

STENOGRAPHIC RECORD

MINUTES OF A MEETING
OF THE TEMPORARY COMMISSION ON
REVISION OF THE PENAL LAW AND
CRIMINAL CODE.

Chancellor's Hall
Albany, New York
November 29, 1962

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PRESENT:

ASSEMBLYMAN RICHARD J. BARTLETT, Chairman
TIMOTHY PFEIFFER, Vice Chairman
WILLIAM KAPELMAN, Secretary
NICHOLAS ATLAS, Commissioner
JOHN J. CONWAY, JR., Commissioner
HOWARD A. JONES, Commissioner
PROFESSOR HERBERT WECHSLER, Commissioner
RICHARD G. DENZER, Chief Counsel

ALSO PRESENT:

HERMAN BASS, Representing Walter J. Mahoney,
Majority Leader of the Senate.
JOSEPH CZEULEWSKI, Appearing for Joseph P. Carlino,
appearing for the Senate Finance Committee.
JOSEPH RYAN, District Attorney, Onondaga County.
AL SGAGLIONE, President, Police Conference of New
York State.
REV. CARL HERMAN VOSS, New England Congregational
Church, Saratoga Springs, N. Y.
MR. J. GILBERT MAURER
RAYMOND C. BARATTA, District Attorney of Dutchess
County, appearing for the New York State District
Attorneys' Association.

ALSO PRESENT: (Continued)

REV. THEODORE L. CONKLIN, Appearing for New York State Council of Churches.

HON. BENJAMIN JACOBSON, Assistant District Attorney, Queens County, representing New York State District Attorneys' Association.

THE CHAIRMAN: Ladies and gentlemen, this is a public hearing being held by the Temporary Commission on revision of the Penal Law and Criminal Code of the State of New York.

I am Richard Bartlett, the Chairman of the Commission. Other members of the Commission here this morning are Professor Herbert Wechsler, our Counsel, Richard Denzer; John Conway; Nicholas Atlas and members of the staff are here as well as representatives of the office of the Speaker of the Assembly and the Senate Finance Committee and the Majority Leader of the Senate.

The hearing this morning relates to the question of capital punishment and, specifically, the speakers are asked to address themselves to the question: Should capital punishment be retained, limited, extended or abolished in New York State?

This is a highly controversial question, both in this State and in other jurisdictions. A wide variety of situations are to be found among the various states of the United States. A number of states have abolished capital punishment altogether. A very few, including New York, have retained capital punishment as the mandatory punishment for First Degree Murder and most of the jurisdictions find themselves somewhere between those two positions.

I am going to ask that those that speak this morning

be as brief as they can be consistent with giving us the benefit of their views and, particularly, ask that any of you who have prepared written memoranda to submit those to us.

We have invited those interested in speaking to notify us in advance and I have here a list of those who have indicated their desire to speak this morning. I will read that list and then ask if there are any others who care to be heard: Mr. Joseph Ryan, District Attorney of Onondaga County. Is Mr. Ryan here?

FROM THE FLOOR: No.

THE CHAIRMAN: Father Cutler is not here yet.

Representing the Police Conference, Mr. Scaglione.

The members of the Commission aren't the only ones who had difficulty in getting here at 10:00 this morning.

Representing the American League to Abolish Capital Punishment, Mr. S. J. McNamara, Reverend Carl Herman Voss from Saratoga.

I understand also that Mr. Theodore Conklin, representing the Council of Churches, wishes to appear and Mr. Gilbert Maurer.

Are there any others present who wish to be heard this morning?

I am sorry. Ray Baratta, I did not call your name. I have it on the list, Ray. The District Attorneys' Association by Mr. Baratta.

Are there any others who will want to be heard this morning?

(No response.)

THE CHAIRMAN: We will then proceed.

I will call upon Reverend Carl Herman Voss, from Saratoga Springs, first.

REVEREND VOSS: As a minister of religion and as an American citizen, I believe that the Legislature of the State of New York should abolish the death penalty as a means of punishment.

Of this Temporary Commission on the Revision of the Penal Law and Criminal Code, I ask leave to affirm that, as a Christian minister, I believe in man's capacity for growth, for rehabilitation, for self-improvement -- in brief, to use a theological term, for redemption. The forces of organized religion, intent on creativity, must, I believe, oppose any form of punishment which is purely destructive and which crushes out life; and to the view that capital punishment is a purely negative device, religious leaders of both Judaism and Christianity increasingly adhere. On religious grounds therefore, I protest the use of the death penalty as a punishment for the transgression of society's ethical codes, especially the taking of human life.

As a resident of this State, I believe the State of New York should encourage every capacity of man to reform

himself and, even in a prison, to contribute to the social welfare and, thus, for the practical reason of seeking human betterment I would oppose capital punishment.

The progress of society, I believe, is balked and not furthered by the continuance of capital punishment in our state penitentiaries. There is, I believe, no valid evidence that the death penalty has deterred crime and, conversely, no available statistics that I have been able to find proved that abolition of the death penalty in other parts of our country and of the world has caused an increase in crime.

Capital punishment does not alter the social conditions that create in men the urge to commit mortal crimes, nor does it change in the slightest degree the deeply rooted sickness of mind and spirit which drives a man to take another man's life. By resorting to the death penalty, whether by electric chair or the gallows, by the gas chamber or the guillotine, the sovereign state resigns itself to using a variant of the same methods by which the crime to be punished was originally committed.

In an increasing number of countries throughout the world, capital punishment has been abolished. I understand that at least eight of our states -- some of my friends say ten -- at least eight of the states in our nation have done away with the death penalty. I would hope that New York State would be next in line. I hope New York State would not covet

the very dubious distinction of being last on the list of our 50 states. I am confident that the rising tide of public opinion against the death penalty will persuade our Legislature to place the Empire State on record as ruling out capital punishment.

In ancient times the death penalty was used to appease tribal deity. Now, that need is happily no longer present. We now in our time acknowledge a God of forgiveness and compassion, a loving God who in the Judeo-Christian heritage, we are reminded, desires his children to be redeemed, to do justly, to love mercy and repent of their misdeeds. Capital punishment is, I believe, no fulfillment of these imperatives in our Judaic-Christian tradition.

The modern treatment of a criminal calls for rehabilitation rather than retribution, for psychiatric treatment, for social reform in place of the extinction of human life. Even when a crime is monstrous and the criminal seemingly incorrigible, the death penalty is, I believe, no solution. It is merely a means of revenge, not redemption, on the part of the State. It is a symbol of defeatism, not of justice.

On the grounds, therefore, Mr. Chairman, of a humane concept of punishment, I would plead before you and the members of this Commission for favorable consideration in the recommendations by this Committee to our Legislature to abolish the death penalty as a form of punishment.

THE CHAIRMAN: Thank you, Mr. Voss.

Is the Union of the American Hebrew Congregation represented here this morning? We understood they were to have a speaker here.

(No response.)

THE CHAIRMAN: District Attorney Raymond Baratta, of Dutchess County, appearing for the District Attorneys' Association.

MR. BARATTA: Good morning, gentlemen.

On behalf of the New York State District Attorneys' Association, I would like to thank the Chairman, Richard J. Bartlett, and the members of the Commission for the opportunity to speak at this public hearing on capital punishment.

Perhaps, it would be fair to state that no group other than the jury, itself, and the sentencing judge lives closer to this problem than district attorneys.

As the designated representative of the New York State District Attorneys' Association, I am not here to discuss the pros and cons of the death penalty morally or philosophically nor am I here to advocate the movement of the abolitionists or retentionists. There are many considered arguments in favor of doing away with this extreme measure in the treatment of criminals and there are worthy arguments in favor of the retention of capital punishment.

The most pointed and convincing argument accepted in

favor of the death penalty is that in some measure it has a preventive effect upon potential offenders. If the threat of any punishment acts as a deterrent, then surely the threat of death is. As Professor Playfair of Williams College stated: "The question is not whether capital punishment is deterrent--presumptively, it is -- but whether it is needed as a uniquely effective deterrent."

The prosecutors of this State, through this Association, are of the opinion that there should be a modification in the method of handling this controversial subject and that this should be done by legislation. The death penalty must remain in our statute books in order that this Association's proposal may be sustained.

In keeping with the retention of capital punishment, our recommendation follows the line of Professor Sidney Hook's comment on a panel discussion held by our organization in January of 1961.

Quoting: "A requirement of good law is that it must be consonant with the feelings of the community; something which is sometimes called 'the living law'. Otherwise it is unenforceable and may bring the whole system of law into disrepute."

At the present time in the State of New York, when a person is tried for Murder 1st under §1044, Subd. 1, known as Common Law Murder, the jury must find that there was a

deliberate and premeditated design to effect the death of the person killed. The jury cannot recommend that the defendant be imprisoned for the term of his natural life. The only instance in Murder 1st where a jury can recommend life imprisonment is under the felony murder subdivision and even in the latter case it is not mandatory for the court to accept this recommendation. As a practical matter, we all know that if the jury recommends life imprisonment, the sentencing judge will usually abide by its recommendation.

District attorneys can readily appreciate homicides fall into the category of Murder 1st and that the same homicides create a close question as to the requisites of premeditation and deliberation. We are also aware that except in very few cases can some form of passion be excluded in the commission of this type of crime.

The experience of prosecutors when they are questioning prospective jurors strongly emphasize that if after hearing all the evidence they are convinced beyond a reasonable doubt that the defendant is guilty, the judge must sentence the defendant to death. Many of the jurors, in response to questions put to them by the district attorney, contend that they are not opposed to capital punishment and will do their duty to the fullest, and if the case is proven beyond a reasonable doubt, bring in a verdict of guilty, knowing the punishment to be death. Many other people are rather

squeamish about sitting on a jury when he or she must ultimately, by his or her decision, mandate that the court impose a death penalty.

I have tried a few common law murder cases and have hammered this particular point, re-emphasizing that they, the jury, must decide the guilt or innocence of the defendant rationally and as far as possible devoid of human emotions. In spite of their affirmative answers and their willingness to sit, I have also learned from jurors after they have rendered a verdict of not guilty or guilty to a lesser degree of homicide, that one of the reasons why they could not bring themselves to render a verdict as was dictated to them by the facts for Murder 1st, was they felt they would be a part and parcel of the infliction of the death penalty. This is why many cases are disposed of by lesser pleas or in trials that result in acquittals.

I might add that not too many years ago I tried an Arson 1-Murder 1 case in which a young college boy murdered-- set fire to a dwelling house in which the woman was in the house; and after the second trial, the first one having ended in a disagreement, the lad was found not guilty and acquitted. After speaking with different members of the jury later, I learned that they as a whole felt that this young man was guilty of setting fire to that house and in spite of the fact that I had emphasized and re-emphasized that it is murder in

the first degree if that woman was in the house, and even though he didn't know she was in the house, but he sets fire to it in the night time and it was a dwelling house, that that was murder in the first degree; and very straightforwardly, with straight faces, they said they would, but when the chips were down they refused for their own feelings to find him guilty because they felt they would have to sentence him to death. One juror went so far as to tell me that if the judge had charged Arson, they would have found him guilty of Arson.

Our proposed legislation, by using the two-stage proceeding, would in the first instance, to a limited degree, do away with this unpleasant duty. In the first stage of the trial, the jurors' sole province would be to determine the guilt or innocence of the defendant with the thought in mind that at a second stage of the trial they would have an opportunity to hear other pertinent and material evidence directed to the sole question of punishment.

As lawyers know, the trial of a homicide case and, as a matter of fact, any criminal case, must be decided by strict rules of evidence. Hearsay is inadmissible with certain exceptions; the character of the defendant is inadmissible unless he, himself, takes the stand or raises this issue; no presumption against the defendant is created by his failure to take the stand. His prior criminal record or any acts which tend to degrade him or affect his moral turpitude are

inadmissible unless he opens the door and the defendant's mental condition is also inadmissible unless a defense of sanity is created. It is therefore safe to state that a jury does not get a full composite picture of all the facts surrounding a homicide and the background material that are inadmissible during the trial but which certainly should be taken into consideration either in mitigation of punishment or in the imposition of extreme penalty. Thus, the reason for the second stage of the trial.

The two-stage setting would also give a jury and the general public to whom they are responsible an opportunity to peruse and completely analyze the components that go to make up the defendant's personal background and history. Many defendants have warped minds, the bases being congenital, lack of normal intelligence, anti-social, environmental, or a combination of all these facets, who with respect to sanity meet the test under the McNaughton Rule, but whose life could be spared by a jury because of the evidence adduced at the second stage of the trial.

Our bill is not a one-edged sword. In many instances it will work to the advantage of the defendant and at the same time would be instrumental in carrying out, in cases that warrant it, the fullest measure of punishment.

A jury might, upon the facts, find a defendant guilty of murder in the first degree if during the second phase of

the trial evidence of extenuating circumstances produced, on behalf of the defendant, the jury, and the jury alone, has the discretion to exercise its prerogative to recommend life imprisonment. In this respect our proposal works towards a just rather than an extreme punishment for the defendant.

On the other hand, you might have a case where the defendant is a callous, determined individual with complete disregard for the rights of others and, particularly, for the life and safety of others, whose background is so permeated with anti-social behaviorism, such as attempted homicides in the past, use of firearms in the commission of prior felonies, etc., then the jury after having heard this evidence at the second stage might recommend the infliction of the death penalty because it is warranted.

It is rare that you find an individual whose personality is so made up that he can completely divorce himself from human emotions. In the first awakening to a horrible murder, the general public becomes highly incensed and seeks vengeance. As time progresses and it eventually gets to the time of trial this emotional flareup has subsided and when the same people who were screaming for the life of the defendant right after the happening of the crime are asked, if so chosen as a member of the jury, to bring in a verdict of guilty, knowing that the death penalty must be imposed, a state of equivocation sets in and you have, consciously or unconsciously, a disregard for

the law -- infliction of capital punishment as is presently in our Penal Law.

As a further result, even though the greatest majority of states still maintain the death penalty, very few people are executed and, even more important, many guilty persons escape just punishment.

This Committee has, I am sure, all the statistics on the subject and I don't intend to submit them. By our proposal, capital punishment, as long as it is retained, should be handled on a rational basis.

Our bill provides that §1045-a, dealing with the recommendation of life imprisonment in felony murder cases, be repealed and in its place, the section dealing with punishment for murder, first degree, namely, §1045, be amended. A jury in a trial for murder first or kidnapping, punishable by death, shall have the discretion to fix the penalty.

If the jury agrees upon a guilty verdict of murder first or kidnapping, punishable by death or an indeterminate sentence, they shall return this verdict to the court. It is important to note here that this verdict cannot thereafter be subject to reconsideration by the jury. Within five days after the verdict is recorded, the second stage of the trial will take place at which time additional evidence, not previously received in the trial, directed to the question of penalty, shall be elicited. The bill specifically provides

that this additional evidence may consist of circumstances surrounding the crime, the defendant's background, history, his record of convictions and of any facts in aggravation or mitigation of the penalty.

It also provides that at this stage of the proceeding the defendant may introduce evidence of a psychiatric background, but in that event the People shall have the right to apply to the court for the appointment of a psychiatrist to examine this defendant. If the defendant refuses to submit to a psychiatric examination by the court appointed psychiatrist, the defendant shall be precluded from introducing evidence of a psychiatric background at the second stage of the proceeding.

If, after deliberating in what is called in the bill the "penalty part of the proceeding," the jury cannot unanimously agree upon the penalty to be imposed, the court may in its discretion discharge the jury, in which case the defendant shall be sentenced to life imprisonment and the defendant who was convicted of kidnapping shall be sentenced to an indeterminate sentence. The fact that the jury in the second stage of the proceeding cannot unanimously agree upon the penalty shall not in any way affect the validity of the verdict rendered in the first stage of the trial.

This bill, in the opinion of our Association, would make the trial of a murder first case more practical and would give the jury, who, after all, are the spokesmen for the

People under our system of jurisprudence, the right to determine, not only the guilt or innocence of the defendant, but also if mercy should be extended.

This brings me to another phase of the bill that repeals Subd. 6 of §1945 of the Penal Law, which was enacted just recently -- in 1960. This section provided that every prisoner upon a sentence of his or her natural life or a sentence commuted to one of natural life may be released on parole on such sentence pursuant to Art. VIII of the Correction Law as if his or her sentence had been of an indeterminate term, the minimum of which was 40 years and the maximum of which was natural life.

The repeal of this subdivision was incorporated in our proposed legislation to prevent the reoccurrence of homicide outside the prison walls and undertakes to eliminate parole in murder first degree and kidnapping cases that come under the statute.

Where the jury has recommended mercy, the sort of incarceration for the remainder of one's life will have a strong deterrent effect upon potential murderers. Our bill, therefore, would not permit, where murder one had been committed and the jury has recommended life imprisonment, the faintest hope of parole, because he must subject himself to prison for the rest of his existence. I might add that this part of the proposed legislation is secondary to the two-stage

trial.

At the present time there are two states, namely, California and Pennsylvania, that have adopted the two-stage trial. I had the opportunity while attending the National District Attorneys meeting in Tuscon, Arizona, to hear J. Miller Leavy, a member of the Los Angeles District Attorney's staff, make a very fine presentation concerning the subject, and according to him it is working out with good results in that state.

James C. Crumlish, Jr., District Attorney in Philadelphia, stated in a recent communication to me, "that since this act became effective on December 1, 1959, they are still obtaining the death sentence in proper cases and that they have not been prejudiced in law enforcement by the new act."

This bill can be commended in that it ends the distinction that now exists in New York with respect to life or death discretion as between felony murder and other types.

As Louis B. Schwartz, Professor of Law at the University of Pennsylvania, stated at our State panel discussion in 1960, "as all lawyers know, of course, the deliberation and pre-meditation as a criterion of first degree murder means very little. It has been reduced by judicial interpretation to not much more than intention to kill with very little deliberation and that is not a very high quality. Some very

impulsive killings and highly emotional circumstances become first degree and where, if you were free to do so, you would certainly classify the conduct as non-capital murder."

Facts which would tend to substantiate this latter type of killing would be admissible at a second stage of the trial.

If I may state the Honorable Herbert Wechsler, Professor of Law at Columbia and a member of this Committee, and one of the pillars of the American Law Institute's Model Penal Code, has indicated -- he can correct me if I am wrong -- that our legislation is a step in the right direction.

In conclusion, I want to state further that the district attorneys in the main are a dedicated lot who do not endeavor to use capital punishment as a weapon to exact vengeance or retribution in our society, but are of the opinion that since infliction of this punishment is mandated by the people through their representatives, then it is our duty to abide by it in the fullest.

Homicide cases, I know, are scrutinized carefully in an attempt to bring about pleas, where warranted, to lesser degrees in conjunction with judicial acceptance; and it is for this reason that many murder 1 indictments, after thorough investigation and all the facts are known, are disposed of by acceptance of pleas to murder 2nd and manslaughter.

It is felt by the members of our Association that our

bill would be more readily acceptable by the citizenry of our state and would place all the facts before a jury in determining the fate of a defendant. This proposal of our State Association encompasses the best features of similar statutes in the states of California and Pennsylvania.

I would like to conclude by quoting -- and I don't know who made this quote, but it is a saying from Oxford University as follows: "The law is neither on the one hand a Gibraltar Rock which constantly resists the erosion of the winds. Nor is it on the other hand a sandy beach which is slowly eaten away by the ceaseless lapping of the waves. It is rather to be compared to a floating dock which, while always fast to its moorings, yet rises and falls with the tides of time and circumstance."

I want to thank you for listening and I apologize for having read this to you.

THE CHAIRMAN: Do you mind a question of two?

Do I understand that the recommendation of the District Attorneys' Association is that in the second part of the trial the jury must unanimously recommend the death penalty?

MR. BARATTA: That is correct.

THE CHAIRMAN: Is it simply a recommendation and may the judge not impose it?

MR. BARATTA: No, it is mandatory upon the court. If they recommend mercy, then the judge must sentence him to

life imprisonment.

THE CHAIRMAN: Suppose they recommend the death penalty?

MR. BARATTA: Then the judge must pass out that sentence.

THE CHAIRMAN: So they are, in effect, sentencing the defendant, is that right, the jury is sentencing the defendant?

MR. BARATTA: They are passing upon his life, that's correct.

PROFESSOR WECHSLER: That is the California system.

MR. BARATTA: Same as the California and also the Pennsylvania.

MR. ATLAS: Is your point in having the second stage so that there would be a greater latitude for the jury to consider the reasons why it could make a recommendation? In other words, suppose you were to amend the law now to let the jury make a recommendation for mercy without a second stage, which would be mandatory on the court; wouldn't that be enough?

