

NEW YORK CIVIL LIBERTIES UNION

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SHELDON ACKLEY, CHAIRMAN

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ALAN H. LEVINE, PAUL G. CHEVIGNY, BURT NEUBORNE, STAFF COUNSEL; NEIL FABRICANT, LEGISLATIVE DIRECTOR

January 31, 1969

Mr. Richard J. Bartlett, Chairman
Crime Control Council
100 State Street
Albany, N.Y. 12207

Dear Dick:

Enclosed herewith is a copy of the Legislative Memorandum which we will be sending up to the Legislature shortly. Harold Rothwax was to have testified before your Committee and was to have presented the views contained in the memorandum. However, he became ill rather suddenly and I couldn't fill in for him.

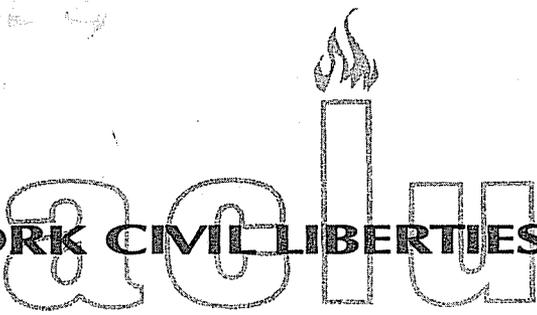
In any event, I think much of what is contained therein was presented to your Committee either in my previous testimony or through other sources. I certainly hope that it is not too late for you to consider some of the changes which we recommend, as we would like very much to support the proposed code together with a number of other groups with which we are in contact.

Very truly yours,



Neil Fabricant

NF:fb
Enclosure



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February 6, 1969

LEGISLATIVE MEMORANDUM #20

To: New York State Legislature

From: Aryeh Neier, Executive Director
Neil Fabricant, Legislative Director

Subject: Proposed Criminal Procedure Law

WE OPPOSE THE ADOPTION OF THE PROPOSED CRIMINAL PROCEDURE LAW UNLESS
IT IS SUBSTANTIALLY REVISED TO MEET THE OBJECTIONS OUTLINED BELOW.

The material below represents some aspects of the proposed Criminal Procedure Law which are seriously objectionable on civil liberties grounds. They by no means exhaust the objections which we have to the proposed code. In reports which the New York Civil Liberties Union will submit from time to time during the legislative session, other and equally serious deficiencies will be analyzed.

(See Following...)

Seems to insist on abolition of whole bail system. Sloughs off new bail forms on ground N.Y.C. court too busy - not important argt.

BAIL

Our most serious objection to the bail provisions contained in the proposed code is that they offer no significant improvement to a concededly archaic and unjust system.

Section 280.10 sets forth, in the following order, eight authorized forms of bail: (a) cash bail; (b) an insurance company bail bond; (c) a secured surety bond; (d) a secured appearance bond; (e) a partially secured surety bond; (f) a partially secured appearance bond; (g) an unsecured surety bond; (h) an unsecured appearance bond. The court may designate the amount of bail without specifying the form or forms in which it may be posted, in which case only the first four methods may be used. These require the posting of collateral to satisfy the face amount of the bond.

Ins Co. Bond?

The practical effect of the order of priorities listed above is to preserve intact the money-based system of pretrial detention. The chief characteristic of the New York City criminal court system is its staggering caseload. Arraignment proceedings are handled at breakneck speed with the arraignment judge arriving at his decision on bail within seconds. Although low-cash bail is an available alternative under the present system, it is infrequently used. In the vast majority of cases, the judge simply announces a sum and proceeds to the next case. Were he to do anything else, he could not complete his daily calendar.

Since 1964, the New York City office of probation has been screening an increasing number of defendants for parole (R.O.R.) and submitting written findings to the court. However, their recommendations for release involve only a tiny fraction of the total arraignment population, and even there only a relatively small percentage of their recommendations are acted upon by the court.

Given these courtroom conditions, the mere fact that the proposed Code authorizes several new forms of bail is unlikely to result in a significant reduction of the pretrial prison population. This is underscored by the fact that the order of priorities set forth above conditions release without security upon the affirmative exercise of judicial discretion. Unless the judge carefully considers the possible alternatives and selects one which does not require collateral, the defendant will be compelled to furnish a secured bond or cash. In an arraignment process in which: (a) the judge must

*Speaking
only of
N.Y.C.
Ct.*

decide whether to assign an attorney; (b) the charges are read to the defendant; (c) a decision is made whether to reduce the charge, hold a preliminary hearing or waive to the Grand Jury in felony cases; and (d) an adjournment date is decided upon, all in a matter of a minute or two, it seems safe to predict that the judges will continue to fix bail in precisely the same manner in which bail is set today.

Second, the first four "automatic" methods of posting bail are not meaningful alternatives. The secured appearance bond is defined as nothing more than a "bail bond in which the only obligor is the principal." A "secured bail bond" is one in which the security is furnished by "personal property which is not exempt from executions and which, over and above all liabilities and encumbrances, has a value equal to or greater than the total amount of the undertaking; or (b) real property having a value of at least twice the total amount of the undertaking."

Confused

*what
staying
is
wrong*

Bail bondsmen currently will often write bonds requiring less collateral than this provision would command. The proposed code therefore offers nothing more than the saving of a very small premium with the added burden of furnishing collateral in an amount not presently required. It seems fair to suggest that no defendant unable to post bond under present conditions would be able to do so under the proposed code.

*How
about
insurance
bond?*

Third, the present code authorizes the judges of the New York City Criminal Court to admit to bail any defendant regardless of prior record so long as the District Attorney is represented or has been notified. Notwithstanding the absence of evidence indicating that this discretion has been erroneously exercised in favor of defendants generally, the proposed code eliminates that discretion where the defendant has two prior felony convictions or is charged with a Class A felony. While as a practical matter few defendants so situated will be freed pending trial, there is no reason to eliminate the discretion to do so. Hopefully, the omission is inadvertent and will be corrected prior to passage.

