

Minutes of the Meeting of the Temporary Commission on
Revision of the Penal Law and Criminal Code, held at the
Commission's Offices, 155 Leonard Street, Room 654, on December
8, 1961, at 10:45 A. M.

PRESENT:

Richard J. Bartlett, Chairman

Timothy N. Pfeiffer, Vice-Chairman

William Kapelman, Secretary, also representing Anthony J. Travia,
Minority Leader Assembly
Justice Philip Halpern
Herbert Wechsler

John J. Conway, Jr.

Nicholas Atlas

Howard A. Hones

Joseph F. Czechlewski, representing Joseph F. Carlino,
Speaker of the Assembly

Samuel J. Kearing, Jr., representing George L. Ingalls,
Majority Leader of Assembly

Joseph J. Kunzeman, representing Fred Preller, Assembly Ways
and Means Committee

Robert Bentley, appearing for Hon Austin W. Erwin

Thomas McCoy, representing Chief Judge Charles Desmond

NOT PRESENT:

William Mahoney

The meeting was called to order by the Chairman at 10:45 A. M.

It was agreed by the members of the Commission that the minutes of the meetings were not to be verbatim, but were to be kept in narrative form.

The matter of ~~xxxx~~ budget ^{its approval,} approval was discussed. The Commission has an appropriation of \$150,000.00 for this fiscal year (which ends 3/31/'62). The original thought was to ask for a reappropriation of the unexpended balance, plus \$150,00 for next year. It was agreed that this amount would probably not be spent but that the money should be available in the event that we need it. It was also agreed that at the end of the year it should be made clear ^{publicly} ~~publically~~ (FOR P. R. REASONS) that the entire appropriation was not spent, and just what was spent.

The matter of hiring additional staff members to assist, Mr. Denzer, ^(particularly in the matter of sentencing) was discussed. Mr. Denzer advised that he has been in contact with Richard Kuh, of the New York City D. A.'s Office, who interviews all the applicants for jobs with the D. A.'s office, ^{who was willing to} He would refer some of the ^l applicants to Mr. Denzer (only after the D. A.'s office indicated that they were not interested) ~~xxxxxx~~. These applicants would have been rejected by the D. A.'s office for various reasons not necessarily scholastic. General discussion followed in which it was noted that McDonald at Cornell had been asked to be on the lookout for likely prospects, and RIB advised that he had been contacted by a young man from Albany Law School who was on the Law Review, and ~~he had scheduled a~~ Christmas ^{was scheduled} vacation interview with him. It was further agreed that we would stay within the present salary range of \$5 to \$7 thousand (with elasticity) for the right man

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2.
or men.

The subject of the court ~~xxxxxxx~~ reorganization was discussed and the Chairman advised that he had spoken with Sen. Daniel Albert at the Special Session held in November at which time Sen. Albert thanked Mr. Bartlett for our interest and mentioned that they had a tremendous job still ahead of them and would probably need some help at which time they would certainly call upon us. To date there has been no word or request from them.

The Interim Report was put on the table for discussion.

Bartlett: It is an excellent job. I had two thoughts in connection--about some minor changes in language. Perhaps we ought to give a little more emphasis to our consideration of substantive changes of present law. P. 33 point II.

Halpern: We ought to treat it as the heart of our work.

~~xxxxxxx~~ Fox example, the last paragraph on p. 20 should be transferred to the heading of fundamental problems.

Bartlett: In preference to relocation of material on 33?

Hazpern: It's material that comes immediately before.

Denzer: What approach are we going to take? Everyone agreed that we should not comment on the approach whatever it turns out to be.

Halpern: 1. changes should be made in structure and work. 2. Fundamental problems without sociological and psychological. There being an indication that in certain areas of the pebal law solutions must come first. For example, no use wasting any time --insanity, 'til we deal with fundamental problems. Detailed drafting that ^{is made plus} comes to the present code, ^{in good shape} comes first. You might have a paragraph mention parts that will be effected by fundamental law.

Atlas: Sociological and psychological are words not popular with lawyers-- they should be kept within bounds. We are going to ~~xxxxxxx~~ decide certain psychological facts before we write a law on insanity for a defense.

3. Diff. is *Pr v U Gen* & *U Gen*

Bartlett: Sentencing, apart from the familiar issue of capital punishment is not a psychological problem. We want a report that is generally well received as to our aims and goals and intended methods.

Denzer: Sentencing is the most urgent. You can change the McNaughton rule without effecting the drafting of most of the provisions.

Bartlett: P. 20.