MR. BARATTA: Well, that, of course, would not open the door for evidence that would be inadmissible at a trial, so that the jury would not be able to hear and get facts that might be extenuating in favor of the defendant in making a recommendation.

MR. ATLAS: In this second stage, Mr. Baratta, the jury could hear almost anything that would go into a probation report -- hearsay, friendly suggestions, intervenings of friends, and anything else?

MR. BARATTA: You hit it right on the nose.

MR. ATLAS: Which would now come from the probation office.

The reason I asked my question is I wanted to bring that out.

MR. KAPELMAN: Mr. Baratta, I feel that perhaps you may be bedeviling the issue by inclusion in your proposal of the repeal of that section which allows the parole after 40 years.

MR. BARATTA: I said here, "I might add that this part of the proposed legislation is secondary."

MR. KAPELMAN: You are underlining that.

I would like to ask one more thing about that. Neither the California system nor the Pennsylvania system included the same purpose insofar as the treatment of parole for life offenders.

MR. BARATTA: I think you are absolutely right there. I know Professor Wechsler knows that because Professor Schwartz was opposed to that particular part of the bill when he spoke at our Association's panel.

MR. KAPELMAN: The thing that concerned me is you

quoted Professor Wechsler was in approval. I was wondering if the Professor went as far as that?

MR. BARATTA: I know I didn't. I didn't say he was in approval. I said he thought we were making a step in the right direction.

MR. ATLAS: I don't understand why you tie the question of non-parole with the question of the second stage trial.

MR. BARATTA: If you people feel, in your wise discretion, to vacate that under the bill, it is all right with me and the Association.

PROFESSOR WECHSLER: Why is the Association really concerned about the parole provision?

MR. CONWAY: The background of it is that they were afraid that the jury would think that if this guy was ever going to get out in the street again, they will go to capital punishment.

PROFESSOR WECHSLER: It wasn't the merits, but concern of jury reaction.

MR. ATLAS: There are some very cogent arguments that can be made why a lifer should be paroled -- certain lifers, anyhow.

MR. BARATTA: I can't question that. It's been proven that many murderers other than the one commission of that act would make far better citizens than many of the cons

paroled out.

MR. KAPELMAN: I accepted the 40-year bill and voted for it because it is a step in the right direction. I am only fearfully concerned about the fact that we may be taking two steps forward and one step backward by adopting the very worthy plan that you suggest, Mr. Baratta.

I wanted to ask you one other question, if I may--

MR. BARATTA: I think you father our feelings on that.

MR. KAPELMAN: Yes. I just wanted to ask one thing more which rather gets to the entire question of capital punishment. I quite agreed with the quote in which you set forth that the law must be consonant with the feelings of the community and I felt somehow that, perhaps, you were quoting it in support of a capital punishment law in the State. Do you believe that the entire question of capital punishment and the inflicting of the death penalty is the view of the community of the State of New York?

MR. BARATTA: You mean the majority of the people?

MR. KAPELMAN: Yes.

MR. BARATTA: Yes, I do.

MR. KAPELMAN: You would have no way of indicating upon what basis you make that conclusion?

MR. BARATTA: Only from my everyday conversation with people and--

MR. ATLAS: You must believe that if you quote my classmate Hook in saying the law must be accepted generally.

We had views expressed here early in the stages of the meetings of this Commission by one of our colleagues, Mr. Mahoney, who suggested that in certain counties in New York the people are unswervably for capital punishment and we have always had it in mind, and does that apply to your county, Mr. Baratta?

MR. BARATTA: Not particularly. I have never made a survey of the feelings of the people on that. It is just in conversation and discussion.

MR. ATLAS: There are differences of opinion in the great urban centers, some of which are like New York, for example.

I would like to know the feelings, for myself, certainly--if not for the rest of my colleagues--how people in the "sticks"--it is not said with any contempt-- how do they feel about that? I want to know.

MR. BARATTA: I think you will find, if you talk with wardens of state prisons, that heavier sentences are proposed in the "sticks" by far than they are in the City of New York.

Worden Faye told me that not so long ago.

MR. KAPELMAN: I don't know if it is a question

of heavier penalties. I would really like to know--I don't know the answer to it--I would like to know what is the feeling of the communities of the State of New York on the entire moral question of inflicting a death penalty; and I think that it is much too easy to say that the community is in favor of it or against it without inducing some kind of proof in that direction, and I think that it is one of the things that the Commission is going to have to direct itself to.

I am quite in agreement with Professor Hook's view to determine what is the feeling of the State of New York.

MR. BARATTA: That is for the Commission to do, but I think you should limit yourself to what is the moral feeling, because I think there is a distinction between moral, ethical and legal.

MR. ATLAS: You wouldn't want to put a question like this to any referendum? Is that what you are talking about?

If it was put on a referendum, you could not put it in any general election bill. If you did that, it would get no attention at all.

THE CHAIRMAN: In any case, it is your feeling that the community is not strongly opposed?

MR. BARATTA: That is my personal feeling. What I have stated here this morning is the feeling of the

majority of the members of the New York State District Attorneys' Association.

PROFESSOR WECHSLER: I know the members' of the Association private views and it always surprised me that they were as humane a group as they are in considering that they are engaged in law enforcement work.

MR. BARATTA: Thank you.

PROFESSOR WECHSLER: Actually, there is a real division in the Association about abolition in toto; isn't there?

MR. BARATTA: Yes, I believe there are members of the Association whom you know that morally--on the moral question, feel that it should be abolished, yes. I would not venture, now--I would not answer you on what my personal feelings would be.

MR. ATLAS: Would you make some copies of your statement available to us?

THE CHAIRMAN: Is there anything you want to add?

MR. BARATTA: No, that is it.

Thank you, very much, for listening.

THE CHAIRMAN: Thank you for coming.

Mr. Theodore Conklin, representing the New York State Council of Churches.

MR. CONKLIN: Mr. Chairman and members of the Commission: I am tempted to make some reference to the last

speaker. I am not going to do that although I would very much like to offer some suggestions in rebuttal, but I will hold to the statement I have prepared. I have copies which I will give you afterwards.

My name is Theodore L. Conklin. I am the Associate General Secretary of the New York State Council of Churches, with offices at 600 West Genesee Street, Syracuse 4, New York.

As staff person responsible for the social relations and legislative program of the State Council of Churches, whose legislative commission has the assigned responsibility to speak for the State Council, I represent both this church council and its constituent groups, including 33 denominational judicatories of 18 different denominations and over 100 local, city and county councils of churches. However, we make no claim to speak with a single voice for this entire constituency of nearly two million persons. I wouldn't even want to go so far as to indicate that any member of this Commission who might happen to be a member of a protestant church in our constituency agreed with us on this. It is always dangerous to try to quote any person who is in the situation of being on the hearing side of the table.

We are always aware that a minority, differing in size and makeup with the issue, would be in disagreement. In the particular instance, nevertheless, we think there is

great unanimity. Nearly all of the denominational bodies whom we represent have, at the national or state level, or both, adopted resolutions opposing capital punishment. While, sir, I have no data that can support this at the moment, it can be secured if your Commission desires it, but I think it would be a fair indication in response to one of the questions that was asked the previous witness that there are a number of people, certainly in this state who are sincerely in favor of the abolition of capital punishment.

The New York State Council of Churches annually prepares a statement of legislative principles which, in each revision, goes through five draftings and is scrutinized by about 500 persons from all our constituencies. Each year for over a decade it has included a statement in substantially the same form, calling for the abolition of the death penalty and, in recent years, for a study and a moratorium on executions until such abolition is accomplished.

I quote from the 1962 statement, and this is not basically different from those of early years.

"We call the attention of society and of our governments to the unique value and sanctity of human life. This becomes a special concern for legislators since they are called upon to establish the procedures by which we deal with those who violate our laws. Vengeance and retribution are not the proper function of human tribunals which, while

providing for the protection of other members of society, must never lose sight of the ultimate objections of rehabilitation and reconciliation of the offender.

"We are opposed to capital punishment and call upon every legislator to consider before God his responsibility in destroying human life by statute. Pending abolition of the death penalty, we recommend that a moratorium be declared by law on the imposition and/or execution of the death penalty for capital crimes during the period of five years from the effective date of such legislation, including a provision for the commutation to life imprisonment of any death sentence then unexecuted. We urge that a joint legislative committee be established to study and make recommendations relative to this issue during this period."

This might be modified somewhat by the fact that you are now making a rather exhaustive study, I take it, of this whole issue.

Throughout the last decade and more, the legislative commission of our State Council of Churches, has regularly referred to this position once or more than once in each year in relation to specific items of proposed legislation. For example, on March 3, 1959, we issued a memorandum on bills by Senators Peterson and Anderson proposing abolition, from which we quote:

"We are convinced that (1) no person or government

has the moral right to take the life of another; (2) that the basic argument of those who approve capital punishment as a deterrent is groundless and cannot be supported in fact; and (3) that the proper purposes of all procedures against those who violate our laws is the rehabilitation and reconciliation of the offender rather than vengeance and retribution.

"We note that 42 other countries and 8 states in the United States of America have abolished capital punishment. Two other states are currently considering legislation with strong support to join the eight. All evidence points to the conclusion that, apart from any moral or religious obligation involved, that society has been helped rather than threatened by such abolition."

Again in 1960, January 28th, in a memorandum on a proposal to permit juries and judges discretion as to the granting of mercy in other than felony murders, we supported the proposal and noted that this bill (Senate Introductory and Print 392 by Mr. Jerry) passed the Senate on January 25, 1960, without a single dissenting vote.

We noted then:

"This bill would remove from the sentencing judge the intolerable burden of composing to sentence the convicted person to death and would, quite possibly, result in more equitable judgment by the jury since they would no longer

be torn between an arbitrary death sentence and acquittal, but would have some freedom of judgment beyond this choice."

May I pause, sir, to comment at this point that this latter part of this statement was inferred in the testimony by the previous witness for the District Attorneys' Association and that it was interesting to note, sir, that he said, as I recall, that almost always when the jury has an opportunity in a felony murder to recommend life imprisonment or to recommend mercy, in other words, that the judge followed this recommendation. It would lead one to believe that, perhaps, the judge--if you will forgive the phrase--would be glad to get off the hook in not having to make this judgment himself.

In 1962, we supported several among the annually increasing number of bills introduced, to achieve one or more goals related to this extreme penalty. A general memorandum on January 18, 1962, was followed by the one dealing with the current version--that is, current in the last session of the Legislature--of the Jerry-Henderson Bill referred to above, and a similar bill by Senator John Hughes. These bills, again proposed the granting of discretion to jury and judge in a first degree murder case for other than felony murders.

In commenting on these bills and supporting them we said, in part:

"A person may be obviously guilty under the law and a responsible jury may be bound to so find. Still the circumstances of the convicted man's life may have been such to almost predicate the crime. The case of Salvador Agron presented before Governor Rockefeller yesterday--" this was the day after that hearing-- "is an example in point. The utter neglect and indifference that surrounded this boy from his birth made the crime almost inevitable. It is a judgment in which every citizen of this State is also sentenced. Yet the jury could not express any opinion on the causes of the act and the judge was bound to pronounce the death sentence."

Ample data will most certainly have been presented before this commission on the failure of the death penalty as a deterrent to murder; on the remarkably good record made by convicted killers who are sentenced to death, both in their terms in prison and in their likelihood of rehabilitation; on the bitter truth that most persons executed for capital crimes are from the economically underprivileged or racially discriminated groups--people who cannot afford the costly defense procedure that so frequently save wealthier accused persons from the ultimate penalty. We could only repeat such statistics for which we have no independent means of support.

The clear conviction remains that there should be an

immediate end to the taking of human life by statute--and an irrevocable act that places an unjust and horrible burden on our juries and judges, on wardens and hired executioners, indeed, on all of our citizens and which is wholly ineffective against any desired end except to strike out in blind vengeance and retaliation because we hate or because we are afraid.

MR. ATLAS: Mr. Conklin, could you tell me how many churchgoers your Council represents in numbers? This is preliminary to another question I want to ask you.

MR. CONKLIN: I could not tell you how many go to church on the average Sunday.

MR. ATLAS: In your organization, in your Council, there are a certain number of churches represented and they represent congregations of a certain number.

MR. CONKLIN: That's right. Slightly under two million.

MR. ATLAS: Would you say that the majority--the vast majority of the opinion of these two million churchgoers is for the abolition of capital punishment?

MR. CONKLIN: My judgment would be--I cannot support this with data--my judgment would be, knowing that almost all denominational bodies at both national and state levels have frequently and often repeatedly, year after year, taken action supporting the abolition of capital

punishment, that from 60 to 75%--this is purely a guess-- of the total protestant constituency of our churches, both in this State and the United States, favor the abolition. This is just a guess. I have no way of supporting it.

MR. ATLAS: In the steps you have taken in support of some of these bills, you have not had any complaints from the constituency of the Council?

MR. KAPELMAN: Opposing your position.

MR. CONKLIN: Practically never. Once in a while we have, but practically never.

PROFESSOR WECHSLER: You do not have any information about the Delaware story on repeal and restitution?

MR. CONKLIN: No, I am sorry, I don't.

PROFESSOR WECHSLER: In three years, 1958-1961, over the Governor's veto in 1961.

MR. CONKLIN: I realize this is true, but I have no data on it; I have not researched it at all.

MR. BENTLEY: Mr. Chairman, Rev. Conklin made the statement that many of these people are convicted because they were not able to afford counsel and I would like to remind you, sir, that no man is ever tried on a murder case without counsel--without very competent counsel. If he cannot afford it, the court assigns it and the county pays a minimal amount for this counsel, including expenses necessary for defense.

Your statement would be very unfair to bar associations, sir.

MR. CONKLIN: Yes, sir. I did not say without counsel. I said without such counsel that is available to people of comparative wealth. I think the great majority of the people actually executed in any of our states are people of economically underprivileged or socially deprived groups.

A reporter told me this morning, as we were seated here, that--if I remember him correctly--that of the last 14 executions in New York State, 13 of the 14 were either negroes or Puerto Ricans.

MR. BENTLEY: That part, I don't quarrel with. But the counsel appointed by the courts, these are not fledgling lawyers. The courts universally appoint, because of the social custom of our country, appoint very qualified men to defend these people regardless of their financial status or color. In our county, we just saved one of Mr. Bartlett's constituents and that is a bar association of 22 people, and he had a better defense than one he could have bought.

MR. CONKLIN: I certainly wouldn't dispute you, sir.

MR. DENZER: I think the broad basis of your position, Rev. Conklin, is, first, that capital punishment is immoral and, secondly, it is not a deterrent to crime.

MR. CONKLIN: I think that's right.

MR. DENZER: Assuming the first for a minute.

Suppose, suddenly someone came up with some statistics that conclusively showed that it was or is a great deterrent to homicide, would that change your position any?

MR. CONKLIN: I think it might change a position --speaking personally as an individual, I think it might change a position which I have not taken here that I feel very deeply also about the suggestion of the district attorney from Dutchess County on the question of no possible parole for a person who has a life sentence. If we found that this was a great deterrent, I would be inclined to change a position I now believe, that there ought to be some opportunity for parole. When he said no hope of parole, I could see a situation which has been, I am sure, referred to this committee many times in which people have said, "I would rather be executed than be told I could never get out no matter what happens." I could change at that level. I could not personally change to say the state or any individual member of the state has the right to take the life of another.

The fact that one person has committed murder does not give the state the right to seek vengeance. The deterrent feature would not overcome my feeling.

MR. ATLAS: In the constituencies of the

churches in your Council, are the largest part of them from the urban or from the rural part of the state?

MR. CONKLIN: Well, this would be hard to say, sir. We have a fairly good cross section of New York State. I would say that we have a larger--I don't know what you mean by rural, under 10,000?

MR. ATLAS: I mean away from those corruptive centers of civilization.

MR. CONWAY: He means north of the Bronx.

MR. KAPELMAN: On behalf of the Bronx, I object.

MR. CONKLIN: Let me say, sir, the percentage--

MR. ATLAS: I have a serious point in this.

MR. CONKLIN: The two or three larger percentages is less than in summer rural or other Upstate areas. Apart from that, we have a pretty good cross section of the state.

MR. ATLAS: The opinion that you have given us as to the feelings on the abolishment of capital punishment, the constituency for which you are definitely speaking now represents not only a cross section but a rather heavy weighting in what we have called here, without contempt, "the sticks".

MR. CONKLIN: I wouldn't say that--not a rather heavy. I would say that the percentage of protestant population in towns under 5,000--towns and cities under 5,000, is generally higher in New York State than the

percentage of protestant population in the larger cities. Apart from that, I wouldn't want to say it was heavy.

MR. ATLAS: Thank you, sir.

MR. KAPELMAN: I want to make very clear something that Mr. Conklin said. I think he would like for it to stand, but just to affirm it: When the very proper question was put to him by Mr. Denzer that if for one reason or another or through some means or another very conclusive proof were adduced as to the deterrent feature of capital punishment, that the position of the council and, particularly, of Mr. Conklin would not be affected by such new evidence except that the only provision that would be affected might be the question of the life imprisonment-parole situation.

MR. CONKLIN: This was a personal observation. I was not speaking for the Council. We have not studied this at all.

My guess is that any such discovery--which I think would be very hard to make, but if it could be discovered that this was a very real deterrent and had been so effective in various states and made a test across state lines where there is no capital punishment at the present time. I think the statistics disprove any such claim.

If the claim could be proved, I suppose it would reduce the percentage of people in our membership who would favor the abolition. I think we would still be in a majority,

but it would reduce the number.

MR. KAPELMAN: It would limit the deterrent effect to the question of nonrelease on a life imprisonment sentence?

MR. CONKLIN: As far as I am concerned.

MR. CONWAY: How does your group distinguish the taking of life in war by the act of the government, for instance?

MR. CONKLIN: I have never been able to find out, sir. I think we pretty much put blindfold~~s~~ over our eyes and go out. I happen to belong to that comparatively small--in fact, some people say the infinitesimal--group known as the pacificist membership of fellowship and reconciliation.

It is beyond my understanding how the protestant-- or citizens in New York society, or anyone in the world, can continually support the whole principle of destruction of human life--what I call mass murder. They do it; I quarrel with them; I can say they are wrong, but I certainly would not be representative at all and could not speak for them in this regard.

THE CHAIRMAN: Thank you, very much.

Are there others who have arrived who had advised us of their intention to appear this morning?

We have one more speaker.

FROM THE FLOOR: Police Conference of New York.

THE CHAIRMAN: Oh, yes. Would you want to come up here, please.

MR. SGAGLIONE: I have a very brief statement and I want to thank you, the Commission, for giving us the opportunity to be heard.

I represent the Police Conference of New York, which is an organization that represents all the policemen in the state, over 50,000.

We want to go on record as being opposed to any change or elimination in the existing laws relating to capital punishment. Unquestionably, the member of society closest to the criminal element is the police officer. The very nature of his work requires this close association. As a result, the police officer is eminently qualified to comment on the retention of capital punishment.

The Police Conference is opposed to any alteration of capital punishment laws because of its great effect as a deterrent. Experience has proven to the police officer that capital punishment preys on the criminal mind when a prospective murder is contemplated. Therefore, many would-be murderers never are actualized. The fear of that which he contemplates, to wit, death, deters a would-be murderer from proceeding.

This is the deterrent force, we believe. This is the reason why capital punishment must be retained in its present

form.

Penalties must be strong. The protection of society demands it. As we are all aware today, there is not enough respect for law and order in our great State or in our nation. Therefore, in conclusion, the Police Conference of New York respectfully urges this Honorable Commission continue the implementation of the mosaic law: "An eye for an eye and a tooth for a tooth" by recommending that the existing laws on capital punishment be left in their present form.

THE CHAIRMAN: Are you familiar with the proposal of the District Attorneys' Association? You weren't here when Mr. Baratta spoke. It provides a recommendation that we propose a two-stage trial, the second stage of which the jury would recommend life imprisonment or the imposition of the death penalty. Does your Conference have a position on such a change as that?

MR. SGAGLIONE: No. We believe the law should stay as it is today with the death penalty for anyone who is a murderer.

THE CHAIRMAN: Have you gone the other way at all and have any recommendation with the present recommendation of life imprisonment on felony murderers?

MR. SGAGLIONE: We don't consider that a good change for the simple reason that if a person is committing a murder, he can go ahead and commit two and three murders

because the most that can happen to him would be life imprisonment.

PROFESSOR WECHSLER: They can only kill him once.

MR. SGAGLIONE: If he knows the most he can face is life imprisonment, he can try to do away with witnesses. He has nothing to lose.

MR. ATLAS: Are you acquainted with the view that most murderers upon questioning, say they never even gave it a thought, what the consequences would be when they set out to do their deed? That is one question.