*OK
now*

*Yes -
has
been*

Fourth, the proposed code carries forward a provision which requires fingerprinting in the more serious felony and misdemeanor cases (Sec.522-a) prior to the setting of bail. However, unlike the present Code, it prohibits the fixing of bail unless and until "(t)he Court has been furnished with a report of the New York State identification and intelligence system concerning the defendant's criminal record if any..." Presumably, in the event of a failure of communication or delay, the defendant will remain in jail.

*In
fcls.
only*

Fifth, Section 390.40(3) provides that only one bail application may be made to a superior court judge challenging the lower court's refusal to set bail or the fixing of excessive bail. This provision is particularly unfortunate since circumstances may and often do change during incarceration. Moreover, habeas corpus does not lie to exercise a de novo discretion, but only to reverse an arbitrary decision. ?

In New York, in previous years, all defendants who were incarcerated prior to trial for more than 48 hours would automatically have their status reviewed by a judge other than the arraigning judge. Many such bail reviews resulted in lower bail or parole. One important explanation for this is the fact that the arraigning judge, aside from being under severe pressure by the number of cases, is subject to more subtle pressures from the presence in court of complaining witnesses and the police officer. He often feels that parole of a defendant, even if there is no indication of flight, will seem too "soft" or too callous with respect to the complaining witness' grievance. An unhurried and automatic bail review in the absence of such pressures is valuable and should be restored in the proposed code. ?

PREVENTIVE DETENTION

The proposed code introduces into New York law a concept which until now has been almost universally regarded as an illegal consideration in the determination whether to set bail -- preventive detention. It does so, apparently, on the ground that because judges take this factor into account anyway, it ought to be candidly recognized, and because the practice "has the approval of the general public." To be sure, the revisers believe that such detention is necessary in many instances for the public protection.

Although this section of the proposed code does not on its face discriminate between the wealthy defendant thought to be dangerous and those who are poor, there is a de facto discrimination which works against the poor, with equally harsh results. Wealthy defendants (we use the term "wealthy" here in the broadest and most relevant sense: those defendants who are not indigent and who are able to post a reasonable amount of bail) are not likely to be accused of crimes which fall into the dangerous category; nor do they ordinarily confront the police in hostile relationships. The charges levelled against them are usually white collar crimes. Poorer defendants, on the other hand, tend to commit the majority of economic crimes involving an ascertainable victim more likely to be injured, and a forcible arrest. Even where the court suspects that a wealthy defendant represents a danger to society, it does not follow that the defendant will be held in preventive detention. Assuming that the defendant is able to make bail, it would seem that the State has gained nothing at the cost of authorizing the imprisonment of large numbers of poor people on the most speculative of grounds. The State has gained nothing because there is no reason to believe that an otherwise dangerous defendant will be rendered less dangerous simply because the bondsman requires greater collateral for his release. The condition under which the collateral is forfeited is simply the willful failure to return to court at the appointed time; the commission of other crimes is irrelevant. The net effect of this section, therefore, is to imprison the poor on dubious constitutional grounds and on even less tenable policy grounds.

When we consider that the proposed code authorizes a judicial finding of probable cause to hold a defendant in custody for Grand Jury action solely on the basis of hearsay or otherwise incompetent evidence, the preventive detention provisions take on an even more disturbing aspect.

Consider the following hypothetical: The defendant is accused of molesting a little girl. The girl, nine years of age, had identified him as her assailant three weeks after the event. She is the only witness. Fifteen years prior to the instant prosecution, the defendant had been convicted of statutory rape. The parents of the girl, as is most often the case, are understandably fearful of the harmful psychological effects of a court appearance and so they testify at the preliminary hearing that their daughter identified the defendant at a stated time and place as the man who had attacked her. The girl does not testify. The judge, on the basis of this testimony, holds the matter for Grand Jury action.

Turning to the standards set forth in the proposed code which would authorize preventive detention, we find that the defendant meets all of the qualifications. Although the prosecution's case is exceedingly weak, the defendant may well be detained for months solely on the basis of the evidence elicited at the hearing and on the ground that he is dangerous.

While we doubt that
~~Whether~~ preventive detention can ever be justified, clearly the procedures and standards under which such a determination may be made need drastic revision. The finding of dangerousness must be predicated on substantial, competent evidence tending to establish guilt of the particular offense and offering clear and compelling evidence that the defendant is, in fact, a dangerous person. A preventive detention hearing, even if one concedes the legitimacy of the concept itself, should be authorized only under rigidly controlled criteria. Given the highly unpredictable quality of the determination that a particular defendant, as opposed to others similarly situated, is likely to commit a dangerous crime while on bail, the hearing itself should be authorized only in cases where the defendant, by past record, has indicated a propensity toward violent crime, for example, the conviction of two felonies involving serious injury to the victims. Additionally, the crime with which the defendant is charged should be one of felony grade, involving violence.

Authorizing such detention under the loose standards set forth in the proposed code may well result in the detaining of defendants who for one reason or another have earned the enmity of the arresting officer, without regard to dangerousness. This is particularly relevant to the escalating hostility between ghetto residents and the police in which disorderly conduct complaints often result in dubious felonious assault and resisting arrest charges. The latter

are frequently dismissed in exchange for acknowledgment of guilt on the lesser disorderly conduct charge and no imprisonment is even imposed. Pretrial detention, under these circumstances, would be the grossest injustice. The proposed code should not open the door to that possibility by permitting a broad judicial discretion.

Moreover, there should be convincing evidence showing that other means of assuring the complainant's safety and the safety of the public at large are unavailable. These could include such methods as daily reporting to a probation officer, police guard or some other means of protection short of absolute detention.