Wechsler: Sentencing-- you can't do much substantive review until you decide on a framework. These controversial problems present a real problem as to how to be handled, so as not to impede the progress of a lot of other work that will not be controversial. I would not be adverse to saying this in the ~~xx~~ report. My own view is that a careful effort should be made to separate these issues to which the public and the legislature are to be really divided. McNaughton can be ~~xxxx~~ dealt with discretely without jeopardizing the whole project. ~~xxxxxxx~~ This is more machinery. Making individual submissions, i. e. bribery. If we can ~~build~~ ^{gather} up with the legislature and public, that we are going to get to ~~xxx~~ big issues, then do work on them and present them to the legislature in a form that will obtain legislative consideration. This Commission ought to have two separate agents. One on controversial issues where matter can be thought over in terms of Hearings; the other, the more ~~workxx~~ ~~workxx~~ work-a-day problems that can be done in the office. I gather the report being a proper vehicle for stating that. *Cont*, P. 6, P. 20.

Denzer: Agreed. It's very difficult to talk about controversial issues. Just what is there to say?

Wechsler: Sentencing is no difficulty in the light of Pps. 5-6.

Halpern: Look at the reports of the Law Revision Commission-- they list topics under consideration and topics for future work. List first each of the major problems, giving each a separate number and paragraph. 1. criminal insanity test and degree of responsibility. 2. capital punishment. 3. general sentencing --put that part first.

Bartlett: a thorough study--its present structure and the fundamental fields in which we have to do some work.

Wechsler:- This is a opportunity to educate the legislature and the public and the opportunity should not be lost to educate these two groups. There's a real need for this operation. Done well, as to overlapping and duplication.

McCoy: I agree with everything that's been said. At the beginning of the report ought to be some sort of forward that points out what is going to be expanded upon in the pages that follow.

Halpern: Listing topics that will follow so that the public will be aware of the various subjects and it will enlist their ~~xxxxxxx~~ attention. It will be useful to the public and the legislature just to list controversial subjects.

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Bartlett: Can't we develop ~~more~~ in our report as to the problems that conform ^{front} ~~front~~ the Code?

Kapelman: Should we leave the area open?

Bartlett: We are not going to have much time for the Code.

Denzer: List all problems in both areas-- is it necessary to distinguish between Penal Law and the Code. Does it make much difference?

Bartlett: It might be well to separate them because we are going to have to deal with them in that fashion.

Wechsler: Procedural Problems.

Atlas: It is important to list the problems largely with a view to scope and length of time involved.

Kapelman: Bear in mind the example of the Tweed Commission.

Wechsler: In Wisconsin it was six years.. in Illinois it was eight.

Halpern: The Tweed Commission dealt only with the structure of the law.

Bartlett: We can touch on some fundamental problems without involving Constitutional changes.

Jones: That we won't necessarily make any constitutional changes. But we can't shy away.

Bartlett: ^{JW} The language to be ~~used~~ employed in this report we should explain the areas in which we intent to do our work without describing the areas of most change.

Denzer: Blow up fundamental area. Give it more importance.

Bartlett: In some form translating a particular or difficulty. Spending some space in the report on comment and on a particular law as it now stands with respect to sentencing.

Wechsler: This report ought to build up that this year thinking is about sentencing -- sentencing which is important to the People of the State of New York.

Bartlett: A statement setting forth that the legitimate rights would be protected.

Wechsler: Anything that reflected that the Commission is aware of the concerns and questions ~~xxxx~~ would help to build up a certain sympathy ^{for} for a job of some duration and depth, (which I am not so sure really exists)

Kapelman: Pps. 6-20 should be condensed into a very much shorter statement.

Halpern: In introducing this material, tie it in with general objectives of our work.

5.

Pfeiffer: It was the directive of the Legislature setting up this Commission. If it's that sentencing is useful, harp on that in the report. That we have been ~~xxxxxxx~~ directed.

Halpern: We are not an investigat^{ing}~~ing~~ Commission. Our function is to seek better methods.

Pfeiffer: Public Hearings. We should set forth that we will hold public hearings in say, '62 on controversial areas which will not effect the general work of the ~~xxxxxxx~~ commission. capital punishment, McNaghten Rule. Is it the view that we should hold any public hearings in 1962?

Bartlett: We agreed that we want to hold at least a ~~the~~ hearing or two in 1962 -- in connection with the motion to suppress bill. Should be first evolve some proposals, test them at public hearings or should we simply say we are holding a hearing on capital punishment? Let's take capital punishment -- it's unlikely that we are going to be able to agree on any course in that field immediately. It's something to be concerned with, on scheduling a public hearing on that an the McNaghten Rule for the ~~purpose~~ purpose of finding out public opinion. Let's not do it until we have some tentative proposals of our own in testing them ~~xxxxxxx~~ by public hearing.