The other question is, as you know perfectly well, deliberation can take place in an instant. What I would like to know is when does the man have the time to sit down and consider the deterrent of capital punishment, in your view?

MR. SGAGLIONE: Possibly after he commits the murder.

MR. ATLAS: After he commits the murder, then he hasn't been deterred. Wouldn't you admit that?

MR. SGAGLIONE: He may be deterred from going further, from killing a second person or a third murder. There is always that possibility.

PROFESSOR WECHSLER: Why don't you favor boiling them in oil?

MR. SGAGLIONE: I think our society doesn't believe in that today.

PROFESSOR WECHSLER: I wonder what the line of

distinction is, as you see it?

MR. SGAGLIONE: I think--I don't have the facts with me--but every so often you read in the papers about someone who is released; they have served a number of years for a crime committed and they go out and commit a more serious crime.

PROFESSOR WECHSLER: You also read about people who served and have been released and go out and don't commit any other crimes.

MR. SGAGLIONE: True.

PROFESSOR WECHSLER: You know, of course, the only state left in the Union--the only jurisdiction in the english speaking world that has a mandatory capital punishment is New York. Every other state has changed and you say you are in favor of it.

MR. SGAGLIONE: We are in favor of the law continuing as it is.

PROFESSOR WECHSLER: You have not studied the reasons why the states have changed?

MR. SGAGLIONE: Some of the states abolished it and brought it back; maybe not as mandatory.

PROFESSOR WECHSLER: There is no change backward on that. Why do you suppose in the last 10 years, 15 jurisdictions have given up a mandatory capital penalty without any one of them returning to it? Do you think that is an

experience you ought to study before you take a position on this question?

MR. CONWAY: What police experience have you had, yourself?

MR. SGAGLIONE: I am a patrolman for 11 years.

MR. CONWAY: In the city?

MR. SGAGLIONE: With the Port Authority of New York City.

MR. CONWAY: Have you run into the situation where the killer says the reason he killed was to avoid detection because of the capital punishment?

MR. SGAGLIONE: Have I heard them say that? Perhaps.

MR. CONWAY: I am in law enforcement and have run into that.

MR. ATLAS: May I point out, so that the record is clear, that the so-called Mosaic Law, "an eye for an eye and a tooth for a tooth," never in the history of the Jewish State was interpreted to mean an eye for an eye and a tooth for a tooth. It meant substitute punishment, that the so-called lex talionis never meant anything more than an equalization of an injury, but it did not mean that I put your eye out. It did not under Hammurabi, it did not under Moses.

Somebody ought to say it.

THE CHAIRMAN: Any other questions for Mr. Sgaglione?

MR. KAPELMAN: I wanted to make one more observation, if I may. Are you aware of the fact that this matter which Professor Wechsler has started to discuss with you has received much comment from police and law enforcing agents in Europe and that a very extensive report was drawn in England in 1954, and that at that time they called upon the law enforcing agents to testify.

One of the things that the law enforcing agents said was that they asked for retention of capital punishment originally because of the fact that it safeguarded the police officer's life, that the police officer attempting to catch a felon had some measure of security in that if the felon attempted to use the gun on him and killed him, the felon would pay the death penalty; and that was the reason why, originally, police officers were in favor of the retention of capital punishment.

They then came to a conclusion, after considerable study--and there is testimony in this English report to that effect--that police officers changed their position and felt that there was a grater security in the abolition of capital punishment because the felon who was seeking to avoid capture now did not need to be concerned about inflicting or using his gun on the police officer and the police officer had a

greater measure of security.

Has your agency considered that avenue of approach in this matter?

MR. SGAGLIONE: That has been considered, Mr. Kapelman, but I think the record will show policemen are being killed today by people carrying weapons.

For instance, in Nassau County, they had a patrolman killed by a young lad who had tatoood on his chest "I Hate Cops." He didn't go to the chair.

THE CHAIRMAN: Do you have any statistics, Mr. Sgaglione, concerning whether the incidence of that is higher in New York or in noncapital jurisdictions?

MR. SGAGLIONE: I have no statistics. I couldn't say.

THE CHAIRMAN: If there are no other questions, I thank you, very much.

Mr. J. Gilbert Maurer.

MR. MAURER: J. Gilbert Maurer, Round Lake.

Chairman Bartlett and other honorable members of the Temporary Commission on Revision of the Penal Law and Criminal Code, the subject matter is abolition of capital punishment as a deterrent to homicide.

We need search no further than our conscience as Christians and God-fearing mortals to arrive at a rapid decision to whether any man--may he be angered or for

personal vengeance--commit murder, may it be a public official upon whom has been bestowed the duty in his official capacity to take a human life as punishment for a crime. One of the ten commandments states, "Thou shalt not kill." In the New Testament, Christ summed up the ten commandments into two commandments, one of which is, "Thou shalt not kill." It is as though He was placing greater stress on this commandment, placing it above all others. His teaching does not qualify the commandment by stating, "Thou shalt not kill unless you are a public official taking the life in performance of one's duty."

As a universal manner we do admit that we are Biblical and church-going hypocrites.

Another sufficient reason, in itself, to abolish capital punishment, is the helpless and helpless aftermath of a capital death when it is discovered that a mistake was made and the wrong person was killed. Under life imprisonment some adjustment and compensation can and is made to effect a remedy as justifiably as possible. Errors in arresting a wrong person are numerous and can be attributed as part of the imperfections of our society, but errors in killing the wrong person also are numerous and no adjustments can be made --a most horrible state of affairs.

However, the coldblooded insistence by mankind to continue to condone this medieval form of torture in the

belief that it deters crime is ironically and overwhelmingly belied by statistical records to the contrary. Nine of our states have passed laws abolishing the death penalty for any crime. These nine states all hold statistical records attesting to the fact that in these states where life imprisonment is the penalty for murder, there is 350% less homicide per capita. Of 35 of the larger cities from 25 states used in the research study, Detroit, Michigan, Milwaukee, Wisconsin and Minneapolis, Minnesota, were three cities from states abolishing capital punishment. The homicide rate average for these three cities was one murder-- and I will quote you in round figures; the actual figures are on my text--were one murder to 43,000 persons during the year polled, 1960; but of the 32 other cities from the other 22 states, there was a murder for only every 12,000 persons. Detroit, for example, was compared with Chicago, being similar types of cities. In Detroit, where capital punishment has been abolished, one murder was committed for every 11,000, but in Chicago, the rate was one murder for every 9,000 persons. The record, however, for life imprisonment goes to Minneapolis, Minnesota, for one murder for every 69,000 persons. With Milwaukee, Wisconsin, second placed with one murder for every 49,000 persons. Incidentally, no other states which employ capital punishment comes even close to half of this number except Boston, which rates one

murder to every 25,000 persons. Sixteen of the 25 states record one murder for an average of 7,000 persons. The record low in this group is Nashville, Tennessee, with one murder per only 4,000 persons with Jacksonville, Florida, a close second with one murder forevery 5,000 persons.

It boils down to the cold fact that living in Minnesota, which has no capital punishment, is 15 times safer from homicide coming to one than living in Jacksonville, where killers are executed. Jacksonville, Florida, is 134 times more dangerous, Minneapolis 10 times more dangerous and Milwaukee over twice as dangerous as living in Detroit, all three of which punish their murderers by life imprisonment.

Murder was up 3%--

MR. CONWAY: May I interrupt. Do you have the statistics on the difference between Kings County and Warren County on the percentage?

MR. MAURER: My research doesn't break it down that minute. It is just states and cities.

Murder was up 3% in 1961 from 1960 in the states having capital punishment, but down generally in those states with life imprisonment.

There are no exceptions to these examples. The favorable facts have not been taken out of context. Throughout the entire study, all of the nine states showed from

100% to 1500% freedom from homicide where life imprisonment was the punishment.

Caryl Chessman was asphyxiated by gas last year by the State of California through compliance with the law, yet Chessman did not even take a life. The charge of rape that he denied is a lesser crime and the circumstances were as shrouded--were so shrouded with doubt that he was reprieved repeatedly for 11 years, during which time he became a model educated and matured citizen, well-rehabilitated from his earlier life of reckless living. But despite all of the nationwide and world-wide protests that this state created to coldblooded murder, Governor Pat Brown steadfastly refused to refute his sentence. I wired a protest to Governor Brown and wrote letters to California newspapers, but all in vain.

PROFESSOR WECHSLER: You know he did not have the authority to do it; don't you?

MR. KAPELMAN: The Governor did not?

PROFESSOR WECHSLER: No, he needed the concurrence of the council, under California law. That's why he reprieved and did not commute.

MR. MAURER: My conscience would be dictating--

PROFESSOR WECHSLER: The governor has to obey the law.

MR. MAURER: I still place the responsibility on Governor Brown.

MR. DENZER: Some of these facts on the Chessman

matter is taken from Chessman's book?

MR. MAURER: No, sir, I have taken newspaper articles only.

MR. BASS: What is the source of your statistics?

MR. MAURER: My source of statistics are the Federal Bureau of Investigation, United States Department of Justice, Federal Bureau of Prisons for 1962 and at least a year back.

PROFESSOR WECHSLER: I imagine the Chessman stuff is from at least a year back.

MR. MAURER: No, sir, not a word of it.

PROFESSOR WECHSLER: It is not from the F.B.I.?

MR. MAURER: I took it entirely out of newspaper clippings. I have quite a file on it. Enough of them were substantiated by other papers that I presume the evidence came from the proper source.

Caryl Chessman was put to a horrible death in the California gas chamber by public official murderers.

Christ taught us repentance in the cleansing of one's soul by believing in Him.

Indefinite prison terms for such a repentance and cleansing is in keeping with the mandate of our Savior with whom we believe. Otherwise, we must admit we are hypocrites without faith or belief. To murder man by official sanction

as a punishment and so deny one of God's children the opportunity to redeem himself in the eyes of the law is blasphemy.

Legislatures are equally guilty of these heinous crimes of murder when in the face of statistical facts they fail or refuse to establish even a 10-year trial moratorium on capital punishment. We cannot turn to our church in honest conscience and ask for forgiveness for our sins while at the same time deliberately turn our backs on the atrocious crime of legalized murder. Can we be so wrong if we follow the guidance of our churches, which all denominations deplore the use of capital punishment?

There were eight different bills again in the Legislature last session substituting life imprisonment for our present medieval an eye for an eye type of law. There are no political overtones or aspects regarding this subject. Of the eight bills that were introduced, three were by Republicans and five by Democrats, three by senators and five by assemblymen and from all over the state.

Gentlemen, I implore you by all measures of humanity and supported by all churches to recommend and urge the legislative bodies to pass into law any one of the similar bills introduced in the 1961 session of the Legislature. Remember, gentlemen, a mistake can be rectified if a man has not already been put to death. This fact, alone, should

compel your action. If this subject were to be placed before the public, a surprising nearness to unanimity would result if the reports of these eight states were publicized. The public reluctance would only be manifested if a doubt was expounded as to whether or not less crime would result. In light of this, you cannot overlook the merits of a 10-year moratorium against capital punishment.

I have given you my source of supply and I thank you, very much.

MR. DENZER: May I just ask you one question. Those statistics that you quoted, were they intended to urge that capital punishment is an incentive to crime rather than a deterrent. Some of the figures were rather sharply contrasted. I don't suppose you are contending that; are you?

MR. MAURER: No. It is so much so that it would appear that that is the case.

MR. DENZER: But you are not actually taking that position?

MR. MAURER: No. It is surprising that the states that have capital punishment are so much greater in homicide than the others. It would almost indicate that.

MR. DENZER: Is that consistently true, that the states that have the highest or the worst record are retention states?

MR. MAURER: Yes, that is correct, right down to the last one. As I said--

MR. DENZER: I didn't know the figures were that consistent.

MR. MAURER: When I supply your Committee with copies of the text within five days, I will indicate my source of information so that you can verify it.

THE CHAIRMAN: Thank you, Mr. Maurer.

Are there any others present here this morning who wish to be heard.

(No response.)

MR. KAPELMAN: May I take a moment. There was a discussion a moment ago with a representative of the Police Association and I would like to point out to those who were present, page 57 of Thurston Sellin's book, "The Death Penalty," where he lists the data insofar as police safety is concerned, in those areas where there has been an abolition of capital punishment and in those areas where there has been no abolition, he concludes, after setting forth very much data, that it is obvious from an inspection of the data that it is impossible to conclude that the states which had no death penalty had thereby made the policeman's lot more hazardous.

It is also obvious that the same difference is observable in the general homicide rates of the various states

reflected in the rate of police killings. This can readily be observed by comparing the middle west states with and without the death penalty with corresponding states in the eastern part of the country, as was done in the tables, where appropriate rates of police homicides are presented.

THE CHAIRMAN: Are there any others here who wish to be heard?

MR. RYAN: I arrived late. I had asked to be heard. My name is Ryan. I am District Attorney of Onondaga County.

MR. RYAN: Mr. Commissioner and members of the Commission, ladies and gentlemen: I first of all would like to just say that the Grand Jurors' Association of which I am a member knew that I would appear in opposition to capital punishment. I had so informed the members of the executive committee at the last meeting in New York.

THE CHAIRMAN: This is of the District Attorneys' Association?

MR. RYAN: Of the District Attorneys' Association. I had first of all committed myself in advance of the meeting with the District Attorneys' Association and my own feelings insofar as capital punishment is concerned in the field of administration of justice is that I feel obligated and I felt obligated to be here today to make my ideas known to the Commission.

Section 1045 of the Penal Law of the State of New York begins as follows: "Murder in the first degree is punishable by death--"

These nine words employed in the Penal Law of the State of New York are the most over-rated in law enforcement and the administration of justice.

The first detrimental effect on law enforcement and the administration of justice, and one that is immediately obvious to a district attorney, is that prospective jurors who might hear and determine the issues of fact in a case involving the death penalty, divide among themselves in opposition to capital punishment. In Onondaga County more than one-third of the jurors are on record as being opposed to the death penalty.

In selecting a jury in a case involving the death penalty, it becomes necessary for the attorney for the People, the prosecutor, to inquire of the prospective juror whether or not he has any conscientious scruples concerning the death penalty.

When this inquiry is made of jurors who claim to have no objection to the death penalty, inevitably the juror apologizes for his position by stating something that goes like this: "I have no objection to the death penalty but I am concerned about using circumstantial evidence if it results in the death penalty."

How many times have you heard this question: "Would you take a man's life on circumstantial evidence only?" The combination of the natural and normal reluctance of a decent citizen to take a human life, coupled with the rules of law relative to circumstantial evidence, make the life of the murderer of greater importance than the life of his victim with the frequent result that a guilty defendant is found not guilty and society is cheated in the administration of its laws.

The mind that plans a first degree murder plans to leave no evidence. At most, only circumstantial evidence is available. Thus, it is that the most vicious type of homicide becomes the most difficult to prove and if the killer is apprehended, he reaps the benefit of the law and the frailties of the human beings who are called to sit in judgment upon him as jurors.

Practically speaking, the killer, by planning his murder carefully and relying on these artificial and natural protections, can take life without paying the ultimate or any cost. His peers upon the jury are not his peers. They are normal, decent people who are reluctant to kill although their hands are twice removed from the switch.

The end result is that the death penalty is not an effective tool with which to combat murder. Because of it, justice becomes handcuffed as well as blind.

The most and the worst that the death penalty accomplishes today is to whip up morbid curiosity in trials, creating a sensationalism that is based on the primal urge to secure an eye for an eye - a tooth for a tooth.

Thus, we see two opposite effects: Upon the jury, that of abhorance to duty; upon the public, that of fascination.

I leave to my friends of the Clergy the moral questions involved. I speak primarily as a prosecutor who would like to remove the criminal courts from the Roman Circus, who would like to see justice as firmly administered against a murderer as justice is firmly administered by juries against car thieves.

For these reasons, I urge upon this Commission the abolition of the death penalty, substituting for it imprisonment for the term of natural life.

Thank you.

THE CHAIRMAN: Are there any questions from members of the Commission?

MR. CONWAY: Would not the California statute solve your problem?

MR. RYAN: No. I think that you are still dealing with nice persons on the jury--you are still dealing with him. If you had--

MR. ATLAS: I hoped that we would have more than

a nice person on a jury.

MR. RYAN: Well, you take 12 people when they go into a court room and see a strange man they never saw before. Now these 12 people came from desks where they were more involved with their own personal livelihood, their own family and everything else. Suddenly, they are subpoenaed to serve as a juror and they are sitting on the jury, and they are told now that--and they know--they are intelligent people--they know that the way they vote determines the life of this person. His life automatically becomes far more important than the life of the person that he planned to kill.

Putting it in another way, let me show you what I think the practical effect of this death penalty is. The death penalty, if it has any merit at all, is primarily directed against the common law, coldblooded, lying-in-wait murderer--the fellow that plots his murder. All right. As soon as he plots his murder so that no one sees him, which is the way he is going to do it, the only evidence you have against him is circumstantial evidence, if you get it, and that's all you have left.

You have the normal reluctance of the human being to take the life and you have the skepticism of the human being from the normal mind, for the use of circumstantial evidence. So that the skillful murderer, insofar as he is concerned and insofar as his particular killing is concerned, he has

abolished the death penalty because he has abolished the verdict of first degree murder.

MR. CONWAY: I don't comprehend how the bi-stage trial falls short of a solution.

MR. RYAN: We come back to the jury. They have to decide whether he is to be executed.

MR. CONWAY: If he is not executed, he is in prison. They are not going to acquit him.

MR. DENZER: This jury has the power to nullify the death penalty. Wouldn't that obviate any feelings he had?

MR. RYAN: From all practical purposes, when you start selecting a jury in a case involving the death penalty, the first thing you are going to have to do, as a practical matter, is to clear that jury of every one who is opposed to the death penalty. Otherwise, you are not enforcing the law that you are supposed to enforce. You have to inquire as to whether or not that juror has conscientious scruples relative to that death penalty. That is the first thing you have to put to him. If he has, he is not to sit on that jury; and the minute you start into that, you increase the prominence and importance of the man that took the life. It makes that person's life--he is packed in gauze and cotton and the administration of justice against him is nowhere comparable with the administration of justice against the person who steals a car or the person that picks a pocket or

the person that takes something off a counter.

MR. DENZER: Would you say most jurors feel that way?

MR. RYAN: Well, Onondaga County has a half million residents. One-third--it is better than one-third of all of the jurors, prospective jurors, are already on record that they are opposed to the death penalty. Of the other two-thirds--

PROFESSOR WECHSLER: It is put on a form?

MR. RYAN: It is right on the form when they are first qualified as jurors.

Of the other two-thirds, the minute they know that you are dealing with circumstantial evidence only, which in the first instance was the plan of the murderer, that there be no evidence and that no one would see him, you are right out the window.

I think the people who are prosecuting these cases have to quit kidding themselves. They are not getting the results that the administration of justice demands in a case involving the death penalty of a human being. The person that is important in these things is the citizen who has been murdered, but the way our laws are shaped today it is the killer whose life becomes far more important than his victim.

PROFESSOR WECHSLER: Have you had any real cruel murders in the last few years?

MR. RYAN: About five.

PROFESSOR WECHSLER: Have you any opinion, based on your experience, as to what the effect on the community would have been if you could not have launched a capital prosecution?

MR. RYAN: I don't follow your question. What do you mean?

PROFESSOR WECHSLER: We are trying to imagine what the situation would be, given an extremely cruel murder, assuming abolition.

MR. RYAN: Let me just see if I can give you not only an example but a situation that exists at this moment. There was a 66-year old woman--this has been in the headlines in Onondaga County since last Saturday--a 66-year old woman was walking along the street. She was quite a prominent lady in the Red Cross circles and so on, a retired individual. Someone, a male, jumped out of the shadows, grabbed her purse in such a fashion that it twisted her, so that when she fell she struck her head. This is a Grand Larceny 2nd Degree, at least, so we are dealing with a felony murder. No one can identify the person. If they apprehend the person, you are stuck completely with circumstantial evidence.

THE CHAIRMAN: I think the point that Professor Wechsler was making is: Do you have a judgment as to what

the public reaction would be in Onondaga County if you had a cruel murder, one that was sensational, and you were unable to prosecute a capital case because of abolition?

PROFESSOR WECHSLER: Let's assume a confession--a documented confession and there is no question of who it is in anybody's mind. This is a cruel, a bitter and unspeakable thing that happened. Now under present circumstances--or under the District Attorneys' Association proposal, if you, as the prosecutor, could perhaps make a judgment as to whether that was a bad enough case to press for a capital verdict, presumably you would take some account of public opinion as you appraised it in that situation. Now what I am trying to explore is suppose you could not do that even in the most extreme case; you are limited to prosecution resulting in a conviction and a prison sentence. Can you imagine what effect on public feeling in your county would be? Would it be a kind of sense of frustration?