It would be anomalous, indeed, if the Fourth Amendment, which prohibits the relatively brief detention of an arrest on less than probable cause, were to authorize the result reached in our hypothetical example.

PRELIMINARY HEARINGS

The proposed Criminal Procedure Law abolishes the preliminary hearing in misdemeanor cases and renders it far less meaningful in felony prosecutions by authorizing the admission of hearsay or otherwise incompetent evidence.

These revisions are, perhaps, the most critical in the entire Code.

The preliminary hearing serves several important functions. First, it weeds out unfounded or malicious complaints. A criminal trial is often expensive and always humiliating. To rely entirely upon the goodwill or the discretion of the prosecutor in selecting for prosecution only those complaints which are based upon sufficient evidence is wholly inconsistent with an adversary system of criminal justice.

Second, the elimination of preliminary hearings in misdemeanor cases works substantial injustice to those persons held in custody awaiting trial. Under the proposed system, an accused may be held for weeks upon the complaint of a police officer, or private citizen, without even a prima facie showing that the charge is not frivolous.

Lastly, an accused who is unable to post bail is under great pressure to plead guilty in the criminal courts. The entire system is geared to that inescapable fact. Unless the imprisoned defendant is afforded a prompt preliminary hearing, he is often forced to choose between the uncertain outcome of a trial preceded by days or weeks of custody and an immediate guilty plea and guarantee of lenient sentence.

For those who are in fact guilty, the system sometimes works to their advantage; however, there are undoubtedly scores of innocent defendants who, if unable to secure immediate release at the conclusion of a preliminary hearing, will elect to plead guilty. For these reasons, the New York Civil Liberties Union strongly opposes the elimination of the preliminary hearing and urges, instead, that the present provisions -- often circumvented -- be strengthened to assure every defendant a prompt, judicial determination of probable cause prior to trial.

ignores fact that you rule in state law always been no judicial hearing

We can't afford prelim hearings for munda - old dead et systems

With respect to the receipt in evidence of incompetent or otherwise inadmissible material, we question the necessity for such a broad and potentially mischievous provision. Experience has not demonstrated significant hardship upon the prosecution in producing competent and relevant evidence at the hearing stage. The varied purposes of the hearing are not served by permitting, without qualification, hearsay testimony to provide the sole basis for the incarceration of the accused pending grand jury action. At the very least, the provision should be amended to require some showing of necessity before such evidence is received.

Real cause suffic in other
jurisdiction, even for inlt
sometimes. How many times
should people have to estab
prima facie case

GRAND JURY

The New York Civil Liberties Union, in the past, has taken the position that the Grand Jury system should be abolished. Recognizing, however, that such action must result from constitutional amendment rather than statutory enactment, we will address ourselves to the specific provisions of the proposed code which, in our view, raise serious civil liberties concerns.

Not an adversary proc., but a screening process - necessary often times.

Section 95.25 lists the persons who are authorized to attend grand jury proceedings. Omitted from the list is counsel for the witness. This is traditional, of course, but there is no justification for continuing the practice. The stated rationale for grand jury secrecy is the desire to permit a witness to testify free from the fear of retribution, the desire to protect innocent persons under investigation but not indicted, and the avoidance of flight by an accused who discovers the fact of an investigation prematurely. None of these purposes are furthered by barring counsel for a witness from attending the proceedings.

Section 95.40 works important changes in the law governing compulsion of evidence and immunity of witnesses who testify before a grand jury. We are in basic agreement with respect to eliminating the elaborate ritual required by Section 2447 of the former Penal Law, and the vast area of uncertainty created thereunder. However, we have several specific objections.

could help. sections have nothing to do with this

Section 95.40 compels the witness' testimony regardless of his belief that it may incriminate him. Immunity is provided for in the latter situation. Apparently, however, the witness may not decline to answer on grounds of privilege not covered in the self-incrimination context. We think that privileged relationships, such as husband-wife, doctor-patient, and lawyer-client ought not to be prejudiced by compulsory testimony in grand jury proceedings. The reasons which underlie the granting of the privilege in the trial of an action apply with equal force to grand jury proceedings.

wrong

Section 95.50, dealing with waivers of immunity, seems deficient in two important respects: (a) the warnings required under paragraph 3 are inadequate. They should include the full Miranda warnings so as to insure a voluntary and knowledgeable waiver; (b) the limitation upon withdrawal of the waiver contained in paragraph 4 is unnecessarily restrictive and may well be unconstitutional.

CPL protects witnesses much more than CCP. Claim seems to be that rejection should occur because not as far as they'd like

*This is open question -
CPL does not, any more than
CCP, preclude wit who has
signed waiver from changing mind.*

A witness who has not been granted immunity should be able to refuse to answer questions in the event that he decides at some point that he may incriminate himself by his answers. The execution of the waiver of immunity does not irrevocably waive the privilege against self-incrimination. Clearly, a suspect in a station house interrogation need not continue with a full confessions simply because he has made several admissions. Neither an implied nor express waiver could work such a result, and there seems little reason to suggest a different result in the grand jury situation.

Section 95.65 states the standard for determining whether there is sufficient evidence to indict a defendant for a crime. Section 251 of the present Code provides that "the grand jury ought to find an indictment, when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury." This standard is a clear one and serves as at least a partial guarantee that no person shall be subjected to trial unless the district attorney has first established all of the elements of a crime by competent evidence. This guarantee is superior to the protection afforded in the federal court where a person may be indicted upon hearsay and without a legal case. The proposed statute states that the grand jury may indict when "the evidence before it is legally sufficient to establish that such person committed such offense" and "such that the grand jury is satisfied that there is reasonable cause to believe that such person committed such offense." The staff comment indicates that there is no intention of changing the standard from that provided in the old statute. However, in view of the importance of the guarantee contained in the present Section 251, there is no reason why that language ought to be abandoned.