Wechsler: On Capital punishment the Gower Commission sat for 5 or 6 years, and never said whether it should be abolished. They produced a report some 506 pages in length. A Canadian Commission had worked some three years. Everything that can be said on capital punishment has been said. I am ^{can be} against ~~xxxx~~ Hearings, used for public relationship reasons. A McNaghten public hearing, all that can give us is very little. Everything bearing on that problem is available. Governor's advisory Committee. It would be proper to solicit a number of people whose views ought to be heard, the clergy, and it being a ~~xxxxxxx~~ vehicle for obtaining this view without public hearing.

Pfeiffer: Public or private hearings?

Wechsler: For instance, McNaghten, the Commissioner of Correction, the reports of Psychiatric Associations in the State to present their views if they wish. The D. A.'s, the clergy. On the sentencing problem, you would want to hear the Commissioner of Correction on the problem, or the heads of the state's penal institutions, judicial views, Chairman of the Parole Board. Perhaps the Legislature should hold public hearings.

Kapelman: There is not procedure in the present legislative process for the legislature to hold public hearings.

Bartlett: It's our place to hold whatever public hearings need be held. The Codes Committee can tell us what hearings they want to hold. The decision is ours. Most legislative Commissions hold public hearings. It's a must for hearings to be held on capital punishment. Otherwise, groups would feel that they had been cheated.

b.

Pfeiffer: It's expected that we hold public hearings on capital punishment. If only for public relations reasons. Do we contemplate any kind of hearing in 1962? If so, we should say something about it.

Kapelman: Are we going into these two fields with pre-conceived notions? Without this Commission having opportunity of re-study of the problem. We ought to see first what the Commission is going to do. (Mr. Kapelman went on to say that he would not introduce a bill this year on the controversial issue of capital punishment--as he has done in previous years). What we are actually trying to do is invite thoughts, our own, educators and draw on a great amount of source material. Perhaps something new will be added.

Pfeiffer: Are you suggesting that we postpone public hearings until the Commission has come up with something?

Wechsler: Why not a paper on each of the problems before public hearing?

Bartlett: Count on the fact that we intend to hold public hearings - on fundamental change contemplated by the Commission applying to Penal Law and Criminal Code.

Atlas: We ought to have at least one or more such hearings.

Bartlett: We intend to hold hearings. On the bill we have today, that's one. We have excision and relocation -- hearings should be held on that.

Wenzer: We might ~~xxx~~ feel it incumbent upon us to hold a hearing. I hope the Commission approves of the excision part.

Bartlett: I thought we generally had agreed last time that someone on the staff would devote his full effort to pick out sections that ought not to be in the penal law, excised or placed in some other body of law?

It was suggested that a motion approving the project be made.

The motion was made by Professor Wechsler, seconded by Mr. Atlas and unanimously carried.

Bartlett: It will boil down the Penal Law structurally, and we'll be able to focus on the fundamental problems.

Pfeiffer: McLaughlin, what is he doing?

Denzer: Forgery and larceny.

Pfeiffer: Common law crimes. We should try to get down to 2 or 3 statutes.

Pfeiffer: One on excision--another one work on the fundamental crimes and common law crimes.

Denzer: Goetz is working on malicious mischief and ^{some} disorderly conduct.

Wechsler: How long do you think the excision job will take?

Denzer: A couple of months.

11.
Wechsler: You need ~~xxxxxx~~ another level a top ~~fixkxk~~ assistant to focus on the controversial issues-- a fellow on sentencing.

Pfeiffer: Professional people.

Halpern: This is a matter of the priorities of our work. Priority should be that the larger issues would be taken up in the report first. Perhaps a consultant to prepare papers.

Denzer: We don't want our staff to devote their entire time to projects of this sort, to be completely occupies with single projects to the exclusion of others.

Bartlett: We discussed relative disparity of having work done by our own staff or parcel out work in terms of a contract with a lawyer or lawyers.

Adjourned for luncheon 12.15

The Meeting reconvened at 2:30 P. M.

Mr. Kapelman and Mr. Bentley were absent-- William Bulman appeared for the Judicial Conference as an observer.

we were discussing (2) JPE - 2 UC 10, 15 & 6.
Bartlett: Our concern is now about the point to which our attention should be focused within the next few months and the next few years. There is the matter of sentencing--one possible subject matter for research and proposal. Is this the sort of thing we want to try to handle ourselves through our own staff or farm out?

Discussion followed in which it was mentioned that Commissioner McGinnis was expecting this Commission to examine the Correction Law in terms of our study of sentencing. Mr. Denzer stated that he preferred the person to study the question of sentencing to be a member of the staff. ~~It was xxxxxxxxx agreed that~~ the Commission would be unable to obtain anyone with the proper background and qualifications at the salary previously agreed for additional staff members but would rather range in the 10 to 12 thousand category. The names of ^{Paul} Paul Tappan, Joshua Oaken and Jim Daley were proposed by members of the Commission as possible candidates for work on the sentencing matter on a part-time ^{or} basis. The Chairman suggested that if we get the project going on sentencing ~~we ought to do it~~ ^{it should} with one of our own staff in consultation with someone such as ^{Paul} Tappan. It was suggested that Peter McQuillen might be the staff member to devote himself to the sentencing problem in conjunction with the consultant but Mr. Denzer stated that he felt it best that McQuillen be left on a general status-- a man Friday. Mr. Pfeiffer inquired whether there were other areas we ought to get staff men for. Mr. Denzer replied that narcotics was one field. Bartlett: we can get mired in that field. The general opinion is that we can hold off for a while on narcotics.