For example, that apparently developed in Delaware after the abolition of 1958 and that led to the almost unanimous restoration of capital punishment in 1961.

Why? Because there had been a triple murder and a very, very unforgivable condition so that any mitigation was negated and just a sense of frustration of the community resulted in this sentiment in the Legislature.

In other words, I put this question to you because it

seems to me the issue is trying to judge whether abolition is really the most practical proposal to make in this situation.

MR. RYAN: Let me just go through that, Professor, until I point out some things to you in what you have proposed. As soon as a person is indicted for first degree murder, the first thing that his attorney does is sit down with the district attorney. That is the first thing. If the evidence against the defendant is excellent, the best that you could have, the counsel for the defendant would recommend to his client a plea to murder second degree, life imprisonment, which is what we have now. That is the first instance.

At that point of time, one man, the district attorney, decides whether or not he is going to put this man through the task of keeping out of the electric chair. That is one man that does that. Also, that one man for some reason--it may be his particular feeling as to the type of murder that was committed or it may be several other reasons--decides that he would not accept a second degree murder plea but that he would insist upon capital punishment, a trial and letting the jury decide. He is running a risk when he does that, the risk of an acquittal, the risk that a jury may not--

PROFESSOR WECHSLER: He would not run that risk under the District Attorneys' Association proposal under the two-stage trial.

MR. RYAN: Under the two-stage proposal, yes. However, under these two stages you are still dealing with 12 nice people, civilized people and--

PROFESSOR WECHSLER: They may not be unanimous in favor of a death penalty, in which event public opinion can focus on them. In any event, the most you would have is an unpopular verdict, but in an abolition situation, what you have is an outraged populus turning to the Legislature and denouncing the law and a very real danger that you may end up worse off than you started, which is what happened in Delaware. They have more capital crimes in Delaware today after the 1961 reversal than they had in 1958 before the 1958 abolition.

MR. RYAN: Do they have more convictions?

PROFESSOR WECHSLER: I don't know. They just changed it a year ago.

MR. RYAN: If I recall, looking at the statistics in New York State, alone, for 1961, where we have capital punishment, I think there was only one execution in 1961.

THE CHAIRMAN: In New York.

PROFESSOR WECHSLER: Two, I think.

MR. RYAN: Two. That comes nowhere near the number of first degree murders in this state.

PROFESSOR WECHSLER: Obviously.

THE CHAIRMAN: There has been none at all since the

spring of 1961.

MR. RYAN: No executions?

THE CHAIRMAN: Right.

MR. RYAN: What I am saying, Professor, is this: that the way the law is presently set up, the most vicious of the killers is the fellow that plans it and schemes it and leaves only the circumstantial evidence.

If he just sits still in a court room, that fellow should get less than first degree, because he effectively abolishes that penalty and that crime insofar as he is concerned, knowing the attitude of that American jury, of that New York State jury.

MR. BENTLEY: In other words, you can't convict him.

MR. RYAN: I would say you can't convict him, because if we could, you would have a bigger number than one.

MR. BASS: How many indictments did you have in Onondaga County for murder in the first degree?

MR. RYAN: Five in the last year.

MR. DENZER: Take a 14-year old girl who is raped and killed by someone, as happened in Mr. Conway's bailiwick recently. They catch the defendant, the whole community is up in arms and outraged. There is a clear case of confession and everything; you can try him and convict him of murder in the first degree, but you can't give him the death penalty. Is the community going to be so up in arms that they are

going to shout to the Legislature for restoration of the death penalty?

PROFESSOR WECHSLER: Or worse?

MR. RYAN: Gentlemen, you are going to change the laws relative to insanity and the case that you are talking about--that type of case--

THE CHAIRMAN: Is this your prediction?

MR. RYAN: My prediction.

MR. DENZER: Don't get into insanity.

MR. RYAN: What you are going to do with the law of insanity is take care of public sentiment in that case.

MR. DENZER: Change de facto insanity is not in issue. It is easy to visualize a case that will outrage the community without insanity. That complicates the question, bringing in insanity.

MR. RYAN: The question is you are proposing a hypothetical question. You are asking me if you have a very vicious murder and you can't electrocute the man, is the public going to be enraged?

MR. DENZER: In Onondaga.

MR. CONWAY: Let's assume you have the insanity question taken care of by the prospective defendant who was discharged by a psychiatric clinic a month before.

MR. RYAN: Perfectly normal, perfectly sane?
How many of these have you had in New York State?

MR. DENZER: We have quite a number.

MR. RYAN: How many have resulted in an execution?

MR. DENZER: Quite a number.

MR. RYAN: I only know of one in 1961.

MR. KAPELMAN: The question being put to you is what would be the feelings of the community, as you judge it, if we abolish capital punishment or recommend the abolition of capital punishment and the Legislature, in its wisdom, followed it and capital punishment was abolished and given the state of affairs that Mr. Denzer has given you? What would be the effect on the community? Would the community feel it has been thwarted? Would the community feel a sense of revulsion to the law, itself? What would be the attitude?

MR. RYAN: One-third of the community should be outspoken in favor of life imprisonment because one-third is on record as being opposed to capital punishment. So, you are sure of one-third.

PROFESSOR WECHSLER: It means being opposed to serving personally in a capital case.

MR. RYAN: The question concerning what I am telling for the record that I am talking about now--

PROFESSOR WECHSLER: I know what it is. I have seen the jury record. Practically speaking, what those prospective jurors are saying to the jury commissioner is, "I wouldn't be happy serving in a capital case"; isn't that

so?

MR. RYAN: No. The question put to them is: "Do you have conscientious scruples relative to capital punishment?" and the answer is: Yes or no, and it is under oath.

THE CHAIRMAN: The question he is really answering is: "Are you willing to sit on a first degree murder case?"

MR. ATLAS: I have some questions.

You are being asked to guess, I think. You have been asked to guess and I think you should have been asked to guess, but I want an estimate from you. You say your jurors are drawn from a voting list; aren't they?

MR. RYAN: No, not necessarily.

MR. ATLAS: How are the jurors drawn?

MR. RYAN: The jurors are drawn according to-- each one has to be over 21 and a citizen of State of New York, a resident for a year, and be married, too, or own-- married to someone owning \$250.00 personal property or own \$250.00 in property.

MR. ATLAS: A sort of a freeholder?

MR. RYAN: That's right.

MR. ATLAS: You know by personal statement that one-third of those drawn are opposed to capital punishment?

MR. RYAN: Definitely.

MR. ATLAS: You are telling us, are you not, in

effect, that of the other two-thirds, when drawn, those to whom the question is put about whether they have scruples about sitting are not giving you the frank answer.

MR. RYAN: Some of them--I will tell you what the experience has been on that. The persons that are ultimately drawn into the array for the purpose of selecting the twelve, these are drawn only from those who have stated they have no conscientious scruples. See? So, we are dealing with what is supposed to be the pure element insofar as capital punishment.

MR. ATLAS: Not the pure element, but an element willing to inflict capital punishment.

MR. KAPELMAN: And administer the law.

MR. ATLAS: Don't call them pure.

MR. RYAN: When you ask one of those persons, "Do you have conscientious scruples?" I have had in the last one, I'd say, at least ten of the ones I examined say that between the time they filled out that application, the card--qualification card--as a juror, they had changed their minds, changed their feelings or changed their religion and they were now opposed to capital punishment.

MR. CONWAY: Don't you think quite a few of those people might have wanted to go on a hunting trip?

MR. ATLAS: That might be.

MR. RYAN: It took them completely off the jury

list, too.

MR. ATLAS: My point is this: I am not asking you about public commotion in the event of a so-called miscarriage of justice, because I think the proposition is hard and asking you to guess is twice as hard and also unfair. Would you not say, Mr. Ryan, that of the 100% of the drawn jurors who are represented, of Onondaga County, being somewhat like freeholders, that we will have above 50% who are opposed, in fact, to capital punishment?

MR. RYAN: That would be my own estimate of what I have seen.

MR. ATLAS: Would that be an honest estimate?

MR. RYAN: Yes.

MR. PFIEFER: Can you tell me if Onondaga includes not only the city of Syracuse, but some country?

MR. RYAN: There are a quarter of a million people in Syracuse and a quarter of a million people outside, roughly.

MR. PFIEFER: Do you know of the third who is opposed to capital punishment, is there any significant percentage more or less in the city as opposed to the country area?

What I am getting at is: I have a feeling that there is much more of an emotional response in the rural areas to a brutal murder--therefore, the retention of capital

punishment--than there is in the urban areas. Is there anything in what I think there? Do you understand what I am getting at?

MR. RYAN: I will tell you my own observation. I have had dirt farmers tell me that they were opposed to capital punishment and be removed from the jury.

MR. PFIEFER: They have less police protection than the city dweller and they felt there was a value in retention of capital punishment?

MR. RYAN: In Onondaga County, that one-third on record, you have farmers, laborers, secretaries; you have got them from all walks of life.

MR. ATLAS: Mr. Chairman, may I deviate from the normal course? I am sure Mr. Ryan wouldn't mind.

One of our colleagues is a district attorney and he is a district attorney in much the same kind of a county as Mr. Ryan, namely, he has a city and he has outlying areas which are quite rural.

Might I ask Jack Conway a question.

I would like to know whether you consider that 50% or more than 50% of your jurors are opposed to capital punishment?

MR. CONWAY: I prefer to discuss it with you quietly, but I think it should be discussed after a certain case.

Mr. Ryan, I assume that in Onondaga you have the same trouble in convicting drunken drivers. Is that fair to say?

MR. RYAN: Yes.

MR. CONWAY: Would you conclude that the conviction should have no effect on his driver's license?

MR. RYAN: They adjusted that law. The big problem with driving while intoxicated--I think the Legislature was very good in that adjustment--the big problem was you had the business man, you had the professional man, you had the professor and nice people who were at Christmas parties and New Year's parties and they weren't falling down drunk is what they tell you.

THE CHAIRMAN: Except on New Year's Eve?

MR. RYAN: That fellow got a ticket for driving while intoxicated and he nearly died for a solid month because of the fact that he got such a ticket.

The test is--the chemical test is and the different ways of proof, it makes it a little tough to put in a good solid driving while intoxicated case.

I have been a defense attorney longer than I have been a district attorney and I hope that would continue in the future, too. I have defended cases or had defended cases where a driver would have a test that would be .21--

MR. CONWAY: I did not mean to get into a long discussion. Don't you think the big deal is what it does to

his driver's license?

THE CHAIRMAN: That is the reason you can't get the conviction.

MR. RYAN: That is the problem. With murder, it is a different thing. With murder, you have thrown an impossible burden on that juror. You haven't taken him into consideration from the practical point of view of enforcement. You are not getting the type of enforcement in murder that you should get in this state.

MR. BASS: You said you had five indictments last year for murder in the first degree. How many of those five indictments went to trial?

MR. RYAN: Four of them.

MR. BASS: Four. And what was the result?

MR. RYAN: One acquittal. Three of them were-- two of them were first degree manslaughter and one second degree manslaughter, who copped a plea in the middle of the trial.

MR. CONWAY: It looks like they were not murder ones to begin with.

MR. RYAN: When a fellow goes out of the room and fills a shotgun up, puts in a shell, kicks off the safety and doesn't let his victim get out of the chair before he unloads one of them into him, if that is not first degree murder according to our sections--

THE CHAIRMAN: He was at least a well-prepared killer.

MR. RYAN: He certainly was.

You have certain other things, too, that you have to be mindful of in this field because of this Mapp v. Ohio decision. In that murder first degree I told you about, there wasn't any doubt in our mind it was first degree murder. This is what happened in that. He had put us in a bind for a day and we didn't get the gun into evidence. The police arrived at the front door at the time the fellow is running out the back door, because the police were summoned immediately and they chased him up the street to his place. He went in the front door, dropped the gun in his bedroom, went out the back door. The police seized the gun.

The judge ruled in that case it was an illegal search and seizure and we couldn't put the gun into evidence, and it barred a good quantity of the confession we had.

THE CHAIRMAN: You have to concede that is one thing we cannot do anything about.

MR. RYAN: These things happen in the course of a trial and a jury has to decide the issue of life and death, which they know they are doing, and they are not going to decide death.

THE CHAIRMAN: We thank you, very much, for appearing.

MR. RYAN: Thank you, very much, gentlemen, for having allowed me.

THE CHAIRMAN: Is there anyone else present who wishes to be heard?

MR. KAPELMAN: I appear for myself as a member of the Commission and also I am appearing for the minority leader of the Senate, Mr. Anthony Travia, who could not find it possible to attend but asked me to attend for him.

THE CHAIRMAN: We all thank you for attending and you can be sure the views you have expressed to us will be carefully considered by us.

We will adjourn until tomorrow morning at 10:00 A.M.

(Whereupon, the proceedings were adjourned until November 30, 1962, at 10:00 A.M.)

MINUTES
OF A
MEETING OF THE TEMPORARY COMMISSION ON
REVISION OF THE PENAL LAW AND CRIMINAL
CODE.

Chancellor's Hall
Albany, New York
Friday,
November 30, 1962

PRESENT:

ASSEMBLYMAN RICHARD J. BARTLETT, Chairman
TIMOTHY PFEIFFER, Vice Chairman
NICHOLAS ATLAS, Commissioner
Mr. BENTLEY, Commissioner
JOHN J. CONWAY, JR., Commissioner
JUDGE PHILIP HALPERN, Commissioner
HOWARD JONES, Commissioner
PROFESSOR HERBERT WECHSLER, Commissioner
RICHARD G. DENZER, Chief Counsel

ALSO PRESENT:

HERMAN BASS, Representing Walter J. Mahoney,
Majority Leader of the Senate.
JOSEPH CZEULEWSKI, Appearing for Joseph P. Carlino,
appearing for the Senate Finance Committee.
SAMUEL KEARING, Appearing for George Ingalls,
Majority Leader of the Assembly.
E. DAVID WILEY, Counsel, N.Y.S. Dep't. of Mental
Hygiene.
DR. RICHARD A. FOSTER, Assistant Commissioner of
Mental Hygiene.

ALSO PRESENT: (Continued)

JOHN CASEY, President of the New York State District Attorneys' Association

HARRIS STEINBERG, ESQ., N.Y.S. Bar Association, Penal Law and Criminal Code Committee

LEE THOMPSON SMITH, Pres., MANUEL LEE ROBBINS, Counsel, Grand Jurors Association of N. Y. County.

MASON TAYLOR, New York State Newspaper Editors Association.

ROBERT MAC FARLANE, Pres., Kings County Grand Jurors Association.

FRANK MICOLOSI, Counsel, Queens County Grand Jurors Association

P. ERNEST DAVIS, Nassau County Grand Jurors Association.

OLIVER DAVIDSON, PRES., Suffolk County Grand Jurors Association.

STEPHEN CRAIG, Pres., with RICHARD ROTH and RICHARD HOLBROOK, Westchester County Grand Jurors Association.

ARNOLD HOFFMAN, Chairman Legislation Commission with GEORGE RUNDQUIST, N. Y. Civil Liberties Union.

HON. JOSEPH A. RYAN, District Attorney of Onondaga County.

H. RICHARD UVILLER, N. Y. County District Attorneys Office.

JOHN CONDON, JR., Chairman, Erie County Bar Association Penal Law & Criminal Code Committee

P R O C E E D I N G S

THE CHAIRMAN: The Temporary Commission for Revision of the Penal Law and Criminal Code is about to begin the second session in Albany.

This morning the topic we are to hear and begin testimony on relates to the test of criminal insanity here in New York. This inevitably involves the evaluation of our present rule, the M'Naughton Rule. Is this doing the job it should in defining for the courts what we consider to be insanity to the extent it can be used as a defense? Should a better or should another rule be substituted for it? And it is on these questions that we are going to take testimony this morning.

The first witness will be E. David Wiley, Counsel of the New York State Department of Mental Hygiene.

MR. WILEY: I have a statement on behalf of the Department of Mental Hygiene that Dr. Paul Hoch, Commissioner, has requested to be placed in the record. Do you want to leave it in?

THE CHAIRMAN: If it is not too long, read it in.

MR. WILEY: I will read it as prepared. Dr. Hoch expresses his regret in not being able to be here personally. This is a statement of his position:

"Dear Mr. Bartlett: Following is a brief statement of my position in connection with the deliberations of your

Commission on the defense of insanity and the hearing on this subject you are holding on November 30, 1962.

I have long been deeply concerned with the existing definition of criminal responsibility in New York Law derived from the one hundred and nineteen year old M'Naughton Rule. I have taken active steps since I became Commissioner of Mental Hygiene for the revision of the definition. I was instrumental in the calling of the Governor's Conference on the Defense of Insanity on October 14, 1957. Your Commission has the Interim Report of the Study Committee designated to study the problems posed by the laws and procedures of New York for dealing with those accused of crime who raise the defense of insanity and to make recommendations to the Conference for their improvement. At this time I strongly urge your Commission to adopt the recommendations of the Study Committee for revision of Section 1120 of the Penal Law and for adding a provision to the Code of Criminal Procedure eliminating restrictions on admissibility of testimony of psychiatrists at such trials. These recommendations were cast in bill form and introduced in the legislature at the request of the Department of Mental Hygiene in 1961 and 1962. The third recommendation of the Study Committee for a revision of Section 4⁵64 of the Code of Criminal Procedure providing for the disposition of a defendant acquitted on the ground of insanity was introduced in the legislature at

the request of the Department of Mental Hygiene in 1960 and became Chapter 550 of the Laws of 1960.

"The present Section 1120 of the Penal Law, defining the criterion for the defense of insanity to a criminal act, rests upon two cognitive principles; one, intellectual and two, moral. This criterion when applied literally is a real defense in certain rare instances, but in many others where gross mental disorder exists destroying control of the will, it is no defense at all. This criterion pre-supposes free will in every person no matter how mentally disordered if he but possesses the necessary intellectual and cognitive capacity. This concept 'has little relation to the truths of mental life' as Judge Cardozo said over thirty years ago, and moreover contradicts pre-McNaughton legal principles of criminal responsibility.

"In my opinion, rather than continue under such unscientific and false doctrine as McNaughton it would be wiser to return to pre-McNaughton principles, namely as Coke and Hale held in the 17th Century that felonious intent was the criterion of criminal responsibility and a madman cannot have felonious intent, or, as the highest judge in England held only three years before McNaughton, 'If some controlling disease was in truth the acting power within him, which he could not resist, the defendant would not be responsible.'

"I cannot accept a somewhat barbaric principle of law

upon the excuse that over one hundred years of judicial interpretation has made it work well in most cases as was the reason given by high placed judges and many district attorneys at the Governor's Conference on the Defense of Insanity or that the establishment of a new criterion for criminal responsibility would be a great burden to prosecutors and the courts initiating another one hundred years or more of judicial interpretation.

"I cannot accept the proposals of the most forceful defenders of the McNaughton Rule that by removing all restrictions on testimony of the psychiatric witness in criminal trials where the defense of insanity is raised the McNaughton Rule is rendered irreproachable, or their proposal to let the savagery of McNaughton be inflicted unabated upon certain defendants whose remented acts have inflamed the public and the triers but provide systems of partial responsibility or special classification for other defendants with psychiatric disorders.

"I urge your Commission to advocate the abolition of the McNaughton Rule as presently stated in Section 1120 in the New York Penal Law and the establishment of a rule of criminal responsibility based upon the requirement of the actors felonious intent and exercise of free will on an intellectual and moral cognitive plane.

"I urge your Commission to advocate, in addition to the

foregoing and not as a substitute therefor, establishment of statutory standards of evidence and procedure removing all possible obstructions to admissibility of psychiatric testimony in criminal trials where the defense of insanity is interposed. In short, I urge your Commission to adopt the recommendations on these points of the Special Study Committee of the Governor's Conference on the Defense of Insanity contained in its Interim Report of May 29, 1958, which is substantially the same as the proposals of the American Law Institute.

Respectfully Submitted

PAUL H. HOCH, M. D.
Commissioner of Mental Hygiene"

THE CHAIRMAN: We will next hear from Dr. Richard A. Foster, Assistant Commissioner of Mental Hygiene.

DR. FOSTER: This will be relatively brief. I think it worthwhile at the outset to repeat a few remarks I made at the opening Session of the Study Group which had the privilege of considering this matter several years ago.

The use of the McNaughton principle in law has actually reached the stage of a cultural compulsive or a group rationalization. It has become, in a sense, socially institutionalized and when such things occur it is common knowledge that there is great resistance to change or deviation.