*Confusion
Standard
Suppose
it
Testifies
all of
ev
cant
be
"unex-
plained
and
uncon-
tradicted"*

How should we proceed with this case + what should we do

Section 95.80 provides that where a person has been held to await the action of a grand jury and more than 45 days have passed without the occurrence of any grand jury action or disposition, the court must order his release unless the lack of grand jury disposition was due to the defendant's request or consent, or unless the People have shown good cause why the defendant ought not to be released. The present law provides that within 24 hours after the discharge of any grand jury the court shall cause the release of every person confined in jail who shall not have been indicted unless satisfactory cause shall be shown for his further detention. In the City of New York, grand juries are normally discharged at the end of the term, which lasts one month. Therefore, this statute would lengthen the time in which the defendant may be held.

Proposed

*CCP § 222-d - an archival section apparently requiring
r.o.r. of everyone in jail w/ "24 hrs after discharge of
any g.j. "unless satis. cause shall be shown for further detention."*

piddling point

Section 105.20, governing the requirement of the defendant's appearance for arraignment upon the indictment, provides that if the defendant has never been held by a local criminal court for the action of the grand jury with respect to the offense charged in the indictment, the superior court must issue a bench warrant for his arrest. A summons is authorized only in the case of a misdemeanor. Where the defendant does not present a substantial risk of non-appearance, there is no reason why the court should not be given the discretion to employ the summons method, even in felony prosecutions.

Section 105.50 governs the procedure on motions to dismiss indictments for insufficiency and for inspection of grand jury minutes. Inspection of grand jury minutes by defense counsel is a rare occurrence under the prevailing law. This proposal would eliminate altogether the court's discretion to permit counsel to examine the minutes in connection with a motion to dismiss. There is no suggestion that the discretion to permit examination has been abused. Undoubtedly, in the relatively few cases in which it has been permitted, counsel was able to persuade the court that the circumstances of the case warranted such inspection. The Bill of Rights, contained in the rejected State Constitution, provided for either a preliminary hearing or inspection of the grand jury minutes.

Should not be advisory procedure

The proposed code reflects quite a different philosophy. When we consider the proposal to water down (and in misdemeanor cases to abolish) the preliminary hearing, the effectiveness of defense counsel at the crucial pretrial stage is seriously prejudiced. Moreover, paragraph 6 withdraws appellate review of the order sustaining the sufficiency of the indictment so long as legally sufficient evidence is produced at trial. This paragraph effectively removes the last sanction against a prosecutor who obtains an indictment without sufficient evidence. Having first placed the prosecutor in the grand jury room as the only lawyer, having then continued the practice of presuming every indictment to be founded upon legal evidence (see *People v. Howell*, NY 2d 672), having abolished the court's discretion to permit counsel to see the grand jury minutes, this provision would then uphold a conviction predicated upon an invalid indictment so long as the trial evidence was sufficient. It would seem, therefore, that the danger of unfounded prosecutions is thus heightened beyond any countervailing consideration of expediency or public policy.

Nitzberg

*May well accrue to
dt's benefit*

TITLE T PERPETUATION OF TESTIMONY

Title T generally restates, with various clarifications of existing law, the procedures to be followed in preserving and using testimony of persons who may be unable to appear as witnesses at subsequent criminal proceedings "by reason of death, illness or incapacity," or when such witnesses "cannot with due diligence be found within the state." Procedures are also set forth by which the recorded testimony of out-of-state witnesses can be obtained for future use.

The major due process issue here is that of the defendant's right "to be confronted with the witnesses against him" (U.S. CONST. arts. VI & XIV; N.Y. CONST. art. I, sec. 6). The right of confrontation is satisfied only when the defendant has a full opportunity to cross-examine the witnesses against him. Thus, even where a witness appears personally at trial, it is unconstitutional for the court to curtail defendant's questioning of the witness so as to preclude meaningful exploration of relevant issues. In this context at a criminal trial it is impossible to "confront" a missing witness with crucial issues that were not known at the time the testimony was preserved. For example, newly discovered facts tending seriously to impair the credibility of the absent witness are lost to the usual opportunity for intensive cross-examination at trial. Meaningful cross-examination of a witness often revolves around substantive issues of fact adduced for the first time through other witnesses upon the trial. Recorded testimony cannot be sufficiently tested at trial under those circumstances.

Title T provides for notice and representation by counsel at the time of the conditional examination. However, there is no clear indication that its draftmen intended to include or did include a sufficient mechanism by which a defendant at trial can challenge the constitutionality of recorded testimony on grounds of the lack of full opportunity for confrontation. Section 355.20 speaks only of the court's inquiry to determine whether personal attendance of the witness was genuinely precluded and allows for a defendant's objections to recorded testimony "which he would be entitled to register if the witness were testifying in person." The language in question appears to contemplate evidentiary objections but not constitutional objections going to total exclusion of the recorded examination. As in the case of pretrial motions to exclude evidence obtained in violation of Fourth, Fifth and Fourteenth Amendment rights, the new law should specify a similar procedure by which the constitutionality of recorded testimony can be tested prior to its presentation to the trial jury.

*Such an objection obviously could
be made at trial.*

*Says nothing of fact
CCP extends mat. wit
benefits to dtb - which
CCP does not do (9619-b)*

*Supp. wit held
for ct charged with
murder? 6 mo?
1 yr?*

MATERIAL WITNESS

Article 330, providing for the detention of material witnesses, makes no basic change in the New York law. It authorizes the detention of witnesses whenever the prosecutor is able to establish by a preponderance of the evidence that there is reasonable cause to believe that a person possesses information "material to the determination" of a prosecution and "(w)ill not be amenable or responsive to a subpoena at a time when his attendance will be sought."

