Excused:

William Kapelman

Howard Jones (Present for meeting of July 10)

William Mahoney

Frederick Ames, Representative of the Majority Leader of the Assembly

Joseph F. Czechlewski, Representative of the Speaker of the Assembly

Meeting commenced at 10:00 a.m., July 9, by Chairman Bartlett. Peter Preiser, Associated Counsel, began with a summary of his study on sentencing procedure in New York State. Discussion on the length of term that forms the dividing line between felony and misdemeanor: a prison term of one year, generally.

Preiser: "...one year is the dividing line..."

(Mr. Preiser at this point made the following comment, with reference to his entire project: "...I've only written up half of it.")

Bartlett to Preiser: "You've covered in the material given to you felony offenses?"

(Judge Halpern observed that in Bretti v. Eastman, on page 23 of Mr. Preiser's report, decision was reversed on June 27, 1962 by the Fourth Department, consistent with the Third Department's decision.)

Atlas: "May I ask a question, Mr. Chairman?...There's nothing we need to withhold on the sacrosanct Baumes Law?...I'm speaking generally of 2nd and 3rd degree felonies...I'm speaking generally of these laws which require double time...the thing

is we should consider the moral questions of being judges up there to do the thinking for defined law...in which a judge can still be a judge."

Bartlett to

Preiser: "You haven't covered county jails yet?"

Preiser: "I've made reference to that in the Correction Law...and there'll be a section on this."

Halpern: "Can there be a concurrent county jail or a penitentiary sentence with a State prison sentence?...We assumed it could not..."

(A discussion followed here on the consecutive sentence; that is, if the felony sentence stood up under appeal, and a misdemeanor sentence is there.)

Halpern: "I don't think you can have a jail sentence run concurrently with a State prison sentence. I was going to suggest that this should be published in a law review article."[referring to Preiser's sentencing study].

Professor Wechsler disagreed with Judge Halpern, noting:

"I don't see how anyone couldn't read this very good job and not be of the opinion that something must be done and can be done to rationalize this whole body of law..."

(Chairman Bartlett recommended, also, that this report be published by the Commission and that it will be of the same benefit as publication of the Interim Report.)

Wechsler: "I think the one place we haven't accomplished anything...is in informing the public that this

isn't an 'elegante juris' thing...that it won't be easy to pass and will be a headache to the Legislature."

(Mr. Bartlett suggested that they get out a sentencing report to the Legislature.)

Atlas: "I think we should get in touch with Peter Keisler, of the Times...we eventually must reach the public...The public has got to be advised."

Khiss

check spelling

Bartlett: "Peter's [Preiser] report will be in the same vein as the Interim Report--very factual in its approach."

Atlas: "...a digest...or a magazine section in the New York Times--or a daily section." [on sentencing]

Bartlett: "Pete will be finished with his complete analysis, including probation and parole...We should release a publication ourselves in order to incite newspaper interest."

Bartlett to Wechsler: "Herb...suppose we issued a statement, pointing out...the ridiculous results of such a system as we have now, and perhaps briefly outlining our tentative approach ~~and~~ in rectifying it?"

Halpern: "...rectify and leave the system basically unchanged...or make a radical policy decision?..."

Wechsler: "...set a tentative recommendation on sentance structure...which would point the way out of this morass and still could be put in summary form or bill form...and then this could be attached as a

supporting study...have this accompanying data to support the need for change...you'll find county judges who'll say, 'This is fine; don't touch anything.'"

Bartlett: "We talked about meeting with McGinnis, of Correction, and Oswald, of the Parole Board."

(Mr. Bartlett suggested that Peter Preiser should be in touch with these people.)

Bartlett: "...if we could get Paul Tappan as a consultant..."

Wechsler: "On the publicity side, a fellow like Tappan can be helpful."

McQuillan: "...Mr. Denzer mentioned he [Tappan] was going to California..."

Wechsler: "...I don't think we would want to commission any elaborate job."

Bartlett: "...submit some proposal on our own and submit it to him [Tappan] for comments?"

Halpern to Wechsler: "Would you be willing to spend a little time with Pete [Preiser]? He ought to soak himself in all that past material." [referring to the A.L.I. Model Code]

Bartlett: "...analyze other systems for us..."

Preiser: "I wanted to have a section on odd sentences--point out some of the really bad things; for example, the obscenity statute (a misdemeanor)--six months to three years--a sentence which, of itself, could not be imposed."

Conway: "...no place to serve it."

Preiser: "Along with my writing, I'm starting to review some of the more enlightening jurisdictions: Federal; California...some other states...the people of the National Council on Crime and Delinquency...have material..."

Wechsler: "The penal work of the N.C.C.D. is pretty poor." [slanted]

Pfeiffer: "Before we can get it over to the public or the Legislature, we must have a critique of the thing [referring to the present New York sentencing structure]; something that can be condensed into a few pages...as Herb said, he isn't going to run through 40 pages to get the details of it."

Preiser: "Do you suggest I make a three-page draft?"

Wechsler to

Preiser: "We can't depreciate this [meaning the present penal sentencing structure]...we can make some major propositions on why this is bad."

Preiser: "I also hope to get the view of the Commission on what I should say to the Probation people...I think all these things should be known on facilities in prisons, etc."

(Professor Wechsler suggested to Mr. Preiser that he consult the Correction Department.)