Though some leaders of thought may recognize that the knowledge tests of responsibility are inadequate and may even reject the old ways in theory, their emotional loyalty to the attitude of the knowledge tests continues in the face of reason. It is a sort of social legacy. I am not deploring this reaction. It would be presumptuous if I were to do so. There are good and sufficient reasons for the appeal of the McNaughton principle, not only as it is related in history, but regardless of its inaccurate or incomplete premise, it has been a means through the years of handling very difficult social situations. It will be trying enough to decide upon appropriate suggestions for improvement in substantive law, but almost insurmountable will be the problem of proper lay communication of these suggestions. Whatever key words we use will be judged, not merely by their denotations, but more importantly by their connotations and their associations. Various and subtle thoughts and affective reactions cluster about the ideas central to our and your considerations.

This morning I was attempting to think how I could add something to your attitudes in this important matter and I felt that although it changes completely our world of discourse and our frames of reference, I think we might refer to the fact that there is recognized in the mental psychic functions of man what is called an estimative system; it is an appraisal system. It functions immediate and unwitting.

It is the precursor and part of all total conscious interpersonal action or nonaction in man, even that which flows or appears to flow from what is termed rational or reflective judgment.

It is to this level of organization of mental function that I should like to address our attention momentarily. It is there that the subtle erosion of insanity takes its toll unconsciously and imperceptively, twisting what normally would be characterized as cold "perceptions" to things of menace and ridicule. This happens, not in seconds, but in microseconds. At this moment I pause because my estimative system cues me to the fact that you might feel that I am referring to something metaphysical or using mere psychiatric jargon. I assure you that such is not the case. What I am talking about is well recognized and has been accepted by authorities of psychology and psychophysiology for quite some time.

Now certainly we cannot utilize in law any proposition based upon appraisal or evaluation of the estimative system. But at least what I would like to bring out is that there is this element within the mind that is completely shunted off in the present definition and the implications of its functioning, even if we begin to be aware of them and to attempt, however crudely, to take them into consideration, puts us in a position where, at least, we begin to speak the

language of the mind.

If this were not such a profoundly serious matter, it would not be much of an exaggeration to say that to dignify in law the delusion that the assessment of responsibility of interpersonal behavior rests solely upon cognitive or, in the platonic sense, noetic capacities, is ironic. The fact is that in most crimes against the person, the cognitive factor or aspect is the least important element to consider if we wish to truly assess criminal responsibility.

Thank you.

THE CHAIRMAN: Thank you, Doctor.

Does anyone have any questions?

(No response.)

THE CHAIRMAN: We will next hear from the New York State District Attorneys' Association. I believe, Mr. Jacobson, you are going to speak for the Association.

Mr. Ben Jacobson, Assistant District Attorney, Queens County.

MR. JACOBSON: I am charged by the New York District Attorneys' Association to make known to this Commission their view that the McNaughton Rule should not be changed in substance though there may be room for change procedurally since, in our view, the great objection to the McNaughton Rule is not to substance but rather to what it does not permit modern psychiatrists to bring out in their testimony.

The only alternative that we have heard of so far to this McNaughton Rule is the Durham Rule and the A. L. I. Rule or some phase of either one of them.

If we start with the premise that so far as most psychiatrists and modern psychiatry is concerned, practically all criminal conduct is, by definition, a departure from the norm of society and is therefore symptomatic of either mental disease or lack of mental health. If that be so, then psychiatrists will testify that almost any mal-factor, anybody who transgresses against the accepted norm of society is not completely -- to use the vernacular -- there mentally. If that is so -- and it has been found to be so in psychiatry -- the standard of the Durham Rule is completely unacceptable. So far as the A. L. I. Rule is concerned, though that is a little stricter than the Durham Rule in that there must be a substantial capacity not only to appreciate the criminality of the conduct of the mal-factor which is due to mental defect or disease, nevertheless, the objection to the A. L. I. Rule is the elasticity of the terms which permit such indefinite answers to bring a person within the terms. Substantial capacity I submit is something which is very elastic. There may be a tremendous amount of play in the definition given and if the matter is to be adjudicated by a jury, it would be very difficult for a jury to comprehend and to measure, with some small degree of exactitude, whether

the defendant comes within the rule or not.

As I said at the outset, the attack on the McNaughton Rule is not so much on the narrowness of its definition -- that is, the terms or the test, rather, which is provided by the Rule -- but rather the difficulty which is encountered in psychiatric testimony on a defense of insanity. If that were eliminated, the McNaughton Rule, which provides the most exact definition of conduct which may be excused because of mental defect or disease, then the objection which has been raging against the rule would be to a great degree eliminated.

It is the recommendation of the New York State District Attorneys' Association that the McNaughton Rule, in substance, be retained. However, in order to bring forth all the implications of the term "know" which seems to be the stumbling block in the McNaughton Rule, that any and all psychiatric testimony should be admissible in explaining or in defining or in attempting to show whether the defendant knew the nature and quality of his act. Surface knowing, as a child knows that he holds a hammer, may not be sufficient so far as a psychiatrist is concerned. If a psychiatrist were permitted to testify as to whether the defendant had perception in depth, then the objections which presently exists against the McNaughton Rule, as I stated before, may be eliminated.

MR. PFIEFFER: Mr. Jacobson, wouldn't that present quite a great difficulty for a jury to determine, whether there was a perception in depth, as you say would be involved if you changed the McNaughton Rule?

MR. JACOBSON: I think less of the difficulty -- the jury would find less of a difficulty than they would in determining as to whether there was substantial capacity. In many cases that I have handled the attempt was made by psychiatrists to explain that though the defendant knew on the surface that this was a bottle he was holding and that there was a man's head he was going to use the bottle on, nevertheless, but -- and then the psychiatrist was cut off. I assume it doesn't appear in the record, but from what I know of psychiatry, I assume that the psychiatrist was prepared to testify that though the defendant knew this was a bottle and knew it was a man's head he was going to bang it against, he did not have full knowledge, he did not know all the implications of his act.

THE CHAIRMAN: Didn't fully appreciate it?

MR. JACOBSON: Didn't fully appreciate it, perhaps, but then we would get within --

PROFESSOR WECHSLER: You are brought right back to substantial capacity. There is no difference between what you are saying and substantial capacity, either in terms of meaning or in terms of the way the jury would understand it.

MR. ATLAS: Isn't there another way? Would you rather re-write rules of evidence than re-write the rule?

PROFESSOR WECHSLER: It isn't only a matter of the rules of evidence, because there is going to be a change on this.

MR. DENZER: If the evidence normally would be excluded because it is irrelevant, what would be the point of admitting it? It is still irrelevant, according to the standard of the McNaughton Rule.

MR. JACOBSON: It may be, gentlemen. However, the ultimate question would be whether the defendant knew -- whether the psychiatrist for the defense says he did not know in depth, he did not have perception in depth or whether he only knew on the surface. We have the same thing now even as to the term "know." The defense psychiatrist says, "No, he did not know what this meant; he did not know that this was a knife," perhaps.

I think in the Roche Case this happened. There was an attempt by the defense psychiatrist to, in giving his opinion, eliminate or not to use the word "know --" that he could not have known, although he knew this was a knife.

MR. DENZER: What troubles me is evidence is either relevant or irrelevant under the McNaughton Rule. The laws, as we now have them, if it is irrelevant it should be excluded. Now the extension which you recommend, as I

understand, would permit evidence in even though it is not truly relevant. If it is relevant, it is admissible anyway. Isn't that so?

MR. ATLAS: I think what Mr. Jacobson said is any evidence ought to be admitted if it bears upon the definition of the word "know."

MR. DENZER: It would be admissible anyway if it is relevant.

JUDGE HALPERN: You would not have to make any change to bring that about. That would be a matter of the judicial question.

MR. JACOBSON: True.

JUDGE HALPERN: My difficulty with your statement is you are addressing yourself to the clarification of the meaning of the word "know." What do you say about the capacity to conform one's conduct to what one knows to be the law? I might test it by asking you this question: Does your Association favor the retention of Section 34 that forbids the consideration of irresistible insane impulses?

MR. JACOBSON: Yes.

JUDGE HALPERN: You favor the retention of that?

MR. JACOBSON: We are opposed to a measure of irresistible impulse excusing responsibility for crime.

JUDGE HALPERN: The broader concept of ability to conform one's conduct --

MR. JACOBSON: That's right.

JUDGE HALPERN: (Continuing) You don't want that to come in. That is the real issue. You really have not addressed yourself to that issue when talking about defining the word "know". The issue is the case of irresistible impulse or the ability to conform. That is the real issue, it seems on the difference between the McNaughton Rule and the proposed change.

MR. JACOBSON: That is one of the main issues. However, an important issue also is the difference -- is substantial capacity to conform.

JUDGE HALPERN: The word "capacity" would modify both ideas, but it seems to me your Association has not given us the benefit of its thinking on the fundamental issue of whether the idea of ability to conform is to be led into at all. We don't have your view on that.

MR. JACOBSON: I submit that the view of the Association is that irresistible impulse or ability to conform, which to me is somewhat synonymous, should not be an acceptable test.

JUDGE HALPERN: That is their final conclusion?

MR. JACOBSON: That's right.

JUDGE HALPERN: What reasons do you have for that?

MR. JACOBSON: It is too easy; it is too easy to claim or for the psychiatrist to attempt to establish that

there was an irresistible impulse or an inability to conform. As a matter of fact, this will be true in almost every case of precipitism.

PROFESSOR WECHSLER: You don't attribute any weight to the requirement that it be because of disease that the actor was without substantial capacity to conform.

MR. JACOBSON: Well, the objection that the Association has to the A. L. I. Rule is not so much to the requirement of mental defect or disease, but rather to the measure of substantial capacity.

PROFESSOR WECHSLER: No, but you said it would cover almost any case of precipitism, but it wouldn't if every case of precipitism was a case of mental disease, which it is not.

MR. JACOBSON: I stated at the very outside that almost any departure from the norm of conduct is accepted by many psychiatrists as symptomatic of mental disease, of lack of mental health and, consequently, precipitism would therefore come within the definition of the A. L. I.

PROFESSOR WECHSLER: You are familiar with the other provision in the formulation that --

MR. JACOBSON: The exclusion, yes, I am.

PROFESSOR WECHSLER: How can you say that in the case of that provision that would knock such psychiatric testimony out? A psychiatrist who believed that persistent incapacity to conform to the law was a mental disease and who gave that

testimony would have his testimony excluded.

MR. JACOBSON: I was only answering the question about the elimination of Section 34 of the Penal Law. I was not giving that answer with regard to the proposal by the A. L. I.

JUDGE HALPERN: That is part of the same project. If the A. L. I. proposal were adopted, Section 34 would have to concurrently be repealed. The two could not stand together. The bills introduced in the legislature so provide, taking the A. L. I. code as a substitute for the definition of insanity as a defense and the repeal of Section 34. The two things go together.

PROFESSOR WECHSLER: The substitute for Section 34 was the proposition that the terms "mental disease" or "defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

JUDGE HALPERN: That is part of the definition.

PROFESSOR WECHSLER: Yes.

MR. JACOBSON: Which I may state would present problems of proof and evidence in meeting a defense of this character. It might very well be that the hands of the prosecution would be tied in attempting to show that this conduct was something that had been repeated and, therefore, came within the exception of --

PROFESSOR WECHSLER: That would not be the point at

all. The psychiatrist would get on the witness stand and he would testify that "in my opinion the person who repeatedly engages in criminal or otherwise antisocial conduct suffers from a mental disease." That would be the testimony he would offer and the court would rule and the instruction would otherwise be that this concept of mental disease is not what the statute contemplates.

MR. JACOBSON: What I am trying to say is: That a defense psychiatrist testifying that this defendant is suffering from a defective reasoning or mental disease, whereby he lacks substantial capacity to conform, etc., etc., then in rebuttal the prosecution, in order to meet this, if there is evidence of this, would necessarily attempt to show that this is not something new -- that this is a course of conduct by the defendant; and under our present rules of evidence, this would not be admissible.

JUDGE HALPERN: It would be under the statute, because on cross-examination that would be the very point. The prosecutor would then proceed to cross-examine the psychiatrist to determine whether his concept of mental disease or defect was based primarily upon an abnormality manifested principally by repeated criminal or other anti-social conduct.

That is the language of the proposal and if the psychiatrist on cross-examination admits that that is the

concept of disease which he used in his testimony, his testimony would be completely impaired under the statute and the court would have to charge the jury that in determining the defendant was suffering from mental disease, they could not take into account an abnormality which was manifested principally by repeated criminal conduct.

MR. JACOBSON: I submit that I am still of the opinion that specific criminal -- prior criminal conduct would not be admissible, despite the rule, in the attempt to bring it within the exclusion.

JUDGE HALPERN: You mean proof that the defendant had committed crimes?

MR. JACOBSON: Yes.

JUDGE HALPERN: That is not what we are talking about. The question is: Whether the psychiatrist's concept of the mental disease is based upon an abnormality manifested by repeated crime.

MR. CONWAY: If you were defending a psychiatrist, having changed your cap, would you anticipate any difficulty in retaining a psychiatrist who would testify that he was not taking this into consideration but the man was still not responsible?

MR. JACOBSON: Not at all. As a matter of fact, under the measure provided in the A. L. I. proposal, that is, substantial capacity, I don't anticipate any difficulty

whatsoever in being able to get a psychiatrist to say this, being such an inexact measure, he lacked substantial capacity.

PROFESSOR WECHSLER: How do you think a psychiatrist now undertakes to form an opinion as to whether the defendant knew the nature and quality of the act?

MR. CONWAY: Don't answer that question.

MR. JACOBSON: Not being a psychiatrist, I do not know, but I assume that he -- since I am not held accountable too much for what I am saying here, it is not reviewable by a higher court, I will hazard a chance. Not being a psychiatrist, of course, I can't answer it. The only basis from which I can judge is my experience in reading records and handling appeals. I assume that the psychiatrist would predicate his opinion upon either examinations or hypothetical questions given to him which contained the facts upon which he eventually bases --

PROFESSOR WECHSLER: I know I am going against the procedure of proof, but what goes on in his head? Doesn't he say to himself, "here are all the symptoms. I recognize a condition. In the condition that I recognize, I think human beings have this cognitive capacity or they have not got it," depending on which way his testimony goes? He is also making an inference from capacity. Isn't he?

MR. JACOBSON: Yes.

PROFESSOR WECHSLER: All this formulation does is make that explicit. The psychiatrist wasn't there. He does not know when he held the knife in his hand he knew it was a knife. He only knows what he knows about the mental condition of this defendant and he draws an inference because of what he knows of that condition.

Suppose he knows that this defendant is suffering from the most fantastic kind of delusional symptomatology and he considers it possible when he held that knife in his hand he really believed that what he held was a crucifix? It is possible, isn't it?

MR. JACOBSON: Sure, indeed.

PROFESSOR WECHSLER: He wouldn't know. He would have to draw this inference that because of the --

MR. JACOBSON: This is also true of establishing presence or lack of substantial capacity to conform.

PROFESSOR WECHSLER: Exactly. The point is that by directing attention to capacity, the formulation would direct attention to exactly what a psychiatrist has to focus his mind on when he makes his examination and makes his diagnosis.

MR. JACOBSON: I submit that this is the same focus which is present in the McNaughton Rule, too.

PROFESSOR WECHSLER: That is why I don't understand why you are objecting to that. I understand you are objecting to what Judge Halpern asked you about.

MR. JACOBSON: I am objecting because the ultimate determination in these matters will be made by a lay jury. I think that a stricter measure -- a stricter criterion in measuring criminal responsibility or one less given to elasticity should be what the jury acts upon.

JUDGE HALPERN: May I put a question to you which is a variation of Mr. Conway's question: Is there any difficulty encountered by a defendant now in finding a psychiatrist who is willing to testify he is not sane under the McNaughton Rule?

MR. JACOBSON: No. However, for the use of the jury -- the lay jury, they can comprehend the cognition measurement much easier and better and more accurately than they can substantial capacity.

JUDGE HALPERN: Substantial capacity to conform?

MR. JACOBSON: To conform.

PROFESSOR WECHSLER: You accept substantial capacity to know? That is all right?

MR. JACOBSON: No, no. To know.

PROFESSOR WECHSLER: If it were substantial capacity to know, if the test were that he must be found to be without substantial capacity to know?

MR. JACOBSON: No, I --

PROFESSOR WECHSLER: You would not accept that, either?

MR. JACOBSON: No.

JUDGE HALPERN: You had no objection to that, as I understood your statement -- that is, suffering from a mental disease that deprives him of substantial capacity to know that act is wrong. The only suggestion you made, as I understood, was to clarify, either by substantial or judicial construction, the word "know" so as to give it greater depth. What would possibly be your objection to injecting substantial capacity in that process? It is part of what you have been advocating. Isn't it?

MR. JACOBSON: No, it has not been.

MR. PFIEFFER: You say the District Attorneys' Association is in favor of amending the procedures or the rules to permit testimony by a psychiatrist in depth of knowledge. What practically speaking is the difference between that and the testimony concerning substantial capacity to conform -- or substantial capacity to know? I am not clear on that.

MR. JACOBSON: This will bear upon the ultimate determination -- that is, the ultimate test of criminal responsibility. I did not say that if he did not know in depth that the word -- that the word "know" should not be so amended as to have the connotation that if there is not knowledge in depth then there is an excuse from criminal responsibility.

JUDGE HALPERN: That leaves us completely at sea

because if you are advocating that there be an inquiry into knowledge and depth, but you are not willing to have the rule put to the jury in the very terms which you are advocating, then that leaves us in complete confusion.

PROFESSOR WECHSLER: What you have is a record full of irrelevant evidence.

MR. JACOBSON: It may be considered irrelevant but it may aid in the determination --

JUDGE HALPERN: Don't you want to reconsider your position on that?

MR. JACOBSON: No, I don't.

MR. ATLAS: Aren't you rejecting, in effect, the statement made by Dr. Foster, which I have to regard as a finding of a trained psychiatrist, that the cognitive factor is the least factor. Aren't you in effect doing that?

MR. JACOBSON: I can present opinions by many other psychiatrists that the cognitive factor is a very important one. It is not the least.

MR. ATLAS: Don't you want to leave room for even that discussion in the course of trial as to what is the least factor?

MR. JACOBSON: No. If you are going to have a determination made by a lay jury, I do not think that something as important as that should be left to a jury.

JUDGE HALPERN: Let me go back to substantial capacity

to conform which seems to be the more important issue. I think you will find, upon reflection, the issue as to substantial capacity to know is not one upon which your Association has a great point of difference.

On substantial capacity to conform: I take it that the District Attorneys' Association is not undertaking to revise the state of psychiatric knowledge, that you are not purporting to represent that it is impossible for a person to be suffering from the kind of insanity which leaves him with the capacity to understand and to appreciate the wrongfulness of his conduct, but leaves him without the ability to refrain from doing it. That is a common psychiatric view and for the purpose of discussion, are you willing to assume that that is what psychiatrists say -- that it is possible to have that form of insanity?

MR. JACOBSON: I will say that there are psychiatrists that say this.

JUDGE HALPERN: Suppose that is the state of the science. Then are you advocating, as a matter of law, that we should simply shut our eyes to the fact and insist that that type of insanity be ruled out?

MR. JACOBSON: May I say this to you, Judge: That I am not prepared to accept your premise as completely as you put it and as dogmatically as you put it.

JUDGE HALPERN: If that premise is accepted, then

doesn't it logically follow that the insanity test in a criminal case must take account of it?

MR. JACOBSON: Perhaps, yes, if there were -- if that were the case, but I am not prepared to accept it.

JUDGE HALPERN: I understand your position was that some psychiatrists take that view and some others do not, but --

MR. JACOBSON: That's right.

JUDGE HALPERN: (Continuing) in order to sustain your position, don't you have to go to the extreme of saying that all psychiatrists that take that position was wrong? You have got to take the opposite extreme in order to sustain the position of your organization; you have got to demonstrate that as a matter of scientific knowledge it is impossible to have a kind of insanity that leaves one without the capacity to refrain from the act as long as he has the knowledge and appreciation of its wrongfulness.

MR. JACOBSON: May I say this: That if there were a body of psychiatrists or psychiatry which adheres to the principle or the premises which you gave, it does not necessarily mean that if I disagree with it I must say that they are wrong. I can also say that there being disagreement on it -- disagreement in psychiatry, itself, as to whether this is true or not, I can have the choice so far as the social science is concerned, so far as criminal law is

concerned, so as to not accept the first for the protection of society.

JUDGE HALPERN: I understand that last phrase that you can cut across in what you consider to be the interest of the protection of society. I don't see how you can take the position where you say there is a difference of opinion as to the possibility of these different forms of insanity. You take a position that as a matter of law we should forbid consideration, as a matter of law.