Our fundamental concern is not with the specific procedural defects contained in the article, although there are several which we shall discuss more fully below, but rather with the notion that the State may hold in custody, for any reason, persons neither convicted nor accused of criminal conduct.

We have no quarrel with the principle that each citizen has an obligation (absent certain well established privileges) to attend court proceedings and to divulge relevant information when called upon to do so. At issue is the appropriate method of enforcing that obligation.

The State has at its disposal a number of methods to compel the testimony of reluctant witnesses. Chief among these is the subpoena power and the attendant power to punish for contempt. This is an after-the-fact remedy; that is, the witness has already proven uncooperative. He has violated his obligation to give testimony. Accordingly, the State has at least an arguable right to exert pressure to compel the witness to divulge whatever information he possesses. If the witness flees the jurisdiction, he may be returned under an interstate compact to which New York and most other states are signatories. Again, this procedure is predicated upon a demonstration of the witness' uncooperativeness. Our opposition to the concept of detaining material witnesses runs only to the assumption of power to detain innocent persons on the speculation that they will not meet their obligations as citizens.

While we recognize that the elimination of the right to detain witnesses may result in a loss of testimony and a resultant failure of some prosecutions, on balance the gain in terms of personal freedom far outweighs the inability to prosecute a small number of offenses.

material

In taking this position, we have in mind not only the fundamental principle alluded to above -- that persons not charged with specific criminal offenses should not be imprisoned -- but, in addition, the recurring abuses of the power to detain. Once the power itself is conceded, the abuses are virtually impossible to curb.

Briefly summarized, these abuses include:

the all too frequent detention of persons under the guise of material witness orders whom the prosecutor merely suspects are involved in criminal activity.

the ease with which prosecutors obtain such orders on evidence which would not sustain findings of probable cause;

the anomaly of incarcerating indigent witnesses, unable to post bail, while permitting the defendant to be free of custody;

the excessive periods of detention, sometimes for as long as a year.

Even accepting the concept of detention, however, the procedures contained in Article 330 should be revised to include the possibility of securing a witness' deposition on notice to opposing council and release subsequent to the taking of such deposition. The suggested procedure might be patterned after the Rule 15a of the Federal Rules of Criminal Procedure which provides as follows:

"If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the Court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed, the Court may discharge the witness."

Moreover, the proposed code fails to set a maximum period of detention. It seems grossly unfair to authorize, by omission, an open-ended detention, especially in light of the notorious calendar delays, and ordinary motion practice which may involve months of litigation prior to trial.

Under Rule 46h of the Federal Rules of Criminal Procedure, the United States attorney must submit a written statement explaining why all persons detained as witnesses for a period in excess of ten days "should not be released with or without the taking of their deposition pursuant to Rule 15a."

While the Federal Rule is permissive, some states have gone so far as to require the release of a witness after his deposition has been taken. (See, for example, Wyoming Constitution, Article I, Section 12.)

Lastly, Section 330.50(d), authorizing proof of the material facts in issue (i.e., probable unavailability and possession of material information), through the use of otherwise incompetent evidence, opens the door to the possibility of widespread prosecutorial abuse and to serious constitutional error. Given the fact that the prospective detainee is not charged with a crime, yet may be incarcerated for long periods of time, it seems that the section should provide for more stringent limitations upon the nature and quality of the evidence elicited at the hearing.

ACCOMPLICE TESTIMONY

Section 30.70 of the proposed code does away with the long established rule requiring corroboration of accomplice testimony -- the New York Civil Liberties Union opposes the elimination of the corroboration requirement.

Although the federal rule does not require corroboration, the Supreme Court has long recognized the inherent untrustworthiness of accomplice testimony:

"...the evidence of such a witness ought to be received with suspicion, and with the greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses. In many jurisdictions such a man is an incompetent witness until he has been pardoned." Crawford v. United States, 212 U.S. 183 (1909)

The underlying rationale for the corroboration requirement has ample pragmatic support. One who is offered leniency or immunity for his own criminal conduct in exchange for damaging testimony against another has a strong motive to perjure himself. When the subject crime involves only the two participants and is highly secretive, for example, bribery, it is virtually impossible to establish the accomplice's perjury.

In the more public type of crime -- robbery, burglary, etc. -- the prosecutor is almost always able to secure the required corroboration, thus obviating the necessity to rely solely upon uncorroborated accomplice testimony.

Essentially, we are engaged here in a balancing of competing societal interests. On the one hand, the elimination of the corroboration rule will add some undetermined degree of risk that innocent defendants will suffer convictions based upon perjured testimony elicited from men who are highly motivated to lie. On the other hand, some defendants -- we contend few -- will go free because the prosecution is unable to secure that extra bit of corroborative evidence necessary to convict under the present rule. We submit that the balance should be struck in favor of the innocent even at the risk of permitting a few guilty men to go free.

*Recent Ct. of App. decisions
Poe v. Beldern
Rosenberg*

JURY TRIALS

New York City is one of the few remaining jurisdictions in which the right to trial by jury is unavailable to an accused charged with other than a petty offense. We read *Duncan v. Louisiana*, 20 L ED 2d 491 (1968) as mandating such trials in misdemeanor prosecutions in which the permissible punishment is more than six months.

Whether we are correct in that interpretation will no doubt be resolved by the Supreme Court in the near future. However, we need not rely upon the compulsion of Duncan to support our position. We find the following excerpt from Justice White's majority opinion in Duncan a compelling statement of principle:

"The guarantees of jury trial in the Federal and State constitutions reflect a profound judgment about the ways in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action.

"Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizens to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States."

In almost all criminal cases, the law enforcement agencies are the complainants. In an increasingly large class of cases involving possession of contraband or illicit traffic, there is no 'victim' in the traditional sense, and law enforcement agencies are the sole source of evidence.