Preiser: "...female misdemeanants can be sentenced to a reformatory...[I] have to find out more about male misdemeanants...facilities offered..."

(At this point, Judge Halpern cited a case about a 16-year-old

misdemeanant whom he sentenced to Elmira Reformatory for being a pyromaniac.)

what about his life of pyromania?

Wechsler: "...see what there can be done with reshuffling facilities, or additional facilities..."

Bentley: "When you get into a discussion of facilities, I think you're exceeding the authority of this Commission."

(In this instance, Mr. Bartlett disagreed with Mr. Bentley; Mr. Bartlett maintained that the scope of the Commission is more sweeping.)

Wechsler: "We have a sentence structure to the extent that the judge at the time of sentencing can make a differential as to where a sentence may be served and the extent of sentence...and the type of institution...the court ought to have a more limited set of judgments to make...if he [the judge] wants to go beyond a local jail sentence, he should have nothing to say about naming the institutions; he should refer this to the Department of Correction..."

Bartlett to Wechsler: "...once the term has been fixed, whether it is a felony or misdemeanor..."

Wechsler: "...recommend a line between State and local jurisdiction."

Halpern , in referring to the sex offense statute:

"...I sentenced one man from one day to life and I would never do it again--he has no benefit of psychiatric treatment."

Wechsler: "...the Commissioner of Correction should be charged with the task of utilizing the resources (for example, reshuffle the facilities)."

Atlas: "...a State prison for psychiatric...the Federal Government has a special prison in Missouri for people who need psychiatric aid."

(Here, Mr. Bartlett read from footnote 16, page 24, of Mr. Preiser's sentencing study: "Governor's comment on 'good time.'")

Bentley: "...I started to multiply how much a psychiatrist must cost..."

Atlas: "...quite a bit."

(Mr. Bentley commented on the staff required, etc. for psychiatric facilities.)

Atlas: "In Springfield, they have a place where a fellow can get psychiatric treatment...judge has full jurisdiction to sentence someone here...New York doesn't have this...women's prison in New York City is a 'hell hole'--it's an abomination...you don't have to go to Attica to see overcrowding, co-mingling, etc ."

Bartlett: "We can perhaps make a general policy determination today, to see what sort of sentencing

structure we're looking for; later on, we may have to get into the penal system itself to make for a better sentencing structure."

Wechsler: "I think what the staff needs to know initially is how many distinctions ought to be drawn at the legislative level...whether to have four categories of perjury with different degrees, or one...if Denzer were here, take his Homicide, for example, he has a murder 1 and 2; manslaughter and reckless homicide...Are those to be limits of maximum only? Or variations as to minimum?...They need to know before they come up with any proposed provisions. We clearly want to retain a felony misdemeanor distinction; I think we want an offense category lower than a misdemeanor...within the felony area, how many variations? And we must consider the habitual-multiple offender..."

Bartlett: "we wouldn't have to come to any determination on what we want to do about multiple offenders..."

Atlas: "...the unwary offender may be convicted of a misdemeanor when he believes he has only been charged with an offense."

Preiser: "The Commissioner of Correction has authority to transfer a prisoner to any state prison despite the state prison named in the Order of Commitment. Persons between 16 and 21 [Is this the correct age range?] are sent to the Department's Reception

Cut the

Center at Elmira...There, again, they can be sent back for resentencing if the institution is overcrowded..."

Bartlett: "Can we have some discussion about the categories of felony, misdemeanor * and something less than misdemeanor, and perhaps take a position?...How about our breaking down the sentencing for a felony into categories? How do the members feel about the degrees of felony in the Model Code for which degrees of sentencing are applied?...We have to agree on the framework..."

* Note felony-misdemeanor or felony, misdemeanor?

Wechsler: "...I'll give you the references: the basic sentence provisions are in Article 6 which begins at page 91."

(Professor Wechsler then read from page 91 of the tentative official draft.)

Wechsler: "The next section is an over-all summary of possible jurisdiction...at page 97: that sets up the consequences of the three degrees of felony:

1st: life (statutory maximum)

2nd: 10-year statutory maximum

3rd: 5-year statutory maximum

When you got into crimes of violence, you'd be tempted to go into the 10-year range."

(Professor Wechsler mentioned the imposition of life imprisonment beyond the 10-year maximum for serious major offenses.)

Wechsler: "...the Code should have some power to fix a

minimum longer than the one-year which is implied...but we fixed them very low...first, ...the severest death sentence apart from death envisaged is 10 years to life...That was drawn from very extensive studies of what actually happens... it was beginning to reflect about what occurs at the extreme point in the best system." The one addendum to this is that these are ordinary terms...we thought that this kind of a system had to be supplemented by what they call, at page 99, 'extended terms' (imposed after a finding)."

Bartlett: "A third offender could be sentenced to an ordinary term?"

(Professor Wechsler affirmed this.)

Wechsler: "...multiple offenders applies to a fellow who is convicted of a lot of crimes: §7.03, on page 109...no jury in this conception of making a finding that a defendant is subject to an extended term."

Halpern: I'd rather have the staff study this...I'd like to see a very careful case study to segregate out these various problems..."

Pfeiffer: "...Now, all this Code business is diametrically opposed to the present State law...there's nothing said about the sentence for burglary, for example."

(Mr. Pfeiffer proposed that there should be a sentencing degree for felony of the 1st, 2nd or 3rd degree.)

Pfeiffer: "...Are we going to have a general sentencing scheme or are we going to try to set up something for each individual crime?"