MR. JACOBSON: Yes.

JUDGE HALPERN: That is what Section 34 does now and the McNaughton Rule.

MR. JACOBSON: That's right for the simple reason because of the method which we have of determining criminal responsibility, the method we have of protecting society, and that is determination by a lay jury; and if there is this disagreement, this honest disagreement in psychiatry, itself, then I do not think we should leave it to a jury to decide which one is right and which one is wrong in the particular case -- not generally, but in any particular case.

JUDGE HALPERN: Your reason for rejecting this test is that you feel society would not be adequately protected if the test were adopted?

MR. JACOBSON: Quite right.

PROFESSOR WECHSLER: Let us test that by a particular

case. Suppose this: A mother has four children and what happens is that she puts the children to bed and she writes a note in which she says, "God forgive me; I can stand it no longer. I am turning on the gas" and then she does lie down herself and she turns on the gas and three of the children get killed, die. She is rescued. It is a first degree murder case; isn't it?

MR. JACOBSON: Yes, deliberation or premeditation.

PROFESSOR WECHSLER: Now the psychiatric evidence is that this was a terribly sick woman and had been for six or eight months before the event, measured by all the most conventional symptoms imaginable. That is a conviction case under McNaughton; isn't it?

MR. JACOBSON: That's right.

PROFESSOR WECHSLER: You are for that?

MR. JACOBSON: You have overstated the case, of course.

PROFESSOR WECHSLER: Tell me how?

MR. JACOBSON: You make it such that it is emotionally charged, it appeals to the normal and natural sympathies of a person.

THE CHAIRMAN: Their sense of justice.

MR. JACOBSON: Yes.

PROFESSOR WECHSLER: That is what this defense is about.

MR. JACOBSON: I know, but I am concerned now not only with this particular case. I am concerned now with the ability of somebody in a different situation who was able to avoid the consequences of his act, where he does not arouse or is not deserving of the sympathy that this case should get.

PROFESSOR WECHSLER: You think juries are going to be suckers for this kind of psychiatric testimony that you are worried about?

MR. JACOBSON: They may be, yes.

PROFESSOR WECHSLER: Have you evidence to support that?

MR. JACOBSON: Giving them an elastic measure, I would not feel safe.

JUDGE HALPERN: Is there really any great likelihood of a jury acquitting on the ground of insanity in the case Professor Wechsler just put under one rule more than under the other?

MR. JACOBSON: It may not be, but for one less deserving than in this case he gave, there may be. There may be an acquittal in either case, but that does not say that therefore McNaughton should be eliminated.

JUDGE HALPERN: It does, to me, to this extent: If a psychiatrist in this case is compelled to force his testimony into the mold of the McNaughton Rule in order to bring it within the existing law, we are not getting at his real thinking on the subject, we are not coming to grips with the

problem and all we are talking about really is changing the rule in a way which, as Professor Wechsler said, makes the considerations explicit, but in the end juries are going to deal with these cases just about in the same way they are dealing with them now, I think.

MR. JACOBSON: They may, but I think there is a greater danger if the rule were different of those who should be charged with criminal responsibility avoiding it.

JUDGE HALPERN: Isn't there a greater danger under our present rule of our better psychiatrists, the men whose enlightened views on this subject would be really helpful in the administration of justice, refusing to participate in any capacity in a murder trial now and you have --

MR. JACOBSON: I can't answer that. I have not had that experience.

JUDGE HALPERN: There are a great many leaders in psychiatry who just refuse to testify as experts because they are not talking the language of the McNaughton Rule and cannot force their thinking into that mold.

MR. JACOBSON: That may very well be, just as many psychiatrists feel that any departure from the norm of conduct is due to mental disease or lack of mental health.

In the last murder case that was tried in Queens County, which I argued last month in the Court of Appeals and which the defense was insanity, each psychiatrist, upon

the commencement of his cross-examination, stated that he was fully familiar with the law of this state as to what the meaning of the term "knowledge" is, that it is not a knowledge of the quality or nature of the act, and that is wrong, but nevertheless would not testify in accordance with it.

Now maybe that discipline does not permit a psychiatrist to render an opinion on the basis of the McNaughton Rule, particularly a defense psychiatrist, because I find that most psychiatrists called by the prosecution have no difficulty in testifying under the McNaughton Rule.

JUDGE HALPERN: That may be a very serious criticism.

MR. ATLAS: It is.

MR. JACOBSON: I do not know whether it is. I think that may be true of any expert.

JUDGE HALPERN: Isn't that one of the issues here that I hope your Association would address yourself to?

One of the great problems in the trial of murder cases where the insanity defense is involved is this inability of psychiatrists to express their views in the way in which scientifically they entertain them and scientifically have arrived at them and in the way in which they are forced to give their views in artificial terminology which to them has no meaning, and the result is that you have equally respectable psychiatrists testifying to diametrically opposed

conclusions, bringing both the law and the psychiatrist into disrepute.

All we are trying to do is to formulate a rule which would give the court and the jury the benefit of the psychiatric thinking on the problem in dealing with a particular case and isn't it in the interest of society and in the interest of the administration of justice that we should bring about that situation?

MR. JACOBSON: Very true, if I may just answer that, very true. However, within the limits of the concept that these matters eventually will have to be determined and decided by a lay jury.

MR. PFIEFFER: May I ask you, Mr. Jacobson, under your theory of depth -- coming back to that -- would any testimony of a psychiatrist be excluded under that change of rules you advocate that would be admissible if the statute read "capacity to know" or is it merely when it comes to charging the jury and that sort of thing?

MR. JACOBSON: That is right.

MR. PFIEFFER: But so far as the testimony of the psychiatrist is concerned, you would let everything in under your standard that Mr. Wechsler wants in under his standard?

MR. JACOBSON: That's right, except the test would be different, the ultimate test.

MR. PFIEFFER: But as far as the testimony of the

psychiatrist is concerned, you would not exclude anything that would come under the other?

MR. ATLAS: You mean that you would let the psychiatrist --

MR. JACOBSON: I would not say the final question, "Doctor, in your opinion can you state with a reasonable degree of certainty whether this defendant had sufficient capacity to conform his conduct". That, I think would be objectionable.

PROFESSOR WECHSLER: Say with knowledge.

MR. JACOBSON: Or to know.

MR. ATLAS: But would you allow a psychiatrist to testify that the defendant had been suffering from a continuous progressive mental disease which was robbing him of his ability to judge and of his ability to conform under the McNaughton definition of "to know"?

MR. JACOBSON: Yes?

MR. ATLAS: Wouldn't you, in effect, be doing the same thing that everybody seems to be trying to do, which is to get before the jury full knowledge of the defendant's mental processes in order to find out whether he has responsibility? Let us use that word for a minute, "responsibility".

MR. JACOBSON: Well, the responsibility is the final conclusion.

MR. ATLAS: That's right.

MR. JACOBSON: The measure is the thing I am concerned with; the test is what I am concerned with. The test is what -- rather the association who I represent is concerned with this.

THE CHAIRMAN: That is your view; isn't it, Mr. Jacobson?

MR. JACOBSON: Yes.

PROFESSOR WECHSLER: You know that under the Military Law of the United States the test of responsibility not only terms on the ability to know the nature and quality of the act and that it is wrongful, but also to act to conform to the right -- those are the words of the manual -- and that's been the military law for many, many years. There has never been the slightest suggestion in military experience that that test is regarded as too generous or too flabby. Does that experience have any significance to you?

MR. JACOBSON: I am sorry, it doesn't, Professor Wechsler.

PROFESSOR WECHSLER: Why?

MR. JACOBSON: I think the concept of living in an open society and in a military society, I think are so different.

PROFESSOR WECHSLER: You think you would have a stricter test under military society, under military

conditions than you otherwise do, yet you have the anomaly that there is a more liberal test in the military law than in the civil law.

MR. CONWAY: Do you have any idea how many that defense has been a success?

MR. JACOBSON: Who is to make the determination of the test in a military tribunal as compared to a --

PROFESSOR WECHSLER: Court martial --

MR. JACOBSON: Officers, army men.

JUDGE HALPERN: A good cross-section of the average jury.

MR. JACOBSON: I think it is men subject to a certain discipline, a certain thinking.

JUDGE HALPERN: You have heard some reference to the military mind.

MR. ATLAS: The preparation of a court martial would be more favorable to the defendant than anything we have here.

JUDGE HALPERN: At the bottom of a lot of your criticism of the proposed change, Mr. Jacobson, is this constant reference to the lay jury. Would your view be different if the jury were waived and the defendant submitted himself to a trial by the court?

MR. JACOBSON: Very frankly, I haven't given that too much thought. I am prepared on this basis and I would

rather not answer that question now. Though some proposal was made, it wasn't part of our recommendation that there be a separate proceeding so far as insanity is concerned, that the court hear it and not a jury, but I have not been charged by the Association to forward it and I --

JUDGE HALPERN: They did not come to any final conclusion, your Association, on that suggestion?

MR. JACOBSON: No. It wasn't too extensively discussed, either.

JUDGE HALPERN: In view of your emphasis on the jury, I wonder if the attention is called to the fact that the Durham case started largely because of the fact that a judge tried the case without a jury and the judge is the one who caused the great difficulty by saying, "I'm convinced that according to strict standards this man is insane, but I am bound by the McNaughton Rule" and then proceeded to say he had to find the man guilty under the McNaughton Rule. That stirred up the District of Columbia Court of Appeals.

MR. JACOBSON: Again, this is one case, yes. Very frankly, in most instances, the question of the defense of insanity takes on tremendous importance in capital cases.

This is the basis on which the Association considered the question and since, constitutionally, a jury trial cannot be waived in a capital case, this is the basis on which we considered it.

MR. DENZER: Mr. Jacobson, isn't it true, as a practical matter, that while the courts technically can exclude a great deal of psychiatric testimony on the ground that it is not relevant to the McNaughton Rule standard, that actually they admit that they give a pretty free hand to the psychiatrist on the stand to the defense in bringing out psychiatric testimony. You don't find judges, in other words, saying, "Well, that isn't strictly relevant to the question he knew the nature and quality of his act." They let him go pretty well; don't they?

MR. JACOBSON: I do not know how great it is on one side or another.

MR. DENZER: From your experience.

MR. JACOBSON: In my experience, not too much.

In People v. Horton, Judge VanVoorhis complained bitterly in his dissenting opinion on the tremendous restrictions placed on the psychiatrist who testified because they attempted to give testimony other than strictly within the confines of the McNaughton Rule.

MR. DENZER: How long ago was that?

MR. JACOBSON: 308 N.Y. I don't remember how long. It wasn't too long ago.

MR. DENZER: I think appellate decisions concerning curtailing testimony for that reason have probably loosened up the courts in that respect. Don't you think in the last

two or three years, for example, that there has been relatively little interference with psychiatric testimony?

MR. JACOBSON: No, I'm sorry. The last experience I had -- and I admit that this one case doesn't make a rule -- the last experience I had that I mentioned before, the psychiatrist who attempted to testify outside the confines of the McNaughton Rule were brought up short and were not permitted to do so.

MR. DENZER: Well, my experience has been a little different. Maybe I am wrong on that. What I am getting at is if that is true you are not offering very much by extending the rules of admissibility.

MR. JACOBSON: Let me say this: I offer it because despite what the courts may be doing, if they wanted to cleave to what the law is, they would have to exclude it.

JUDGE HALPERN: Or at least charge the jury that they could not apply that standard.

MR. JACOBSON: That's right.

JUDGE HALPERN: That is my great difficulty with the law. I think I understand your position.

MR. JACOBSON: Not my position; the Association's position.

JUDGE HALPERN: There is great difficulty with the case where the psychiatrist says the man is insane in the sense that while he is able to appreciate the nature and quality of

his act, he was unable to refrain from doing it by reason of mental disease. Where that is the situation, the court still had to tell the jury that the man cannot be insane if they accept the testimony of that psychiatrist. That is what bothers me.

MR. JACOBSON: I understand it perfectly.

THE CHAIRMAN: Thank you, Mr. Jacobson.

Mr. John Casey, President of the Association is present. Do you want to add anything, Mr. Casey?

MR. CASEY: I do not have anything at this time, Mr. Chairman, except to say Mr. Jacobson has covered the position of the Association.

THE CHAIRMAN: All right, sir.

Speaking for the New York County District Attorneys' Office, Richard Uviller.

MR. UVILLER: Mr. Chairman and members of the Commission: I do not want it to appear that the New York County District Attorney's office has in any way seceded from the Association of District Attorneys and yet I am grateful for the opportunity to express our sovereign views on this very important problem.

I think the problem which occupies the Commission this morning is undoubtedly one of the most provocative and difficult in the criminal law. It has perhaps stirred broader and longer controversy and engendered greater prostration

among those who have tried to put their thoughts into some avertible formula than any other area.

At the very outset, I must acknowledge that I am not going to be able to provide very much assistance in this regard inasmuch as during the course of several conferences and many, many hours of discussion in our office in preparation for this occasion, we were unable to arrive at any uniform and thoroughly convinced point of view on the issue of the formulation. So that with your indulgence, I am going to merely express certain comments, reflections and views based upon our thinking and our experience in several of the proposals that have been advanced. Certainly, the task which faces the Commission of taking the various comments and the many written and many learned comments of scholars over a great number of years and trying to sift them into an acceptable formula which will shape the course of the law in this area in this state is not an enviable one. I think that my position in front of the table is a lot simpler.

I did say that I thought that the problem, although it was a provocative one and although it was a stimulating one, was far from the most important problem in the criminal law today. From a practical standpoint, I think perhaps the defense of insanity is one of the least significant or important areas with which this Commission will come to grips. It is unimportant, I think, for several reasons. First, it is extremely rare that in any instance a person who is

severely disturbed and would be medically classified as psychotic will ever come to trial. The procedures for commitment are predicated upon a standard of mental illness which is a lot looser than the McNaughton Rule. The capacity to comprehend the charges against one and the capacity to prepare and assist in one's defense, I believe, is a standard which more easily comports with psychiatric evaluation than the legal formula of the McNaughton Rule; and I think that clearly many disturbed individuals would not be so capable although they may be able to pass the knowledge test of the McNaughton Rule. Of course, if they are incapacitated, there is undoubtedly evidence of that at the time of arrest or either from the nature of the crime or from the experiences of counsel with his own client and, of course, as the Commission is aware there are full and adequate procedures for his examination prior to trial. So it is a rare instance and, perhaps, I should mention that I think mental disease is probably such that there is in most cases some continuity of the defect, consciously. The person who is in a position or anticipating a defense of insanity will probably be suffering from the same mental condition at the time that he comes up for trial unless there is a great lapse of time between the commission of the crime and the time of trial, which is unusual.

In such an instance, the individual never asserts his

defense. It may be that at the time of his discharge or recovery, the indictment is still pending against him in certain jurisdictions and maybe he is brought to trial on that indictment despite the fact that he may have spent a period of time in a mental institution. This is not the case in our county.

PROFESSOR WECHSLER: It happened in the Bronx very recently, thirteen years --

MR. UVILLER: I think that is precisely the kind of instance I have in mind. I do not know of such a thing happening in our county. It might.

Theoretically, I think what happens as a practical matter, when a person comes back after that period of time or even any substantial period of time in a mental institution, though the indictment may not be disposed of in and of itself, it is not dismissed, there is an arrangement generally worked out in accordance with justice. I say that I am appealing to the experience of the Commission, itself.

Clearly, there is a sense, I think, on the part of the court that justice insofar as justice required the isolation of the individual or the rehabilitation of the individual, that those purposes may have been served by the procedures before trial or before the disposition of the indictment, as well.

So that I say it is an extremely rare instance in which

a full fledged or case of severely disturbed and psychotic individual asserts the defense of insanity. Primarily, I think the defense of insanity is utilized by those individuals as a device for bringing before the jury material which would ordinarily be inadmissible, which might tend to diminish rather than absolve his responsibility for the act.

I can think recently of an instance of an extremely aggravated homicide in New York County in which there was a wealthy store of material which was never brought before the jury because there was no defense of insanity and because this individual did not testify in his own behalf. But under the guise, under the cloak of an insanity defense, it might very well be brought before the jury and might very well impel the jury, out of motives of sympathy, perhaps, not to acquit, because certainly it would be difficult to find a psychiatrist to testify under the McNaughton Rule the individual was insane. It probably would have motivated the jury to at least diminish the degree of responsibility. Perhaps, because it does in the jury's mind go to the question of intent and, perhaps, there is at least in the lay mind, if not in the law, such a thing as degrees of criminality and intent, degrees of criminal intent.

JUDGE HALPERN: Wouldn't the evidence be admissible on his capacity to require specific intent?

MR. UVILLER: I should think that the entire sanity

defense, insofar as it is embodied in a so-called rule such as the McNaughton Rule or in a particular provision, may be superfluous in that sense. That is to say that perhaps all of the very same evidence, the very same testimony would come in. The charge would be different, but I should think that nonetheless there would have to be a charge to the effect that intent, as one of the elements of crime of guilty mind, would have to be proved by all the elements beyond a reasonable doubt; and if the testimony concerning the mentality or the mental condition of the individual at a time has a bearing on that question of intent, it should be charged as such without any particular formula or formulation to describe when it is an excuse or when it is not. In other words, it is an excuse merely when it is intended to be introduced as a reasonable doubt as to some element of intent; perhaps very much in the same way as intoxication, which is no defense, per se, but nevertheless may be introduced as evidence of the impairment of that faculty which formulates a specific intent.

Of course, that line of reasoning takes you to the point where you might conclude -- and I think that there has been some thinking along this line -- that the best solution to the dilemma of the McNaughton Rule and the other rules is to abolish the defense entirely and to allow the question to revert back to the pure, simple question of the ordinary rules of proof beyond a reasonable doubt and the ordinary

requirements of proof of a specific intent for an aggravated crime.

PROFESSOR WECHSLER: If I understand your suggestion, here, it is perhaps that the Study Committee's proposal is already the law of New York?

MR. UVILLER: I do not know it is inasmuch as there is at the present time, at least, a competing rule which is based upon a specific verbal formulation.

PROFESSOR WECHSLER: If you did not, the statute occupying the field would be the law.

MR. UVILLER: Could very well be, it seems to me.

JUDGE HALPERN: As a matter of fact, the American Law Institute Code has a separate section on mental capacity as affecting capacity to formulate the required specific intent. It is quite separate and cuts across it, but can it bear the weight of this whole problem. Isn't it more than a rule could bear because there we have to find a total lack of capacity to entertain the intent, which is somewhat different from the issue of responsibility under an insanity test?

MR. UVILLER: It is quite different. The one thing that puzzles me about the McNaughton Rule or the A. L. I. formulation, for that matter, and certainly Durham, is why the emphasis on mental disease or defect? I can understand why you would not want a person excused merely because he had done the same thing many times before. The habitual criminal

should not claim a license by virtue of that fact alone. Yet it seems to me that if there is some cause other than mental disease or a defect which deprives a person of the capacity to appreciate or to conform, that despite the fact it is not caused by mental disease or defect, it should be just as excusable. In other words, I do not think there is any honor attached to having a mental disease.

PROFESSOR WECHSLER: What kind of cause are you imagining?

MR. UVILLER: I am thinking, for example, of intoxication, perhaps, some sort of coercion from another agency, perhaps -- I do not know if there are no other causes -- then all the more reason why it seems the words "disease" and "defect" are not necessary.

PROFESSOR WECHSLER: There is reason for coercion and duress. This is a section in the Penal Law, not a very good section, but it is dealt with and it would be a defense.

MR. UVILLER: The issue is somewhat confused by the introduction of the words "mental disease" and "defect." It brings us almost to the dilemma of the meeting place between two entirely -- two sciences with wholly different sets of premises.

JUDGE HALPERN: Your thinking is more radical than that of the proposal in that regard.

MR. UVILLER: Yes.

MR. ATLAS: Regarding the law of science.

MR. UVILLER: Well, Mr. Atlas, that was inadvertent, perhaps. I mean to say that those who address themselves to the problem of moral responsibility necessarily -- and I emphasize necessarily -- assume the problem of free will. This has been commented on, of course, by many scholars.

In addition, the interest, the purpose or function of the inquiry is to examine overt behavior and its impact on a social order which includes other individuals. This is a wholly different approach, of course, from a medical witness' determination predicated upon a history, interested only in the internal or personal right and wrongness, which means, of course, relative to the needs of that individual.

PROFESSOR WECHSLER: When doctors set up a mental hospital and start to run it, which they do, what do they do? They have a lot of rules, they publish the rules.

MR. UVILLER: They act like lawyers.