BE DONE
* since the person doing the work would be expected to submit a proposal

Bartlett: Any more comments on the Interim Report? We are all agreed on the manner in which we want Dick to rewrite this, changing the emphasis to a consideration of the fundamental problems then going into the development of the list of this. Is it generally agreed that there ought to be some reference to public hearings in our Interim Report to the effect that we intend to employ that device without being terribly precise.

Wechsler: There should be some reference that we will use public hearings in the case where we think it appropriate.

Bartlett: We should not offer any suggestions as to when we will accomplish any part of our program as to its dates. Then, Dick, as quickly as able will do a second draft in line with our discussion today This is something upon which we ought to have an entirely agreed upon draft no later than January 10, 1962.

The Chairman then placed the matter of the proposed bill on search and seizure on the table for discussion, and comments. 813-c: the Motion in General was discussed and the opinion was that the language should be changed to read "a person 'claiming" to be aggrieved, as this bill does not purport to determine who was aggrieved, and in place of the term "property" the term "property, papers or things" should be used. In paragraph third of 813-c, the term "moving party" is to be used instead of "movant".

The Chairman called for comments on the 4th paragraph of 813-c, on right of appeal.

Judge Halpern stated that he would like to see a provision for an interlocutory appeal, that there should be a right of appeal if a motion is denied by leave of the Court that passed upon the motion.

Mr. Denzer stated that he was against this interlocutory appeal by the defendant as he has the right to appeal, broadening the scope of review once the case is upheld.

Discussion followed: It was agreed with respect to §813-d that in the first paragraph "if possible" should be omitted and the last sentence "Except under circumstances specified in this section, failure to make a motion prior to trial shall constitute a waiver of the right to contest the admissibility of such evidence on the trial" should be omitted. It was further agreed with respect to the section, that before indictment or charge a motion to suppress must be made in a Court of General jurisdiction in the county in which the trial is to take place (County Court or Supreme Court upstate) or in the Court of General Session or County Court in New York City.

It was further suggested ^{and agreed} that the pre-trial court to reserve decision and pass it on/the to the trial judge.

A suggestion was made with reference to §813-d, that the language should read that motions shall be made and promptly determined.

That
Motion: ~~Where~~ a defendant be allowed to take an appeal from a denial of a motion to suppress by leave of the court having denied the motion to suppress by leave of the court having denied the motion or of the court to which the appeal would be taken ~~where~~ where such ~~motion~~ motion was brought and determination made prior to the commencement of trial.

Pfeiffer: For
Kapelman: Absent
Conway: Against
Halpern: For
Jones: Against
Wechsler: For
Atlas: For
Bartlett: Against
Mahoney: Absent

Ex-~~officio~~ members declining to vote. Vote 4 --for, 3 against.

Mr. Atlas requested that the vote be recorded--he wished to go on record as voting against the motion.

Denzer: I have ^{done} taken this by the Federal circumstances-- the right to appeal exists in Federal Courts if the Government's case is effectively destroyed.

Wechsler: It's a very close vote on our first substantive issue and the vote ought not be taken as final. It should be brought up at a subsequent meeting.

Bartlett: The two matters on which we want to get final drafts are the interim report and the bill. We ought to have a hearing on this bill-- I don't consider it necessary, just desirable. I would like to introduce it by Jan. 10, 1962.

Jones: I was hoping it could be pre-filed. The Governor is very interested and it should be mentioned in the Annual message.

Bartlett: The proposed final drafts will be sent to all members within the next two weeks, so it can be pre-filed.

A series of reports in re capital punishment were mentioned; Gower report (English), the Canadian report on capital punishment, and it was suggested that each ~~member~~ member be furnished with a copy.

Conway: On misdemeanors, it should be mandatory to make the motion in advance, transfer the motion to the judge hearing the trial and it must be determined before.

It was decided that the next Commission meeting would be held on Saturday, January 6, 1962.

Delete all Bartlett to
this from

final
minutes; Wechsler: "What are the restrictions for suspended
substitute sentence in the Model Code?"

the following:
(Professor Wechsler: "There are none."

Wechsler
observed that
the Model Code
contains no
limitations in
the court's power
to suspend the
execution of
sentence, except
for murder.)