Bartlett to Halpern: "...I don't even think we have to determine whether there should be three or five categories of felonies; I think the staff can make recommendations."

Wechsler to Halpern: "...If you look at §6.06 on page 97 [A.L.I. Code]..."

Halpern: "...It's more than that...I think we should have a staff study...There's very little room [illegible] judge. It is far more minimum than our system [illegible] now provides."

(Mr. Bartlett disagreed with Judge Halpern, saying that first degree felony calls for a minimum of one to 10 years and he quoted §6.06 on page 97.)

Wechsler: "This is a very disputed point...this alternate section was adopted under which the judge may fix a maximum lower than the statutory maximum. This is an issue in itself."

Bartlett to Wechsler: "...whether we choose the alternate approach or this, is something we could determine later on..."

Halpern: "This alternate §6.06 does cover a great deal."

Wechsler: "...I don't want to force any particular decision.

In all states you're going to have statutory limits of some sort."

Halpern: "...I don't think any decision of today will be of any help to the staff...they have to work out recommendations."

(Mr. Bartlett recommended that the Commission develop a category approach with reference to felonies, misdemeanors and offenses.)

(Professor Wechsler affirmed Mr. Bartlett's proposal, in adding: "...slot that offense into whatever the existing category shall be.")

Bartlett: "...Peter [Preiser] suggested that perhaps after having finished his factual analysis on penal institutions, and before he gets into suspended sentence, the Baumes Law, etc., he may shift his attention to what we are discussing now: developing a system of sentencing itself."

Preiser: "Time-wise, it might be the best place to start."

Kunzeman to Bartlett: "Will there be categories into which we could fit all felonies?"

Halpern: "'Degree' in New York means grades; other than what it means in the A.L.I. Model Code."

Wechsler: "...throughout the substantive part of this Code,[A.L.I.] we use the term 'degree.' For example, 'burglary as a felony of the 1st degree'...and 'burglary as a felony of the

2nd degree.'...It would be confusing to use [the word] 'degree.'"

Halpern: "...use 'grade' or some other word: use 'class.'"

Wechsler: "...the defendant gets the benefit of these limitations on consecutive sentences."

Kunzeman to Halpern: "In a criminal matter, how would you interpret the term 'degree?'"

Bartlett to Kunzeman: "...in robbery 1st, the sentencing for this is in that structure...If there is a lesser included offense to which he could take a plea, that will also have a category."

Bartlett: "Call them 'classes A, B and C.'...Peter Preiser will continue with his sentencing study; that he conclude with his analysis of penal institutions and that he develop his proposed sentencing structure generally along the lines of developing categories of uniformity...of limits."

Preiser: "The only institutions yet to be reported on would be the county jails and the penitentiaries."

Preiser to Pfeiffer: "...when you say a summary..."

Pfeiffer: "...a summary (3-page) of the present chaotic law..."

Halpern: "...This fall, we may be able to come to a conclusion that is more specific..."

(Mr. Bartlett proposed that we get in touch with Mr. McGinnis and Mr. Oswald, in the fall.)

Wechsler: "...the Correction Department has a great deal to say on this [sentence structure]. Not much attention has been paid to what the Commissioners of Correction had to say on this over the years."

Halpern: "...I think the education of the judges is a real problem..."

(Mr. Bartlett asked Mr. Bass if there wasn't an appropriation for a curriculum for the education of judges, relating to sentencing.)

Mr. Bass: "...the Judicial Conference should have an institute...about sentencing criteria..."

Wechsler (in referring to the procedure of the Federal Pilot Sentencing Institute):

"...the Probation fellows present summaries of actual cases which are distributed to judges...these are analyzed and the extent of the diversity of view is reported; then, they get into a discussion of reasons."

Bartlett: "...Peter's [Preiser] not at all sure that by September he will be prepared for a meeting with McGinnis and Oswald...he'll [Preiser] give us some general proposals for the meeting with McGinnis and Oswald."

Wechsler: "...ask them to come and see what they want

Note: For final minutes, delete this entire passage. Add the following summary: (Mr. Pfeiffer recommended that a subsequent Commission meeting be held at a State prison. Chairman Bartlett agreed, suggesting Sing Sing.)

Pfeiffer: "Do you think that the next time, instead of going to the Glenburnie Club, we should go to jail?"

Bartlett: "I think we should meet at Sing Sing and have a quick look at the chair."

Note: For final minutes, make this passage read as follows: Professor Wechsler suggested that it would be enlightening for the Commission to observe an actual Parole hearing.

Wechsler: "I haven't been through the State institutions in over 10 years and I'd like to see them again, but I think we should sit with the Board of Parole for one day...while they're interviewing prisoners..."

(Professor Wechsler mentioned that at one time, he had gone to Sing Sing and sat in on a Parole Board meeting. He found it very enlightening...got the files.)

Bartlett to

Preiser: "Do you have an outline in your own mind of what you're going to undertake this summer?"

(Mr. Bartlett mentioned that Commissioner McGinnis would not be available for the rest of the summer and suggested that the Commission meet with both McGinnis and Oswald at some early date.)

Wechsler to

Pfeiffer: "Tell them we're interested in the sentence structure..."

Pfeiffer: "...we want their views."

Note: For final minutes, delete this entire passage; substitute the following summary: (Mr. Conway also suggested that the Commission meet with members of the County Judges Association.)