Under such circumstances, the position of the judge acting alone is difficult. In the majority of cases which come before him, the judge comes to rely upon the word of a law enforcement officer to establish guilt. The officer is as much a part of the administration of justice as is the judge. In the long run, the judge is loath to believe that an officer is lying, or that he has obtained evidence improperly. It is natural for the judge to entertain an "official bias" however much he may try to overcome it. In a situation where the enforcement of law is increasingly a purely police matter, that bias, subtle though it is, assumes special importance. The importance of the jury, as a neutral fact-finding body, increases as the tools of official law enforcement become more powerful. As law enforcement becomes more efficient, then, in this age of 'sumptuary' laws governing public conduct, the jury becomes an indispensable balance against official abuse.

At the recent Constitutional Convention, a limited right to trial by jury was incorporated in the proposed Bill of Rights. During the debates on that bill, not a single delegate argued on principle that jury trials ought not be granted in misdemeanor cases. The sole argument in opposition was one of expediency (i.e., "our courts are too crowded"). In an appendix to this statement we have annexed a statistical study presented to the Joint Legislative Committee to Study Administration of Justice, and yet to be rebutted, which demonstrated that jury trials are indeed feasible in New York City. We do not, for one moment, mean to suggest that our position turns on whether or not jury trials are practical. If necessary, the State is obligated to construct additional facilities to implement this fundamental constitutional right. We think, however, that the extravagant claims of law enforcement representatives regarding the chaos which such a provision will bring about are dispelled by the study, and we commend it to you for that reason.

*All this proceeds on
premise that there should
be trial to determine
sentence.*

SENTENCING

The sentencing procedure contemplated by the proposed code is substantially as follows:

- (a) the submission of a confidential pre-sentence report (200.20);
- (b) defendant's submission of a pre-sentence memorandum setting forth "any information he may deem pertinent to the question of sentence." (200.40);
- (c) a pre-sentence conference on the court's discretion chiefly for the purpose of resolving any discrepancies between the pre-sentence report, or other information the court has received, and the defendant's pre-sentence memorandum. (205.10).

The pre-sentence report, probably the most important factor in the sentencing process, may not be seen by the defendant, absent specific authorization from the sentencing court. Thus, the right to confront and controvert the material in the report is contingent upon counsel's skill in anticipating its contents, marshalling evidence in rebuttal and hoping that the court will permit a conference to resolve the contradictions.

This procedure is fundamentally unfair. It not only undercuts counsel's ability to effectively represent the accused at the most critical stage of the criminal process, but it reduces to a matter of judicial discretion the constitutional right to be sentenced upon accurate and relevant information. (Townsend v. Burke, 334 vs 736 (1947); Kent v. United States - U.S. - (1966).

Whether disclosure of the pre-sentence report is a constitutional imperative remains an open question. (See e.g. Williams v. New York, 337 vs 241 (1949) and discussions of the holding therein in Rubin, The Law of Criminal Correction, 98-9 (1963); Note, 58 Col. L. Rev. 702, 713-14 (1958).

Most commentators and a number of jurisdictions agree, however, that as a matter of policy, the contents of such a report ordinarily should be made known to the defendant. So, for example, the President's Commission on Law Enforcement and Administration of Justice recommends:

"In the absence of compelling reasons for nondisclosure of special information, the defendant and his counsel should be permitted to examine the entire presentence report." (The Challenge of Crime in a Free Society at p:45)

One commentator has described defendant's position at sentence as follows:

"The most anomalous situation exists wherein a sentence based on erroneous information is violative of due process, but it is possible to find out what the sentence was based on where the practice is to enshroud the presentence report in secrecy." (Higgins, Confidentiality of Presentence Reports, 28 Albany L. Rev. R, 27 (1964).

See also: State v. Harmon, 147 Conn, 125, 157 A. 2d 594 (1960); Driver v. State, 201 Md. 25, 92 A. 2d 570 (1952); Smith v. United States, 238 F. 2d 925 (5 cir, 1956). American Bar Association, Standards Relating to Sentencing Alternatives and Procedures, Sec. 4. 4.(b), pp. 214-224; Model Penal Code Sec. 7.07 (5).

The unfairness of refusing to disclose the contents of the presentence report is compounded by the fact that it accompanies the defendant wherever he goes. By its terms, section 200.50 requires its submission to courts, probation departments, and state agencies which subsequently acquire "jurisdiction" over the defendant. A "parole or public institutional agency" outside the state, upon request, may also receive a copy of the report. Accordingly, a defendant who has been once prejudiced by an inaccurate report (in that he may have received a more severe prison sentence) may in other contexts be prejudiced for the rest of his life without ever being apprised of the fact that a report containing damaging allegations against him has become part of his "official record."

Moreover, assuming that the original sentencing court has held the conference contemplated under section 205.10 and has resolved the factual disputes arising therein in the defendant's favor, section 200.50 would nevertheless authorize the transmission of the original presentence report found inaccurate by the court.

When we consider the scope of the inquiry authorized under section 200.30 (the defendant's social history and personal habits are to be examined), the oppressiveness of the entire statutory scheme is readily apparent.

We recommend the following revisions:

- (a) absent a showing of compelling reasons for nondisclosure, the defendant should receive a copy of the presentence report within a reasonable time prior to sentence;
- (b) the defendant should be afforded an opportunity to rebut allegations in the report which he claims are inaccurate;
- (c) upon a prima facie showing by the defendant, the court should either conduct a hearing with respect to the matters in dispute, or failing that, should direct that the contested allegations be expunged from the report as unproven.

Finally, we question the wisdom of what is apparently a blanket authorization to furnish these reports, corrected or otherwise, to other agencies of government. Much of the information contained therein is (a) hearsay, (b) relevant for the purpose of sentence, but wholly irrelevant to the legitimate purposes of other governmental agencies, (c) elicited from the defendant under a de facto compulsion and (d) often stale and untrue at the time of transmission due simply to the passage of time between compilation and release.

