal Law we have quite a lot—a rational, quite clear, easy to use, extremely well-drafted body of law, with some quite meaningful changes. Until the legislature starts to pick away at it—as it must if penal law is to keep pace with a changing society—this is a law with which we can all comfortably work. If we can somehow survive the community's current tendency to think the answer to social problems is more and higher criminal penalties—a perhaps predictable reaction by a violent society to something it can neither manage nor even understand—a future commission to revise the Penal Law may be able to undertake a more fundamental revision of the substantive law.

February 1969  
H. SCHWARTZ

---

3. 370 U.S. 660 (1960).

4. 381 U.S. 479 (1965).

5. 365 U.S. 86 (1958).