Conway: "...include the sentencing judges [County Judges Association] in New York--they feel they're being left out."

Note: Delete this, also, from final minutes. Tie the following in with the above summary: ("Mr. Conway also suggested...Association. The members

Wechsler: "...they are a powerful group...they have their own committee on sentencing..."

agreed this would prove of value to the Commission's work.)

Delete this passage from final minutes.

Bartlett: "Schenck (in Albany) has been designated for the 3rd Department."

Wechsler: "Write to whomever is President of the County Judges Association."

Note: Delete entire bracketed material from final minutes; substitute, instead, the following: (Mr. Bartlett suggested he would communicate with the liaison committee of the County Judges Association.)

Bartlett: "I wrote to them last year, telling them we wanted to establish a liaison committee with the Commission."

Bartlett to Bass: "I've been remiss because I never followed the thing up."

(At this point in the discussion, Messrs. Conway, Atlas and Bartlett proposed that the Commission meet with the County Judges Association <u>after</u> their meeting with McGinnis and Oswald. As McGinnis and Oswald have different points of view [on sentencing], Mr. Bartlett thought it would be advantageous to get their divergent views.)

For final minutes: (Mr. Bartlett called for further comments on the subject of sentencing structure generally.)

[N.B. rc: Inter-relate all this on meeting with McGinnis and Oswald.]

Bartlett: "Are there any other comments appropriate at this point on the sentencing setup itself? We're going to set up a two-day meeting with McGinnis and Oswald, if this can be conveniently done."

Wechsler to Preiser: "There is the problem of youth offender and

collateral disability resulting from conviction of a felony, and I think your present survey should include the present status of the law."

Bartlett to Preiser: "...you intended this as a final part of your report?"

Delete from final minutes; substitute the following: (Mr. Preiser pointed out the defects in the new Family Court Act; for example, it erroneously refers to the Elmira Reception Center.)

Preiser: "I think you can be sentenced to Elmira if you're over 21...it's very confusing. If you'll notice, even the new Family Court Act says Elmira Reception Center..."

(Mr. Preiser then asked Professor Wechsler precisely what areas involving youth crimes should be covered in his report; for example, the subject of wayward minors. [youthful offenders]

Wechsler: "I had in mind disposition of youthful offenders."

Preiser: "How about wayward minors: would you want that in there, also? They're not covered by the Family Court Act because they're over 16...it's touched on briefly under Reformatories."[in his report]

(Mr. Bartlett suggested that all the Commission members arrive at a decision as to what they wanted Mr. Preiser to work on.)

Note: Delete from final minutes.

Conway: "I have a quick question for everyone: should there be a prosecutor in Family Court?"

Strike, also, from final minutes.

Wechsler: "The jurisdiction of the ~~County~~ Family Court is not our problem..."

Bartlett to McQuillan: "Any word from the Albert group?"

McQuillan: "Dick Denzer and I attended a public hearing in New York City and submitted a memorandum to Senator Albert's Committee on their proposed amendments to the Code of Criminal Procedure."

(Note: Mr. Bartlett mentioned that he had talked to Mr. Albert last September, and that the only contact we had with them was the attendance at the February meeting of Mr. Denzer and Mr. McQuillan.)

The subject now discussed was whether the present age limitation for Children's Courts should be increased.

Bentley: "...nobody has said what age they really want."

Bartlett: "...they go to 16th birthday...That's another question; the youthful offender is an extension of that."

(Judge Halpern suggested that Mr. Preiser concentrate on sentencing structure and put aside youthful offender for now.)

(Mr. Preiser indicated that he would include a study of the present provisions relating to suspension of sentence in his study.)

Wechsler: "I think we should discuss the capital punishment and M'Naghten problems--set our schedule for hearings."

(Note: For final minutes: Professor Wechsler suggested that the public hearing on capital punishment include the M'Naghten Rule, in that the subjects overlap and that the people to be heard are interested in both problems; and it would be a matter of convenience for the Commission to combine them.)

(continued from "save one more", p. 19)

Wechsler: "It's in that §6.02, at the bottom of page 91. [A.L.I. Model Code] I'm sorry, Dick, [Bartlett] I gave you the wrong answer... except on murder, there is no power."

Note: except? not sure

Note: Delete from formal minutes

Bartlett: "There is no mandatory increase except for a previous conviction...Our practice now is to file an information...How about driving while intoxicated?"

Note: Delete from formal minutes.

Conway: "...There's no reference to the prior conviction in the indictment."

Note: Delete from formal minutes; substitute the following: (Mr. Atlas stated that in a felony gun charge, prior conviction is part of the People's proof.)

Atlas to Preiser: "In the gun charge...as a felony, part of the proof would have to be prior possession, wouldn't it?"

on? in? check this with PMCG

(Judge Halpern asked whether there is a constitutional right to a jury trial on the trial of a multiple offender information.)

Preiser to Halpern: "Under Article 6, §18 [of the New York State Constitution], it says all indictments shall be tried by a jury except an indictment for libel."

(Mr. Preiser referred Judge Halpern to Legislative Document (1959) 65(M) or Law Revision Reports, 1959, pp. 489-545.)