PROFESSOR WECHSLER: Everybody acts like a lawyer when it comes to trying to get conformity. I wonder if the breach is really as steep as you say?

MR. UVILLER: Didn't this difficulty arise not because there was anything wrong with the McNaughton formulation? The McNaughton Rule expresses a pretty valid and sound sort of moral principle which is certainly just as

valid today. The fact that 119 years have passed does not make a moral principle out of date in and of itself.

McNaughton's, simply speaking, was an expression of, I think, a very common feeling that a person is not responsible or to blame, let's say, or at fault, if he does something which is wrong when he did not know what he was doing. I think it is analogous to the sensation that any individual had 119 years ago or has today when contemplating the act of a child, let us say.

JUDGE HALPERN: The McNaughton Rule in that sense was an advance, the inability of the individual to know what he was doing, which is the crudest and most primitive reaction to the problem. Hasn't psychiatry developed in the last 119 years to a point where it is generally recognized. It is recognized that you could have a mental disease or defect which leaves one with the capacity to know but deprives one of the capacity to control his conduct.

MR. UVILLER: I have been singularly unable to detect uniformity among psychiatrists, particularly when they talk in these terms of "know" and "capacity". The issue still remains, should such a person be excused.

JUDGE HALPERN: That is the issue.

MR. UVILLER: It is, I think. McNaughton is sound so far as it goes, inasmuch as it expresses a moral principle. The fact that the psychiatric science may

develop in the interim does not in any way affect the validity of a moral formulation.

JUDGE HALPERN: How does it express a moral principle? If psychiatric knowledge has reached the stage of recognizing these two different kinds of mental capacity, what is moral about saying one should be admitted as a defense and the other not --

MR. UVILLER: You have changed, slightly, the shape of what is moral.

JUDGE HALPERN: (Continuing) and saying the other one is a good defense? I cannot see the moral basis.

THE CHAIRMAN: You said it expressed a moral rule.

MR. UVILLER: I think it does. The rule is moral in the sense it is founded upon an idea of responsibility for free choice. In that sense, it is a moral rule. It is not founded upon an idea.

JUDGE HALPERN: The proposed rule also would start, as you pointed out, with a summation. The A.L.I. Rule would also start out with the same summation of moral responsibility. They both do that.

MR. UVILLER: Yes, sir.

JUDGE HALPERN: We are getting a subdivision of morality here, which is a way of saying the McNaughton Rule is moral.

MR. UVILLER: Did I say that?

JUDGE HALPERN: You said that.

MR. UVILLER: If it does, I don't say it is moral.

JUDGE HALPERN: No more. Where do you find the basis that the moral principle has to stop in the lack of capacity to know and cannot embrace lack of conformity to --

MR. UVILLER: I did not say that.

JUDGE HALPERN: I am asking you a question. I am not saying you said that.

MR. UVILLER: Considering the A.L.I. provision for the moment, which I skipped, I wanted to discuss that first -- considering the A.L.I., I think that A.L.I. represents very sound reformulation of McNaughton in the sense that the word "pressure" is a far more sophisticated word than "know" and "capacity" is what we are really talking about. We are really not interested in what he knew, but what sort of person he was, which means what capacities did he have.

PROFESSOR WECHSLER: You don't object to "substantial"; do you?

MR. UVILLER: I think that the criticism of the A.L.I. involves such words as "substantial," which I myself, to myself, to me, does not give me any great difficulty.

I think the jurors are substantially equipped to handle

terms such as that. I do not think that there is anything more difficult in the term "substantial capacity" as it may be defined by a court, perhaps, even by the use of synonyms than the word "reasonable."

THE CHAIRMAN: Reasonable or weight of the evidence or reasonable doubt, beyond a reasonable doubt.

JUDGE HALPERN: It excludes the idea that there must be a total lack of capacity to come within the test?

MR. UVILLER: Yes. I might say that there is some disagreement in my office with respect to that and there is a rather strong feeling on the part of some, that this is a wishy-washy sort of term, "substantial." The same thing is true of "pressure."

Now the word "know" Mr. Jacobson said could be defined so broadly as to encompass the idea inherent in the term "pressure," but the fact of the matter is that in my jurisdiction it is not. The word "know" is so narrowly defined that it has resulted, in our jurisdiction, in a charge which might be known as the "banana test."

The jury is told by the judge that the word "know," the nature of the quality of his acts means did he know he had a gun in his hand or did he think it was a banana?

When you hear a charge like that it has -- the banana charge like that -- it has the advantage of being simply clear and explicit.

THE CHAIRMAN: I think certainly it represents the opposite pole as far as the capacity of the jury to deal with the concept and yet, despite its advantage of workability, the question is whether it has not become, through judicial interpretation, somewhat too narrow.

You always come to the point, I suppose, where you have to decide whether or not a change in the law is going to be effective legislatively, or whether you are going to wait for the courts to legislate. I do not think it is the completely satisfactory answer when there is a legislative tribunal, if you will, deliberating about a change to say, "Well, let's let the court develop that by re-definition."

PROFESSOR WECHSLER: A statute here a hundred years ago dealt with it.

JUDGE HALPERN: In a field like criminal law, governed by a code, there is very little change of judicial construction changing the rules.

MR. UVILLER: I should say there is very little chance. Particularly, it is pretty well encrusted by this time, I think, with many decisions.

PROFESSOR WECHSLER: If I remember right, Judge Van Voorhis said you better say "know" or "pressure," because otherwise if you say just "pressure" it would be construed as "know."

MR. UVILLER: That is a hazard of any new word.

JUDGE HALPERN: What is your view of the A.L.I. test on substantial ability to conform?

MR. UVILLER: I think that the second half of the test has the same virtue as the first in the sense that it is based upon what I consider to be a sound criminological principle. It is not a medical diagnostic procedure. It is again predicated on a moral judgment.

In other words, we are now saying not only should we excuse from responsibility the child who doesn't know that if he pulls the lamp cord the lamp breaks, or it is wrong to break lamps. In addition to excusing such a child, we are also excusing the child who, although he knows, he is unable to help it. He cannot help what he is doing. Maybe this is the adult. He is not a child and does not or does appreciate it, but can't help it.

It seems to me that is a sound thing to do from a theoretical standpoint. Whether it would result in a substantial difference in effect, I don't know. It seems to me that occasionally changes such as this are made more by, say, those who are concerned with the details of the architecture of the law than those who are worried about how many acquittals or convictions you get.

I think, particularly in view of the necessarily or intentionally vague wording in the A.L.I. formulation, it is quite possible the result would be virtually the same as it

would be under the test, as far as the jury action is concerned.

JUDGE HALPERN: As you put it, we are more concerned with the conscience of the judge than the conscience of the psychiatrist.

PROFESSOR WECHSLER: And the conscience of the jury.

MR. ATLAS: And the lawyers.

MR. UVILLER: I say on a theoretical basis I think the A.L.I. formulation is a sound one and a good one. There is one criticism that has been made which I have only hinted at, and this is a very practical one, and I think that it deserves at least some consideration.

Unfortunately, under the jury system we do have to prove the sanity of an individual beyond a reasonable doubt and to 12 out of 12 jurors. When you introduced some area of vagueness into a standard, it seems to me that you are making a better standard for a single individual who appreciates the complexities and needs, the necessary free range of mind in order to take into consideration the total picture on such a difficult issue, but at the same time you are also introducing an almost built-in device for hanging a jury.

I think that when you have competing psychiatric testimony and the standard is substantial capacity to conform, and the proof is proof beyond a reasonable doubt, I think

there will almost always be at least some of those 12 who will feel that that standard has not been met.

When we say that McNaughton is a workable rule and when the District Attorneys' Association favors, if anything, only moderate changes in it, I think that the concern there is that there would be almost an impossibility of convincing 12 out of 12 jurors beyond a reasonable doubt that a man had substantial capacity to conform. This is, of course, something which is not ascertainable by prediction. We can only convey to you the sensation or the fear, really, that we have, that such would be the case.

PROFESSOR WECHSLER: Nobody studied the Illinois experience under this rule.

MR. UVILLER: Not that I know of.

PROFESSOR WECHSLER: It has only been a year now. That is the one laboratory that exists, the precise formulation as enacted in Illinois last year.

MR. CONWAY: Would you shift the burden?

MR. UVILLER: Well, I'm not that much of a conservative. Of course, under the -- in Daniel McNaughton's case, the burden, of course, was on the defendant. There was a presumption of sanity. It seems to me that is as sound a presumption as any other in the law, that most people are presumed to have free will or to have sanity.

PROFESSOR WECHSLER: That is charged now in New York.

MR. UVILLER: Yes.

PROFESSOR WECHSLER: I know what the burden is, but the presumption is charged.

MR. UVILLER: It seems to me that if there is such a presumption it would not altogether be unreasonable of overcoming on the defendant, as occurs with most presumptions. That violates a very basic principle of law.

JUDGE HALPERN: As far as a substitute is concerned, the court would say the burden is on the defendant. You have this overall principle: all elements in a criminal case have to be established beyond a reasonable doubt.

PROFESSOR WECHSLER: The burden is on the defendant in England, as you know, and has been and was even under the McNaughton Rule. It is a test of legitimacy.

MR. UVILLER: In an instance such as that, I think there would be a vast difference in the outcome.

JUDGE HALPERN: Would you say in a fair preponderance of the evidence to put the burden on the defendant to prove beyond a reasonable doubt?

MR. UVILLER: How about ten or twelve jurors? You have thirteen different elements to work with.

JUDGE HALPERN: That is a separate issue. As far as I am personally concerned, I see no objection to ten or twelve. That is a separate issue and a highly controversial issue. You would feel less objection to this rule

if there were a 10 to 12 rule in a criminal case?

MR. UVILLER: Yes. I think the principle objection -- or let us say the greatest fear that we have about A.L.I. is that we cannot convince all 12 beyond a reasonable doubt under that standard.

JUDGE HALPERN: The burden of proof rule is not an impossible approach to this problem. That opinion of the Court of Appeals just last year saying that the burden was on the defendant to show that any prosecution witness who would claim to be an accomplice was an accomplice. They did not spell it out as to what the standard of proof would be, but said the burden of proof was on the defendant. It is a possible approach to this problem.

PROFESSOR WECHSLER: May I ask you this: Is it your judgment -- I know you have not taken any policy, but is it your judgment that among people who carry law enforcement responsibility, particularly in New York, that if the burden were on the defendant to establish the defense to the satisfaction of the jury, along the English law, and the prosecution did not have to negative it beyond a reasonable doubt when some evidence was introduced, that this might make a change more acceptable? I mean, are there any people who might accept it on that basis of those who are now against it?

MR. UVILLER: My offhand reaction would be it would make it a lot more palatable. I cannot speak for the

Association, generally. I certainly see it as at least one step toward the removal of the principle objection to it, that is, burden being one step --

PROFESSOR WECHSLER: You realize from the point of view of disagreement it may not help too much?

MR. UVILLER: That's right.

PROFESSOR WECHSLER: The defendant picks up one and the one is satisfied and that prevents a verdict.

MR. UVILLER: We would have to hope that the presumption would carry through with all and if he convinces one, that is the end of the verdict.

If I can revert to another problem in just one moment. I want to cover one thing I have not talked about and that is Durham. Durham, to me, represents a particularly unfavorable solution to the problem. The reason is not because, as they have said, that the District of Columbia has far more acquittals on insanity defense than they had before. This is wholly besides the point, but because the Durham --

PROFESSOR WECHSLER: This means they keep them longer in St. Elizabeth than they have kept them in prison.

JUDGE HALPERN: That has gone so far that the United States Attorney tried to force a defense of insanity on the defendant to get him to the hospital instead of prison. The Supreme Court of the United States had to reverse.

MR. UVILLER: I am wondering about that automatic commitment law. That has not been tested.

JUDGE HALPERN: No.

PROFESSOR WECHSLER: The Supreme Court is dealing with it in the case that they had, that where the defendant pleaded insanity, this consequence was --

MR. UVILLER: I would like to see a case come in where the man pleaded insanity at the time of the crime two years before and was acquitted and automatically --

JUDGE HALPERN: And sought a release on habeas corpus.

MR. UVILLER: I think there is the presumption of continuity of mental disease, but I do not think you can deprive a man of his liberty on that presumption.

PROFESSOR WECHSLER: Not for any time.

MR. UVILLER: There might have to be an independent finding that he was a danger to himself or the community at the time of his commitment, not that he was insane two years before at the time of the crime.

PROFESSOR WECHSLER: Don't you think it is a burden, then, to petition or come forward and petition for a release?

JUDGE HALPERN: That is true of any person committed under the Mental Hygiene Law.

MR. UVILLER: There is -- has to be a finding at the time.

JUDGE HALPERN: Ex parte finding.

MR. UVILLER: The District of Columbia law, as I understand it, there is no such requirement. He is automatically committed.

JUDGE HALPERN: Because he is found to be insane at the time of the act. There is also a degree of constitutional doubt if any different standard could be applied on application for release on the population generally.

PROFESSOR WECHSLER: Is New York Law any different than the District of Columbia law on automatic commitment under the enactment of last year?

MR. UVILLER: I don't know.

JUDGE HALPERN: It has not been tested, constitutionally.

MR. UVILLER: I am aware of this. There was an individual by the name of Arthur Benjamin who was a young and very talented swindler, and he was picked up in the District of Columbia where he was tried for a monumental swindle which was committed part in New York and part in the District. He tried his own defense on the ground of insanity, giving a very learned discourse in his summation to the jury on this then newly enunciated Durham Rule. Despite the government's witnesses from the St. Elizabeth Hospital who testified he was perfectly normal, the jury was persuaded he was not and was acquitted by reason of insanity and

automatically committed to St. Elizabeth Hospital. On the very day of his commitment, he had prepared documents challenging the constitutionality of the law I am discussing.

When he filed this for good and judicial reasons, it was not challenged. He then had his sanity hearing, at which time he called the very same psychiatrists who testified at his trial for the government and these psychiatrists said it was still their opinion he was perfectly normal. He was thereupon immediately released, having been about three days in St. Elizabeth's.

Detectives from my county were present on this historic occasion. They picked him up and brought him in to New York, and he was tried in New York.

He then conducted his own defense on the grounds of insanity, this time devoting his summation to a discussion of the advantages of the Durham Rule over the McNaughton Rule and the historical development of the various insanity statutes of the different states in the United States; and the jury, I assume, felt that he was really such a talented young lawyer, never having completed a grade school education, by the way, that they convicted him and he was sentenced and has spent his time since challenging various other statutes from jail.

His challenge to the constitutionality of the automatic commitment procedure, to me, had the ring of some persuasive-

ness. However, it was treated as such by the court and there never was any decision.

MR. CONWAY: Does that case convince you of the defects of McNaughton?

MR. UVILLER: No, sir. He was perfectly sane. He had been in institutions and hospitals in California for a number of years and there wasn't one single doctor who classified him as anything but a nuisance.

In any event, the Durham Rule, it seems to me, is in effect handing over the court room to the psychiatrists. It has the defect which, to me, is a paramount defect of obliterating principles of moral responsibility in favor of those of mental theory and diagnosis. It has all of the faults that a standard could have for vagueness. Certainly, the material mental illness or the ideas of causality or the concept of a person mentally ill doing something which is not related to his mental illness is difficult to comprehend. I refer the Commission to Judge Edgerton in Blocker vs. the United States, who wrote what I considered to be a devastating and extraordinarily persuasive criticism of the rule, and that is at 288 Fed. 2nd 853, and it is a 1961 decision of the District of Columbia Circuit. There is a 58 Col. Law Rev. 182 where a Thomas Zasz has also written an interesting criticism of this particular formulation.

I think the Durham or New Hampshire approach can be severely faulted both on theoretical and practical grounds.

Now Judge Briggs' approach, I suppose, could be considered together with A.L.I. inasmuch as it takes in a portion of the A.L.I. formulation, and these three rules seem to be, including irresistible impulse, of course, the only ones that any state or any jurisdiction has had the courage to try out despite all the discussion.

However, it seems to me there is another aspect of the problem I would like to touch on briefly, which has nothing to do with the formulation and yet it relates very intimately to the defects which we feel are inherent in the A.L.I. formulation, and that is the question of who is the decision-maker. Throughout the discussion, at least here this morning before the Commission, I think there has been an assumption that a jury is the only proper finder of a fact such as this. I think, perhaps, it is even too easy for lawyers and those concerned with the law, to relegate to the jury all difficult questions, the idea being that the jury if instructed thoroughly, if not clearly, will be able to resolve issues which nobody else and no other agency devised by man can resolve, such as, in a one-witness identification case in which the defendant was viewed for a brief period of time in a dark hallway and not seen again for three or four weeks. Is the person who identifies telling the truth when he says

that is the person? That seems to be one of those questions which no other device, man or agency has yet invented which can possibly answer it, but juries answer it all the time. So, I think there is a great tendency, perhaps, an excess of faith in the divining powers of a jury. The jury is the finder of the facts, but it seems to me that there are at least three different categories of fact which a jury is called upon to answer or to find.

The first is the simple fact that, such as in the case I posed, of who did what and when. It may be very difficult to find that fact and there may be conflicts and gaps in evidence, but it is the kind of fact we most traditionally associate with the jury and which, perhaps, they peculiarly are well-equipped to find.

There are two other areas which commonly come under the category of facts which are really not strictly speaking facts at all or if they are facts, they are different kinds of facts. Particularly pertinent here, of course, is the question: Was the person mentally ill or was the person suffering from some mental disease or defect? In all the proposed formulations, as I see it, this is a fact which the jury is called upon to decide, but it is a different kind of fact. It is really not a fact. It is what I would call an opinion and what other writers have called a theory -- a theory meaning because it is an idea which is called upon to

explain facts rather than being a fact itself.

The jury, if finding a fact such as that, it seems to me, usually does have little more than a choice between opinions. That is why you get into this difficulty, it seems to me, of whether you can ask the expert witness the ultimate question. Sure, you ask the expert witness the ultimate question and then the argument is always made he is usurping the jury's function. Actually, I think the difficulty there is the expert and the jury are doing the same thing, because the fact is a different kind of fact.

The third and perhaps most difficult kind of fact for the jury to find is what might be called -- it is not a fact at all, it is really a judgment, and that is the fact that the defendant was responsible. I notice that in the alternative A.L.I. formulation, it is actually placed in the formula, itself, that the jury is supposed to decide whether the defendant should be responsible.

PROFESSOR WECHSLER: That alternative was rejected.

MR. UVILLER: The rejected formulation, yes.

Well, I have never really seen it that boldly expressed, but it seems to me that that calls upon the jury to find, by calling it a fact, whether the defendant is responsible. You can say that is a fact. The fact is whether he is responsible is not a fact. It is really a moral judgment. It seems to me that if this be the case, if

facts are --

PROFESSOR WECHSLER: You will remember it was so substantially impaired that he cannot justly be held responsible, but it was tied to the degree of impairment which presupposed impairment of capacity.

MR. UVILLER: The standard really came down to the fact -- it was articulated but really what it was saying to the jury is, "What do you think is right?"

PROFESSOR WECHSLER: If you find impairment.

MR. UVILLER: Yes. Or, "Do what you think is right and you can take into consideration what you have heard about his impairment."

PROFESSOR WECHSLER: No.

MR. UVILLER: You would not accept that? Well--

PROFESSOR WECHSLER: "If you find impairment, do what you think is right."

MR. UVILLER: Well, yes. In any event, if facts are analyzed in this way, it seems to me that it is not at all inconsistent with the traditional processes of a court, that a jury should not be called upon to pass on the question of insanity as a defense. You get into some difficulty because really sanity is a defense, as you say, related to an element which juries do find and that is intent.

JUDGE HALPERN: What practical proposal are we heading to? Certainly, you can declare a constitutional

amendment to take that away from the jury.

MR. UVILLER: There is a suggestion -- and I am not advocating it exactly, but I do call your attention to it, you probably know it -- in an article in the Pennsylvania Law Review, where a system was suggested. This is 110 Pa. No. 6,771.

PROFESSOR WECHSLER: That system produces a conviction, though; doesn't it?

MR. UVILLER: Not necessarily. It is a very --

PROFESSOR WECHSLER: The issue is faced after conviction.

MR. UVILLER: No.

MR. ATLAS: You mean framed questions?

MR. UVILLER: No. This is a procedure in which it is not put in a form of a proposed statute. There are many areas of flexibility. Essentially, what it is, is a procedure in which a person may elect to receive psychiatric offender treatment at the outset.

THE CHAIRMAN: He may elect it?

MR. UVILLER: Yes, the defendant may elect.

If he does not elect psychiatric defender treatment, then he goes through the trial process exactly as it is today, McNaughton standard, if he wishes to avail himself of it.