Even under a procedure which guarantees accuracy at the time the report is submitted, it seems to us that the factors outlined above should compel a much narrower disclosure policy than the one contemplated under section 200.50. Given the procedure provided for in the proposed code, these factors seem all the more compelling. Section 195.50 provides that the court may summarize the reasons for the sentence it imposes. We suggest that the provision be made mandatory in any case in which a presentence report is required. (The Model Sentencing Act, Sec. 10, provides as follows: "The sentencing judge shall, in addition to making the findings required in this act, make a brief statement of the basic reasons for the sentence he imposed.")

One of the striking characteristics of our system of criminal justice is the wide discretion accorded the sentencing judge. His range of choice with respect to sentencing is virtually unreviewable. However, given the fact that a presentence report is envisaged for the more serious offenses, presumably the revisers intend that the sentence imposed be consistent with the nature of the crime and the character of the defendant, as suggested by the evidence before the judge.

Disparity is to some extent unavoidable if judges are to have some discretion in meting out punishment. However, the proposed code should at least attempt to limit the exercise of judicial discretion to relevant sentencing criteria.

It makes little sense to require a comprehensive presentence report designed to promote an intelligent sentencing decision and at the same time to permit the court to impose sentence without requiring even a minimal assurance that the relevant criteria are being employed. See, *People v. Jackson*, 21 AD 2d 843, 2 JO N.Y.S. 2d 831 (1964).

Section 210.10 provides for revocation of probation upon "(c) omission of an additional offense...." We suggest that this section be amended to require either "conviction" or at the very least "substantial proof" of an additional offense as a precondition to revocation.

*N.Y. Court. limits et. of App. to
Questions of Law. CPL loosens
this up by loosening up
what is question of law
§ 240.10 - § 470.05*

APPEALS

Appellate procedure does not ordinarily present serious civil liberties issues. However, there are several provisions of the proposed code which may be of some concern in individual cases.

Section 230.80 -- Appeals to court of appeals from order of intermediate appellate court; in what cases authorized.

The qualifications upon the jurisdiction of the court of appeals set forth in this section are, it seems to us, unnecessarily restrictive. To limit jurisdiction by authorizing appeals only in cases where reversal or modification was "on the law" prevents the court from granting leave even in cases where constitutional error may have occurred, but where counsel failed to adequately object. As a result, the defendant is unduly penalized for the errors of his attorney and the appellate division becomes the court of last resort in cases involving substantial issues. Since the court of appeals limits its caseload by limiting the number of certificates it grants, this further limitation upon its jurisdiction serves no positive function and should be eliminated.

*"on the law" complex "P"
See new § 460.30 - extends a bit*

The proposed code does not provide for late filing of a notice of appeal to the appellate division under any circumstances. The first and second departments, by court rule, obligate trial counsel to advise the defendant of his right to appeal and of his right to poor-person relief. The attorney is further required to file a notice of appeal if requested to do so by the defendant. However, the rules do not provide for relief from the attorney's negligence. The latter's failure to file a notice of appeal is a complete bar to appellate review unless the defendant is able to establish either that he was prevented from timely filing of the notice because of an affirmative act of a state official (e.g. prison authorities fail to mail the notice) or that he was insane during the thirty day period.

*Maybe
word
"neg"
could
be
used*

Some states authorize late filing for periods ranging from 30 days (federal) to 1 year where the appellant can establish "good cause" or "excusable neglect". The present New York law is unduly restrictive and should be amended along the lines suggested above.

Section 235.30 et seq. deal with the stay of judgment pending the appeal. These provisions are of no value unless bail is set. If the judgment is stayed and the defendant remains in jail because he is not entitled to bail, he does not receive credit for that time in the event his conviction is affirmed. The only reason to provide for a stay is to

avoid the accumulation of time served on the defendant's sentence while he is actually free on bail. We suggest that the sections be eliminated in their entirety and a stay granted automatically whenever bail pending appeal is granted and the defendant actually released.

That's what sections do
- see new §§ 460.50, 460.60. -
stay doesn't start until
it is released. - same
in blue book (§§ 235.40, .50)
Writer confused here.

CONCLUSION

This memorandum has dealt solely with some aspects of the proposed code which, it is felt, are in need of serious revision.

There are several reforms contained in the proposed code which merit praise, most notably the provisions relating to appearance tickets.

Expressions of approval with respect to these provisions will be forthcoming, no doubt, from a variety of sources. However, the need for reform is so great and the failures of this proposal so serious that the critical approach is taken here in the hope that the needed revisions will be incorporated before the proposal now before the legislature becomes law.

STATISTICAL ANALYSIS
OF THE
FEASIBILITY OF JURY TRIALS IN
MISDEMEANOR PROSECUTIONS

We had always suspected that the opponents of trial by jury had innocently but grossly overstated the difficulties involved in providing jury trials within the city. In analyzing the relevant statistics for presentation at the Constitutional Convention we were astonished to discover just how great was that overstatement.

In 1967, the most recent year for which statistics are available, there were 14,064 misdemeanor trials in New York City, exclusive of traffic misdemeanors which accounted for another 2,427 trials, a total of 16,491 trials.

As part of a study recently completed for the Criminal Law Bulletin, a questionnaire was sent to every Legal Aid and/or Public Defender agency in the 25 largest American cities to determine the actual proportion of misdemeanor cases which were actually tried by a jury and the average length of time which such trials involved. In that way, we would have a realistic basis upon which to project the extent of the administrative burden in granting trial by jury here in New York City. The percentage of misdemeanor cases actually tried by a jury varies from city to city, but in no major city is the percentage very large.

In Columbus, Ohio, less than 5% of misdemeanor trials are tried by a jury.

In Philadelphia during 1967, there were only 124 jury trials out of a total of approximately 8,000 trials, or about 1½%.