Preiser: "I'm going to finish the three institutions: penitentiaries, county jails and workhouses. Then, I'm going to get into some kind of sentencing structure based on the model penal code..and an inspection of the laws of foreign

Note: For formal minutes, edit Preiser's comment to read as follows: (Peter Preiser said he would include in his report a study of the three institutions; namely, penitentiaries, county jails and workhouses. He indicated that he would also be concerned with some type of sentencing structure based on the Model Penal Code, and an inspection of the laws of foreign states.)

states...I'll limit myself to how crimes are categorized."

Halpern: "No one has mentioned the new concept of parole: the extension beyond the maximum."

Preiser: "I'm very satisfied with that solution, also... I can finish one section of what we have and then one section of what we ought to have."

Note: Delete from final minutes.

Bartlett: "Peter Preiser wants to get back to the City this afternoon; I'm sorry he couldn't be with us."

(Chairman Bartlett and the Commission members decided to take up the excision and relocation project at the afternoon session of the meeting and to resume with a discussion of Homicide, the morning of July 10, at 10:00 a.m.)

The Commission adjourned at 1:30 p.m for lunch. At 2:30 p.m., the meeting recommenced with a discussion of excision and relocation.

*✓ Note: Portia continues with her notes at this point.

Note: For formal minutes: (Mr. Pfeiffer suggested that ~~XXXXXXXX~~ at least one public hearing be held in the western part of the State.)

(Mr. Pfeiffer seconded this idea of Professor Wechsler, to have hearings--particularly in the "western part of the State.")

Note: All this will be eliminated in formal minutes. All references to McGinnis and Oswald will be grouped together. Also, give the final proposed hearing schedule in formal minutes ("The Commission agreed, etc.")

(Mr. Bartlett suggested a meeting [hearing] in Buffalo, in September--perhaps get McGinnis and Oswald to attend?)

Pfeiffer: "I'm talking about a public hearing. What should be the first hearing?...On capital punishment?"

Note: Combine all succeeding discussion on presentments.

Bartlett: "...we don't want to forget our 'stepchild'--presentments. Is Cook [J. Douglas] finished? He's doing a report on it."

Note: Delete from formal minutes; substitute the following: (Mr. Bartlett informed the members that J. Douglas Cook, of Buffalo, is doing a study for the Commission on grand jury reports.)

Note: Delete this entire passage from formal minutes.

Halpern: "...this whole subject [presentments] would disappear when grand juries disappear...that's rather unrealistic." [Halpern spoke in re Cook]

Conway: "...the grand jury is the only outlet."

Note: Again, add this to where presentments is summarized.

Bartlett: "Here is my thought on the question of presentments: I think we have got to hold a meeting...it was really the joint decision of the leaders of the two Houses and the Governor that we'd be a lovely home for that question... I think we should formulate opinions and draft a bill; and study the new proposal of Richard Kuh."

Note: Delete this from formal minutes.

(Note: Mr. Bartlett instructed Mr. McQuillan to distribute copies of Mr. Kuh's proposal.)

Bartlett: "...notice must be given to all individuals involved and after a hearing, the judge decides whether the grand jury report should be released to the public...The Legislature would be interested...but neither of the bills we had last year were acted upon in Committee."

Note: Delete this from formal minutes, as well as succeeding passages.

Halpern: "...public officers with regard to their conduct in office."

Pfeiffer: "What other things are we going to have a meeting on?"

Bartlett: "I think we can hold a meeting on grand jury presentments [in Albany] almost any time after September."

Pfeiffer: "...the matter of capital punishment and the M'Naghten Rule responsibility...we're not going to keep it out."

Wechsler: "...combine the two...I don't think it's necessary to have a hearing on capital punishment."

Note: ack Delete if Wechsler at this point said something to the effect that capital punishment would never be abolished in New York State.

Note: Leave this in formal minutes, for purposes of emphasis.

Bartlett: "Two-thirds of the mail, other than from professional groups, was on capital punishment..."

Note: Delete this from formal minutes; substitute the following: (All Commission members agreed that no individual statements on the question of capital punishment would be issued by individual members.)

Halpern: "I think we've got to hold hearings in self-defense, because if we don't, we'll each have to hold private hearings."

Note: Delete, also, from formal minutes.

Conway: "I think we should be uniform, fellows—no personal opinions in behalf of the Commission."

Note: Strike this passage from formal minutes; substitute as follows: (Mr. Conway said that the New York State District Attorneys Association today opposes capital punishment. However, he brought out that former prosecutors seem generally to favor the retention of capital punishment.)

Conway: "The D.A.'s [Association] agrees they're against capital punishment; the alumni is uniformly for capital punishment...as soon as they are judges, they come out for capital punishment."

(At this point, the Commission agreed that the proposed Homicide Article would not be discussed at any public hearing.)

(Professor Wechsler suggested that the Commission frame for public discussion the question: "Should capital punishment be retained, limited, extended or abolished in the State of New York?")

Note: Delete from formal minutes.

Pfeiffer: "...maybe one [hearing] in Albany?"

Note: Leave in formal minutes, but edit: (Professor Wechsler thought that....)

Wechsler: "I think four hearings throughout the State on capital punishment would be superfluous."

? Leave delete?

(Mr. Bartlett and Mr. Conway discussed the possibility of having one hearing in Rochester and one in New York City.)

Note: Delete all this discussion from formal minutes; use it as part of entire summary on public hearings.

Pfeiffer: "What other subjects do we have to hold public hearings on, besides presentments, capital punishment and the M'Naghten Rule?"

(Mr. Pfeiffer suggested that the Commission set up a schedule.)

Bartlett: "Herb [Professor Wechsler] mentions a hearing on the amendment of the M'Naghten Rule. How about that?"

Wechsler: "I think we need a hearing to sound out sentiment [on the M'Naghten Rule]."

Note: Leave this in formal minutes.

(All the Commission members felt strongly on this: combine the M'Naghten Rule with capital punishment in one hearing.)

The Commission adjourned at 1:30 p.m. for lunch. At 3:00 p.m., the meeting recommenced with a discussion of the excision and relocation project.

(Note: Portia continues with her notes, at this point.)

Meeting reconvened at 10:00 a.m., July 10, by Chairman Bartlett.

The Commission members agreed that they would mail the excision and relocation memoranda, with marginal comments, directly to Peter J. McQuillan and that he would furnish them with fresh copies for their files.

(Mr. Bartlett said that meeting would be concerned with the schedule for public hearings and Richard Denzer's proposed Homicide Article.)

Bartlett: "Convey to Dick Denzer any portion of the proposal--but defer final consideration until he meets with the Commission...Are there any comments?"

(Mr. Bartlett remarked that the necessity for two degrees of murder may well turn on whether capital punishment is to be retained.)

Wechsler: "When you are involved in singling out a single determinant of a thing like capital punishment, the whole case should be evaluated...There are three jurisdictions in the United States where this is now the case; for example, the military court martial utilizes a separate proceeding; Pennsylvania and California have adopted the two-stage proceeding."

(Mr. Conway said that from a prosecutor's viewpoint, a trial would be required in every murder case because the prosecutor would be unable to recommend a lesser plea.)

Note: Delete this from formal minutes; substitute as follows: (Professor Wechsler, however, observed that we are dealing with a murder-manslaughter distinction and, therefore, the prosecution does have scope for lesser plea dispositions.)

Wechsler: "If [there is a] design to kill, it is murder... [there are] no degrees of murder in England and in 10 states where the English law is followed... Illinois never had degrees of murder."

Conway: "What would be the problem if we eliminated the degrees of murder, absent capital punishment?"

Note: Edit this for formal minutes to read as follows: (Judge Halpern observed that there is no good basis for murder 1 and 2 distinction today and, in his opinion, the distinction in Denzer's draft between "grievous bodily harm" and "substantial bodily harm" is not strong.)

Halpern: "...no good basis for murder 1 and 2 distinction today...He's got a rational scheme [referring to Richard Denzer's proposal]."

Wechsler: "Let's be fair to Dick [Denzer] about it...Dick is both extending it and narrowing it; for example, under Dick's draft felony murder and 'depravity' murder are not capital crimes."

(Judge Halpern was of the opinion that felony murder, as defined in Mr. Denzer's draft, should be in a higher category.)

Note: Delete this and substitute: (Judge Halpern referred to a recent opinion by Judge Burke, in People v. Plitz 7 N.Y. 2nd 147, in which Judge Burke wrote an opinion for a unanimous court.)

Halpern: "He's pre-empted the term of mitigating circumstances...on page 2...of his draft bill. I believe we should leave those words open...call this provocation to reduce it from murder to manslaughter...I can't understand why he failed to give us Judge Burke's opinion...Court of Appeals is unanimous about it."

Note: The portion of the minutes from page 28 on has not been edited.

Halpern: "...'heat of passion, page 24 and 25 of his notes: Manslaughter...here it is, page 27.

(Judge Halpern noted that the following should be added at the end of the first paragraph on page 27 of Denzer's Homicide proposal: People v. Plitz 7 N.Y. 2nd 147...unanimous court.)

Halpern: "...it's discussed later in a batter case: De Andrea 207 2nd 215 (Judge Sobel).

Wechsler: "That's really a 'lulu,' that manslaughter provision."

Halpern: "One of the virtues (of our draft) is to overcome bad rules...No court resents [the] legislature 'reversing.'"

Bartlett to Conway: "Jack, is it your point, in connection with the retention of a 2nd degree of murder, that the public wouldn't be satisfied?"

(Mr. Conway favors retaining 2nd degree for plea purpose.)

Halpern: "...psychological element..."

Wechsler: "...if you have a capital class, you can get the same consequences."

Conway: "The psychological reaction by the people to the reduction to manslaughter is extremely violent."

Bartlett: "As Dick has defined 2nd degree here, it's not a good basis at all...murder 2nd only involves assault with attempts to commit a depraved act or felony murder."

Wechsler: "...we shouldn't come up with a statute where the District Attorney is going to worry about

how he's going to fit it into what he wants to do."

(At this point, discussion turned to the attached Appendix to the Homicide proposal.)

(Mr. Atlas and Judge Halpern were concerned about Nos. 2 and 3, of <u>§4. Manslaughter</u>, of page iii.)

~~Judge~~ Halpern: "...to bring in the consequences of 'proximate cause' would only complicate things..."

(Judge Halpern was opposed to proximate cause.)

Wechsler: "It is implicit today."

Conway: "Burglary is not 'inherently dangerous.'"

Wechsler: "...the law of felony murder needs the chance of the person of much less culpability to at least fight his way out, if he can, with a jury...I have the greatest respect for the difficulty of doing this...'presumptive device!"...

Bartlett: "I think the 'presumption' is a good thing to 'hang your hat on.'"

(Mr. Bartlett feels that the 'presumptive device' is good.)