In Minneapolis only 5% of misdemeanor trials are tried by jury.

In Pittsburgh the estimate was about 5%.

In the District of Columbia about 15% to 20% of non-felony trials involving potential sentences of more than 6 months imprisonment were tried by a jury. In cases involving potential sentences of less than 6 months, the estimate was between 5% and 10%.

In San Diego, California, about 30% of misdemeanor trials were tried by jury in cases involving sentences of more than six months imprisonment. The percentage dropped, however, to less than 6% in cases involving sentences of less than 6 months.

In San Francisco, during the fiscal year July 1, 1967 to June 30, 1968, out of more than 21,000 cases, there were only 1922 demands for a jury trial and of those only 43 were actually tried by jury.

In Los Angeles, previously published statistics indicated that only 11% of non-felony criminal trials were jury trials, although preliminary results of our study indicate that the percentage may now be considerably higher, and possibly even as high as 30%.

Thus, the percentage of misdemeanor trials that are tried by jury seems to vary from about 2% to as high as 30%, with the great bulk of cities reporting percentages in the range from 5% to 15%. Let us assume that in New York City the percentage would be relatively high, say 25%. Since there were 16,491 misdemeanor trials in New York City during 1967, that would mean approximately 4200 (25% of 16,491) trials would be jury trials.

How much extra time would it take to convert these 4200 non-jury misdemeanor trials to jury trials?

Nonjury misdemeanor trials do not, on the average, consume more than one hour. A survey of criminal lawyers, judges and prosecutors taken by the New York Civil Liberties Union, again for presentation to the Constitutional Convention, yielded a wide range of estimates as to the time that a misdemeanor jury trial would take. Eliminating the extreme estimates on either end, the vast majority of those surveyed felt that the average trial would take from three hours to one day of judicial time. The actual working day for most criminal court parts is about 5½ hours. Thus, the majority estimate is between 3 and 5½ hours.

Several judges put it differently. They felt that a jury trial for misdemeanors would take about three times as long as a nonjury trial. Since nonjury trials average one hour, jury trials could be expected to take three hours. That compares with the lower end of the higher range (three to five and one half hours) estimated by the majority of those surveyed in New York.

In the 25 largest cities where misdemeanor jury trials now exist, the time estimate was fairly consistent. Almost all cities reported that non-felony jury trials took about one day. Translated into hours, jury trials in misdemeanors appear to take from 3 to 6 hours in most American cities. When combined with the estimate of 3 to 5½ hours by many New York lawyers and judges, we get a combined range of 3 to 6 hours as an estimate of the time it would take to have a jury trial in misdemeanor cases.

Let us assume that misdemeanor jury trials would take 5 hours as compared with only one hour for nonjury trials. Thus, each time a nonjury trial is converted into a jury trial, four extra hours are required. Assuming 4200 such conversions a year, about 16,800 extra work hours would be needed.

If jury trials were available, however, the need for three-judge courts would be eliminated and more judicial time would be released. This factor would reduce the number of additional hours needed for jury trials. But by how much?

In Brooklyn Criminal Court, three-judge courts meet 232 days a year. In the Bronx, three-judge courts meet 176 days a year. In Queens, they meet 156 days a year; in Manhattan, 260 days; and in Staten Island, 10.

Thus, three-judge courts in New York City meet for a total of 834 work days a year. Assuming 5½ work hours for each work day, three-judge courts meet for 4,587 work hours each year. But since there are three judges, each spends 4,587 hours a year sitting on three-judge courts. If jury trials were available and three-judge courts eliminated, then 9,174 (4,587 x 2) hours of judicial time would become available.

Since jury trials for misdemeanors would require 16,800 additional hours, it follows that 9,174 hours of that requirement could be met by the time released through the elimination of three-judge courts.

Thus, only 7,626 additional hours would be required to institute jury trials for misdemeanors. Assuming each judge works 5½ hours in court for 240 work-days per year, each judge works 1,320 hours in court per year.

If each judge works 1,320 hours in court, and 7,626 additional hours are needed, then no more than 6 additional judges would be required.

Conclusion

At each stage of our analysis, we have erred on the high side of the critical estimates. We have assumed that fully 25% of misdemeanor trials would be tried by jury if jury trials were available, even though virtually all major American cities report smaller percentages. We have included more than 2,400 traffic misdemeanors in our base figure even though many cities exclude traffic cases from their statistics. We have assumed that jury trials would take 5 hours as compared to one hour for nonjury trials, even though most New York lawyers do not think the difference would be quite that large.

Nonetheless, our results show that only six extra judges would be needed to absorb the additional burden of time that would result if jury trials were available in New York City for misdemeanors.

Finally, this entire analysis was done without taking into consideration the recent addition of 20 judgeships in the New York City Criminal Court. Thus, if only one third the number of judges that will be added during 1969 were available during 1967, jury trials for misdemeanors could have been established in New York City.

Although one may quarrel with one or another of the estimates cited above, we would respectfully submit that the overall picture as reflected in the statistical data presented here is a fairly accurate reflection of what the New York City experience would be should the Legislature determine to extend the right to trial by jury. Nothing very startling would occur; chaos would not result; and the wheels of justice would not grind to a halt as some would have us believe.

We have already discussed the underlying principles which make the jury so vital to our system of criminal justice. We would simply add, in closing, that the system as presently constituted is almost a burlesque of due process of law. An unavoidable carnival-like atmosphere prevails in which judges are compelled to make split-second decisions vitally affecting the lives of those who stand before them. At a time when our judicial system is under extraordinary pressure and faith in the legal process as an instrument of social justice is rapidly diminishing, this city can no longer afford to tolerate a court system which compels disrespect and disillusion.

Apart from any other reason heretofore urged upon you, we believe that a jury system in our criminal courts is necessary because the presence of such a body will lend an important element of dignity to a court which needs it.