(Judge Halpern differs with all presumptions. He is satisfied with Mr. Denzer's approach.)

Wechsler: "...the section of the law of homicide should be used to deal with killers..."

Halpern: "...policy decision for legislature and not for [the] a jury."

Wechsler: "Give the jury the privilege of deciding whether the actor completely disregarded human life... go one step farther: tell the jury to deal

with those people who culpably jeopardize human life."

Halpern: "...'extreme indifference to human life:' the problem is one of policy: should we say that any man who undergoes to go out armed on a burglary should be charged with the highest degree of murder?"

(Judge Halpern favors Mr. Denzer's approach, but wants to move it up to 1st degree.)

Halpern: "If you want to define a felony murder as a crime of violence committed while unarmed, that's another thing..."

(Mr. Conway wants to include burglary only if armed. He feels that burglary does not inherently involve danger. Amend this, but include "armed burglary.")

Conway: "I think robbery is the most violent crime.:

Delete this from final minutes.

(Note: Herman Bass left at this point.)

McQuillan: "...any kind of a weapon?"

Atlas: "That's a very interesting question."

Bartlett: "The unarmed mugger..."

Conway: "who strangles?"

Bartlett: "We were talking about what robberies would be excluded from felony murder."

Kunzeman: "Are you going to narrow the felony murder rule or expand it?"

Bartlett: "We're going to narrow it."

(There was discussion, here, between Mr. Bartlett and Mr. Atlas, of "forcible sex crimes.")

Atlas: "I don't like the general phrasing."

Bartlett: "Pete [McQuillan] said that Dick [Denzer] left it deliberately vague until sex crimes are formulated."

Wechsler: "England has completely abolished felony murder, in 1957."

Bartlett: "I think you've got to retain something here."

Halpern: "The deterrent element should be retained."

(Mr. Conway felt that the public would violently resent abolition of the felony murder rule in New York State.)

Bartlett: "The difficult case is where one of them is not armed..."

(Professor Wechsler here made mention of British public opinion.)

Pfeiffer: "The case that gets the greatest publicity is the hardship in imposing the rule on the person that the public has the greatest sympathy for."

(Professor Wechsler cited a case in New Orleans of three boys who decided to "roll" a homosexual. He fell, broke his skull and died. The jury acquitted all of them.)

Atlas: "That may have stemmed from an ingrown dislike for 'fairies.' [in reference to Professor Wechsler's narration] I am saying we should make closer differentiations [between intent and non-intent]."

(General discussion followed on No. 1, of §3, of page iii, of Mr. Denzer's Homicide Article. The members agreed that the phrase "inflict grievous bodily harm" [physical injury] should

be retained.)

Wechsler: "Make 'intent to inflict grievous bodily harm' sufficient for murder."

Halpern: "It's circuitous to get to the proposition."

Bartlett to

Halpern: "[Should] subdivision 1 of murder 2nd be made a subdivision of murder 1?"

Halpern: "Merge with it."

Atlas: "...the basic concept of our civilization is that intent was always there."

Wechsler to

Halpern: "I'm for limiting the felony murder rule, as you are...I want to take out the 'non-homicide intent' cases (juries acquit in these cases)."

Atlas: "Narrow it down to exclude chance convictions.

Bartlett: "Formulate felony murder rule to terms of definitely doing an 'act:' grievous bodily harm; creating or risk of doing grievous bodily harm... Make it elastic, even to include accomplice in the act."

check spelling

Wechsler: "Judge Stephen [an English judge] charged this way in an arson case."

Bartlett: "I think you have to retain something that's called a felony murder doctrine."

(Professor Wechsler said that not using the presumption of the A.L.I. Model Code is agreeable to him.)

Bartlett to

Jones: "Do you agree with me that we have to have something that we call 'murder?'"

Jones: "Oh, Yes."

Bartlett: "...that we limit the felony murder doctrine to the actor or someone privy with the actor, where the act is done with a risk that it will result in a homicide."

Wechsler to Halpern: "I think we want all three, Phil: intent, knowledge and risk."

Halpern: "Felony murder should be in the higher category."

(Mr. Bartlett recommended that Mr. Denzer's draft should have alternative proposals.)

Wechsler: "...may have to have three or four grades..."

Bartlett: "Dick covers murder 1 and 2."

Bartlett to McQuillan: "He [Denzer] drafted this with capital punishment in some form retained?...but that this be subject to life imprisonment for murder 1."

(Mr. Bartlett doesn't feel that he wants to subject someone to capital punishment under murder 1.)

Halpern: "'Grievous bodily harm' is manslaughter now. Why lift it up to murder?"

Jones: "By present standards, 'grievous bodily harm' might just imply a punch in the nose..."

(There followed a discussion of the word "substantial," as applied to manslaughter; and "grievous," as applied to murder.)

Halpern: "Draw no distinction between 'substantial physical injury' and 'grievous physical injury.'"

(Mr. Atlas and Judge Halpern both felt that Mr. Denzer was influenced by the assault statute in the wordage of substantial

and grievous.)

Bartlett: "Are we going to permit a plea for murder 1?"

(Professor Wechsler made reference to 6-c, page 128, of the A.L.I. Model Code.)

Conway: "Without capital punishment, we'd have no bargaining at all: the guy would have nothing to lose. You would have nothing to offer him... If there were no death penalty, the D.A. would have no leverage."

Halpern: "Have your degrees at the sentencing stage, rather than at the conviction stage."

Wechsler: "Trading can be on the minimum. This is done in some states."

Wechsler to Halpern, in re Conway's point:

"I don't know why he shouldn't have exactly the same kind of construction with the distinction drawn by a fixed straight life, on the one hand, and some kind of indeterminate: 20 to life, avoiding straight life. Prohibit parole to have a real hold."

Halpern: "Have one degree of murder...why not a manslaughter plea?"

Bartlett: "...murder 2 is murder 1 where the D.A. agrees to a plea."

Wechsler to

Halpern: "...if you assume that the capital penalty is out, but that life imprisonment is substituted for it, everyone will work very gingerly towards letting go of the fellow serving a fixed life

sentence."

Wechsler: "Have (a) a fixed life sentence or (b) felony in the first degree (20 to life), at the sentencing level...this would satisfy the D.A.'s needs..."

Bartlett: "Assuming no capital, I'd assume we'd have some pretty well-defined circumstances for the judge to use in order to impose either life or an indeterminate sentence."

Bartlett to Jones: "...you say we now have a 40-year minimum for fixed life?"

Atlas to Jones: "The 30-to-60-life-man may be worse off than the 40-year-minimum-fixed-life man."

Wechsler: "We don't do it in the A.L.I. because we opposed the idea of 'fixed life:' a revolting sentence. But perhaps this would be a progressive step in New York State."

Bartlett: "We want to discuss manslaughter..."

Bartlett to Bentley: "Do you think that the Legislature is in a mood to abolish capital punishment?"

Bentley: "I think it's pretty close."

(Mr. Bartlett mentioned that polls in upstate counties are "substantially in favor of abolition" of capital punishment, particularly Orange County.)

Bentley: "I was basing on what the individual Senators might say."

Bartlett: "We shouldn't take [sic] a decision until...after November." [elections]

(Mr. Bartlett related a narrative in re Paul Bosse--Probation officer.)

Halpern: "We should convey to Denzer: leave 'intent to kill;' leave 'intent to inflict grievous;' Do we want to retain the non-violent felony principle?"

(Professor Wechsler wants to see non-violent felony manslaughter dropped entirely. Judge Halpern agreed to this.)

Wechsler: "...companion question: Shouldn't §5, Reckless homicide, be raised to manslaughter?"

Bartlett: "I don't agree...it's gross...it's more characterized by recklessness than negligence."

Halpern: "...add a new form of reckless homicide as §5."

Bartlett: "Doesn't all culpable homicide require conscious disregard of the safety of others?"

Wechsler: "No. You can call it gross negligence."

Halpern: "For negligent homicide, we want to use recklessness again...'depravity' in murder 2 is recklessness..."

Bartlett: "I'm trying to relate our terminology here, as that used by lawyers."

Wechsler: "If you tried a manslaughter 2 case (He cited the Coconut Grove [fire] case)...trial court would deny the request to give this charge; you must find 'beyond a reasonable doubt,' that in operating the machinery, etc., the defendant realized he was creating a danger of death."

Halpern: "Use the term 'homicide by criminal negligence.'"

(Professor Wechsler discussed the phrases 'property damage;' 'public catastrophe,' in page i of the Homicide Appendix.)

(Mr. Bartlett cited §1053-a of Gilbert's Penal Law..."when a person has knowledge...")

Bartlett: "The consensus is that we define §5 of Denzer's draft as 'criminal negligence,' and that what amounts to 'reckless homicide' in his Article, become a subdivision of manslaughter. Section 5 should become subdivision 3 of §4. The present subdivision 3 of §4 should be repealed."

(Mr. Conway would like to see drunken driving included under a lower sub-section in negligent homicide.)

Conway: "Include vehicular homicide while intoxicated specifically in section on lowest degree of manslaughter."

Bartlett: "There has to be testimony as to erratic driving?" [while intoxicated]

Conway: "Absolutely."

(The members then turned to a discussion on holding hearings in re capital punishment, etc.)

Bartlett: "Should capital punishment be abolished, maintained in its present form, or extended?...Also, a hearing on the M'Naghten Rule?"

(Mr. Bartlett here related Professor Wechsler's suggestion: make the proposal of the Christy Bill the subject of a hearing. Send out copies of this bill to Commission members. Mr. Bartlett said that Daniel Gutman may have worked on it.)

(Mr. Bentley suggested that the Commission print the bill

up as a proposed report; then, distribute it.)

Pfeiffer to

Conway: "We're more prepared for a hearing in the fall on capital punishment; we're not ready yet for a M'Naghten hearing."

Bartlett: "These hearings won't help us much, except to incite public discussion..."

(Mr. Atlas suggested that the Commission hold three hearings on capital punishment.)

Pfeiffer: "Hold the first hearing in Rochester; hold the second hearing in New York and the third hearing in Albany."

Bartlett: "Have the hearings a day apart? A week apart?"

Conway: "Have the Albany hearing during the Session, in January."

Bartlett: "January 30 should be the final date for the introduction of the Commission's bills on capital punishment. We should have our hearings entirely out of the way before the Session convenes; we should have a position before January. M'Naghten won't draw the amount of public attendance as capital punishment would. Perhaps we should have M'Naghten?"

Wechsler: "The Governor's bill on M'Naghten would be helpful because it is keyed into the present New York statute."

Note: There has been no execution in New York State for the past 14 months.

(Discussion then turned to holding a hearing on the subject of