If he elects psychiatric offender treatment, then there are examinations, appointment of psychiatrists, and so

on, reports to the court and then the court has a hearing on two separate issues. One is: Did he do the act? He may concede he did the act or there may be a hearing on whether he did the act. If the answer to that is that he did not do the act, then there is nothing further -- there is no commitment, there is nothing. There is acquittal.

On the other hand, if there is a finding that he did do the act or there is a concession that he did do the act, then the court, and the court alone, goes further to decide whether or not it was done under sufficient mental impairment.

JUDGE HALPERN: Couldn't we accomplish the same result by providing a waiver, in capital cases, of a jury trial?

MR. UVILLER: And not assert the defense unless it is waived?

JUDGE HALPERN: Then you get the question decided by a judge. You think you should have a different standard in such a case where the judge is to decide it?

MR. UVILLER: Where the judge passes on it alone, then most of the principle objections to the A.L.I. formulation are automatically obviated.

JUDGE HALPERN: You realize that caused all the trouble in the Durham case, where the judge was so conscientious he was going to follow the McNaughton Rule even though he expressed his view to the contrary.

MR. UVILLER: The A.L.I. formulation makes such flexibility for exactly that sort of sophistication on the part of the judge. What he would be doing is really not finding a fact as making a judgment. The A.L.I. formulation would be merely guidance or legislative advice on how the community feels this particular judgment should be predicated.

PROFESSOR WECHSLER: I think you overplay that. I agree with you, that it is not merely fact-finding, but on the question, particularly, on capacity to conform where the judge is choosing, really, between two competing diagnoses, and accepts one or the other.

MR. UVILLER: That is picking opinions; isn't it?

JUDGE HALPERN: It is true in civil as well as criminal cases.

PROFESSOR WECHSLER: There is nothing unique about that. It is a kind of fact.

MR. UVILLER: It is a kind of fact, but it is a different kind of fact than "what happened?"

PROFESSOR WECHSLER: What about it?

MR. UVILLER: Well, I think that perhaps facts of that sort can best be --

PROFESSOR WECHSLER: It is like testing testamentary capacity. Is that a fact, did the testator have testamentary capacity?

MR. UVILLER: That is always the same category of fact.

JUDGE HALPERN: It goes to the jury.

MR. UVILLER: It does go to the jury. The jury is called upon to pass upon these three different types of facts, but it is not inconsistent with the jury idea to take them away.

You take, for example, facts of the second kind, like, "How much pressure can this boiler sustain without exploding?" questions of that nature. Frequently, as I understand it, in practice, these facts are being taken away from the juries and are being given to qualified arbitrators, people who are experts in a particular field.

Where fact category No. 1, choosing of opinions is involved, it seems that a person who has some experience and knowledge in the field is better qualified than the layman to find the fact.

Where fact No. 3 is concerned, whether or not a moral sanction should be imposed, possibly theologians or judges are better qualified than either expert and I would not turn it over to a board of doctors for that reason or the lay jury.

That seems to me very much to the heart of what is involved in the insanity defense. It is a question of who ethically do we excuse from the condemnation of guilt. It is not a question of whom do we send to the hospitals. It

is not a question of what do we do with the transgressor, the guilty man. It is a question of who is the transgressor. It seems to me this is quite a different issue than, for example, did the burglar, when he broke in, intend to commit a crime?

JUDGE HALPERN: Is this the practical impact of your last remarks, that if the defendant waives the jury that there should be a more flexible standard in passing upon the defense of insanity?

MR. UVILLER: Yes. In the sense that I would say that I think I stated -- I don't think a flexible standard -- yes, I think there should be a flexible standard. The impact of my remark simply was I think the problem with an inexact standard is in the nature of the fact-finder rather than in the nature of a standard. I think it is really folly for any group of sensible or sophisticated individuals to get together to think there can be a single sentence devised which so completely embraces the knowledge of psychiatrists and the principles of law through the years that it would satisfy all facts on this issue. I just think that sentences don't lend themselves to that kind of heavy duty, so that I think that ambiguity or vagueness or flexibility, if you will, in the formulation is essential so as to make it workable. But on the other hand, if you are going to try and use it as a jury standard, it is going to produce severe problems, serious

problems. It may mean that an insanity defense ends the case.

THE CHAIRMAN: It guarantees a disagreement.

PROFESSOR WECHSLER: There is nothing in the experience in irresistibility to suggest it is not even true in the District of Columbia under Durham. I agree with everything you said under Durham, but it still isn't true. Why should we think it would be true under a very moderate alleviation?

MR. UVILLER: I think it is probably because of the fact that words are included which are subject to disagreement. I think that we could pick a few cases in recent years from our office and submit them to this jury here and find disagreement as to whether or not --

PROFESSOR WECHSLER: You mean tough, close cases?

MR. UVILLER: Yes.

PROFESSOR WECHSLER: They probably ought to have been acquittals.

MR. UVILLER: All close ones should be acquittals.

PROFESSOR WECHSLER: That is the theory of proof beyond a reasonable doubt.

MR. UVILLER: Proof beyond a reasonable doubt is not proof beyond all doubt.

I am thinking of one case in particular. There is nothing mysterious about it. There was a case involving a killer by the name of Roche. I think that everybody agreed at that time that this fellow was at least, in some respects,

a mentally deranged individual. His killings were brutal; they were repeated and they were apparently senseless and at least factors sufficient, I think, to make somebody think he was deranged.

JUDGE HALPERN: In cases like that, protection of society obviously requires his incarceration. The only question is whether he should be in a hospital, or is capital punishment at the root of this discussion? If you did not have capital punishment, what great difference would it be whether he is in a hospital or in prison?

MR. UVILLER: I think it makes a great difference for the architect of the law. I find that you can practically never discuss the insanity rule with a layman without it becoming a discussion of capital punishment; the two are so intimately related in a person's mind. Probably, the fact is the insanity defense is most asserted to avert capital punishment, but I think there should be just as many potentially eligible people, if you can use that term, who commit other crimes and murder. It is the most commonly used.

THE CHAIRMAN: This is where it is urged most often.

MR. UVILLER: Yes.

MR. CONWAY: You cannot recognize the irresistible impulse to go through a stop sign.

MR. UVILLER: Certainly, in petit larceny cases

and shoplifting.

MR. KEARING: Do you feel that the McNaughton Rule does exclude relevant testimony?

MR. UVILLER: I am very glad you asked. I heard Mr. Denzer say earlier this morning --

MR. KEARING: I mean relevant and you know the sense.

MR. UVILLER: My only feeling is -- and maybe I'm missing something -- but my own feeling is that it does not, that under the present rules, a judge who excludes a psychiatrist's opinion as to the mental condition of the individual he examined is violating a very basic principle of evidence. It seems to me, as I recall it, any expert who gives an opinion on any subject can only be asked the basis for his opinion and the basis for the alienist's opinion is the man was suffering from a particular syndrome or had a certain history, whatever it may be. Then, it seems to me, he can always be asked and can always give the answer in terms of a medical diagnosis, so that I don't see how on grounds of relevancy under McNaughton, a psychiatrist can be prevented from giving the medical basis of his legal opinion.

JUDGE HALPERN: Not so much as a matter of evidence, but as a matter of ruling by the court you can instruct the jury if the psychiatrist's testimony in making the basis of his opinion is: In his opinion the man did not, as a

result of this disease, lack the capacity to know and appreciate the nature and cause of the quality of his act, but he lacked the capacity to control his conduct in conformance with the law, the judge would charge the jury under the McNaughton Rule that on the basis of that psychiatrist's testimony, the defendant was legally sane.

MR. UVILLER: Yes, he would.

JUDGE HALPERN: In effect, you realize we instruct the jury that that is irrelevant to the issue the jury is passing on.

MR. UVILLER: It may be relevant even though it does not result in the result. I think that this is what I was trying to address myself, It is a different point. Sure, the standard cuts off at the point of understanding. It seems to me, whether the McNaughton Rule or A.L.I., there would be no restrictions on a psychiatrist giving the full and complete basis of his opinion in medical terms.

MR. ATLAS: What you are saying is: The jury would be entitled to hear anything that would help it define the word "know"?

MR. UVILLER: No, sir, I am not saying that at all. I do not think the jury would be able -- I think the definition of the word "know" would be given to the jury by the judge in the charge. If the psychiatrist says, "In my opinion this man was in such a mental condition, whether

under McNaughton alone or irresistible impulse, he can be asked, "What is the basis of your opinion?" And in answer to that question, I do not see how he can be cut off when he starts developing this psychiatric syndrome that the man was suffering from; and I don't see the excuse for the Durham Rule as being merely a device for opening the files or the treasure's of his knowledge.

JUDGE HALPERN: Let us pursue that for a moment. In the case I put to you, you agreed the instruction would have to cut it off. Suppose there was a motion made by the district attorney to strike out his testimony on this issue on the ground he has just stated?

MR. UVILLER: The conclusory testimony?

JUDGE HALPERN: The testimony on this issue.

MR. UVILLER: We are asking here, can he say, for example, that this man had had hallucinations at the age of four, that his mother left him --

JUDGE HALPERN: There is no problem about that.

MR. UVILLER: That is what I think is the problem. The psychiatrists are now saying the trouble with McNaughton is they are not permitted to develop the psychiatric finding. They are not permitted to give the diagnosis in their own terms. They are confined to an answer of a right-wrong test. It is the confinement under McNaughton that seems to me that they are protesting as well

as the phraseology of the standard, itself, of course. I think what we are addressing ourselves --

JUDGE HALPERN: Are they any happier with a ruling that allows the psychiatrist to give testimony which the judge is later to tell the jury is irrelevant and not to be the basis for its decision?

MR. UVILLER: No, sir. Again, are we talking about the testimony of the conclusion if the psychiatrist says, "In my opinion he could not conform his conduct" and so forth? That should be stricken unless we have A.L.I. They are not protesting that they are interested in saying he can conform or cannot conform. What they are interested in is having the opportunity to develop a description of the defendant in terms which make sense to them in keeping with their own discipline.

JUDGE HALPERN: I would think you are stating -- I have talked to many psychiatrists on this issue who want more than that. They want a test stated in terms of flexibility and they prefer Durham so that their medical conclusion has an equivalent in law.

MR. UVILLER: Even those psychiatrists who have no objection to testifying have privately confessed that when they answered the question, "Did he know the nature and quality of his act?" they make a transliteration in their own mind and relate it on whether he was psychotic.

JUDGE HALPERN: That depends very often on which side you are testifying.

PROFESSOR WECHSLER: It is quite indefensible, the transliteration.

JUDGE HALPERN: Of course, it is. That is why so many of the better psychiatrists, whose opinion to the court would be immensely invaluable, refuse to answer.

MR. UVILLER: That is right. They say they cannot answer the question honestly.

JUDGE HALPERN: You are understating the impact upon psychiatric testimony of the McNaughton Rule.

MR. UVILLER: I am, Judge. All I can say in defense of it is I am stating only that aspect of it which I think we can satisfy. We certainly cannot satisfy the other area of difficulty as that would be devising a test saying psychotics are not responsible. I don't think anybody has seriously proposed such a thing.

JUDGE HALPERN: Durham goes pretty far in that direction.

MR. UVILLER: Even that doesn't say --

THE CHAIRMAN: Is it fair to conclude that in spite of some reservation you feel that the A.L.I. Rule is preferable to McNaughton?

MR. UVILLER: Unfortunately, I am not authorized to make a choice, not because of any timidity on our

part.

THE CHAIRMAN: You are unable to agree?

MR. UVILLER: We frankly have difficulty in reaching a uniform opinion within the office, itself.

PROFESSOR WECHSLER: There are members of your staff who are of that opinion?

MR. UVILLER: Yes, sir.

JUDGE HALPERN: Is it fair to assume what the Chairman has just said, that if this proposed A.L.I. Rule were coupled with a statement that the burden of proof is on the defendant to establish his insanity by a fair preponderance of the evidence, that you would be for it?

MR. UVILLER: That would help, yes. I don't think that would quite go far enough to remove all of the doubt we have about A.L.I.

THE CHAIRMAN: Of all of the staff?

MR. UVILLER: Of all of the staff. I am not trying to in any way withhold this except to express, I think, the natural hesitation of caution of anybody who studied the problem.

THE CHAIRMAN: Thank you, very much.

Our last speaker is John W. Condon, Jr., appearing for the Penal Law and Criminal Code Committee of the Erie County Bar.

MR. CONDON: Our Committee, unfortunately,

because of the communications between it and the Bar Association and the commitment of many of the attorneys, have not been able to address themselves to this problem until the last 10 days.

We understand it is clearly stated in your notice that if it is advisable the McNaughton Rule should be changed and what standard should be substituted?

For the first question, our unequivocal answer is yes, but in exploring the reasons for it we think that Commission should decide what new standard is to be imposed. In doing this, we met every two days and met with the legislative chairman of the Erie County Psychiatric Society; and while we feel that it should be changed, it is because that which has been repeatedly stated is the mental condition of the defendant cannot be honestly appraised in a court room. This should be revised in many ways, but what we probably have is a situation where many psychiatrists will not come in to testify; since psychiatrists have reputations of continually testifying but always on one side of the question or the other. There are certain psychiatrists that come into the court room for the purpose of educating that we should have a change and the reasons for it.

What happens is self-evident. The standard that we know is the McNaughton Rule. The testimony that they give, we feel, is not necessarily related to that rule, but they

bend their testimony ultimately to fit into it one way or another. They do this for selfish reasons. One is because they are totally against the rule, that they have got much to propound on the subject and they have got an honest concern, in many instances, as to what happens to the particular individual. In changing the standard, it is necessary that you look at every aspect of it. In other words, you cannot talk about changing the standards without talking about what is going to happen to the individual, that you will still have a question of some psychiatrists, on occasion, being quite liberal with his testimony if it is purely a question of an individual may go to a state prison, we will say, from today to life.

Therefore, we think almost at the outset you have to look at the last problem, which is the question of commitment, and we have a suggestion in that regard: That no person should be able to introduce in a trial the defense as we now call insanity or, as we suggest, should be criminal responsibility without specifically pleading it and this should be -- would be that the district attorney is alerted to it in advance so he can properly prepare himself for it; and, secondly, because we propose that a jury should be able to make a special finding and that is a jury would return a verdict or a defendant could plead guilty beyond a reasonable doubt or a jury would have to find beyond a reasonable doubt

that he was the individual that committed the act or acts complained of. He could plead not guilty by failure of criminal responsibility or a jury could return a verdict that he was not criminally responsible for the act that they found beyond a reasonable doubt that he was guilty of. This is to stop the problem where a jury, by acquitting an individual in such an instance, that in effect after a very, very short amount of time as we heard in Washington, it was only a matter of days. We know of instances in our county where for a double murder it was only a matter of weeks that an individual was then in a hospital.

In the event that it was found that a person was guilty of the act but not criminally responsible, then in such an instance he would be committed but differently than a civil commitment, but yet he would go to one -- would not be in a prison. His release would be different than any other civil commitment insofar as this --

THE CHAIRMAN: Isn't that the law now?

MR. CONDON: The law, as I understand it, is he may be released when he is not dangerous to himself or dangerous to others in the community, but it does not give any reasonable assurance that the criminal act he committed or similar to it -- that he would not commit such an act again.

PROFESSOR WECHSLER: How can you say he is not

dangerous if there is a risk he will commit the act again?

MR. CONDON: It would appear that from experiences that have been related within our committee, that the act -- I am speaking of a particular instance where there is a double murder -- I understand in this instance the only thing that had to be shown at that time -- I mean at the time of his release -- was that he was not dangerous to himself or dangerous to other members of the community and the standard for him was identical to anybody in that institution. And what we are suggesting is that the standard be higher for that individual because, as a matter of fact, of what he has done, what has been proven beyond a reasonable doubt. The reason we are suggesting this is we feel it would relieve a lot of the problems; that there are instances such as the one that you suggested about the wife or the mother, what she did, that the district attorney's position would probably be much different if they knew, as a matter of fact, that this person was going to a hospital, but not for a limited amount of time, where they can be released, that the standard as to any other civil commitment could and would be met.

JUDGE HALPERN: To meet constitutional requirements, wouldn't you have to set up a procedure of finding guilty but insane and the court could proceed to treat him constitutionally on the basis of conviction?

MR. CONDON: We gave that some consideration,

but a person to be convicted under this additional plea, there would have to be two things found by the jury: One, that beyond a reasonable doubt the person committed the act; secondly, above and beyond that, they were criminally responsible. In an instance such as I am speaking of, that they found he did commit the act but is not criminally responsible for it, that there would not be a conviction, but that there would be a civil commitment. In other words, the mental hygiene standard of a person after a finding of this type would be increased as opposed to another person.

PROFESSOR WECHSLER: Don't you think that you actually -- I don't say you do get it, but ought to get that under the proper administration of the law that was passed last year, because you certainly wouldn't expect that the Department of Mental Hygiene in making these judgments as to whether a person could be released without danger to the community, would be inattentive to the fact they were dealing with the person who committed a double murder?

MR. CONDON: Professor Wechsler, it would appear that what you say is true, but the members of our Committee that are in the District Attorney's office feel, as a matter of fact, that that is not so.

PROFESSOR WECHSLER: Do they base it on particular cases?

MR. CONDON: Yes, sir.

JUDGE HALPERN: Those cases were all before the recent statute --

MR. CONDON: No, sir, not the Worth case, Judge, in Erie County. It was not.

JUDGE HALPERN: What year was that?

MR. CONDON: Last year.

JUDGE HALPERN: 1961?

MR. CONDON: Yes.

JUDGE HALPERN: What part of the year? When did the statute go into effect?

FROM THE FLOOR: 1960.

MR. CONDON: Why I feel this is so is because a member of our committee that handled the entire proceedings --

JUDGE HALPERN: I know the Worth case and I think that is a good illustration of the fact that the man acquitted on the grounds of insanity may, as the Mental Hygiene Law has heretofore been administered, get a very speedy release after committed.

PROFESSOR WECHSLER: I wonder if we can get a memorandum on that specific case?

JUDGE HALPERN: He was released within two weeks.

MR. CONDON: I think it was a little bit longer than that. It has been stated he was released with an apology, though he murdered two human beings.

There was one other point we would like to address ourselves to. We have worked on a rule, a standard, but what we find that is problematical with so many that have been suggested is we are completely dependent upon the psychiatrist in a court room but yet when we construct the standard, we will refrain in great detail from using psychiatric terms that the psychiatric profession is in accord with.

We feel this falls into two areas. One has the standard of responsibility that the Legislature can adopt, but the terminology of that standard should be one that the psychiatric profession completely embraces. Therefore, there would not be the quarrel with the psychiatrist in the court room. Our relationship with the psychiatric profession leads us to believe that they feel very deeply about the fact that the manner in which they are pitted in a court room, they feel very deeply as to the point brought out that many of them would not come into the court room; that by constructing a statute that we feel is agreeable to us as lawyers, but repugnant to the psychiatric profession, as such, we do a disservice to the individual on trial, we do a disservice to justice; that we are dealing with psychiatrists here, they are the ones who are going to testify under the statute and they should play a very, very strong part in the terminology as opposed to the level of responsibility,

because we feel as lawyers we cannot agree with them completely, as to the level of responsibility, but of necessity we should agree with them as to the phraseology which allows us to define that level.

THE CHAIRMAN: You are offering this as an argument for the rule?

MR. CONDON: For the time we had, which was very brief, though we met every other day, that we attempted to get -- as we understand the definition of the American Psychiatric Society in Washington, D.C., we were not getting it by the statute that the rules that have been suggested here are a question of determination on just what you want the standard to be, how tight you want it to be upon an individual. We feel that is one of the legislative prerogative but we feel that working in a court room the problem is allowing the psychiatrist to come in to testify. We are not quarreling about the terminology of this statute.

THE CHAIRMAN: Isn't that generally true of the A.L.I. Rule, that the psychiatrists are not in accord with the language used to describe the standard?

MR. ATLAS: It is not generally true with every expert.

JUDGE HALPERN: Are you going to far to advocate the rule that Mr. Uviller said no one would advocate, that the test should be whether he is psychotic or not, which

would be using the medical term?

MR. CONDON: I would like to think about that more than I had the opportunity to at the moment, but, Judge, it is along those lines that we feel our thinking should be directed because this will take many of the problems out of the contest within a court room. There certainly is, within a psychiatry society, a level and a group of responsible psychiatrists that agree on a profound term and we have had our problems in sitting down just trying to get definitions and terms and rules from them.

JUDGE HALPERN: Can we assume your position in this way: That you would like to go further in the direction of meeting the views of psychiatrists than the American Law Institute does, but the model is a step in the right direction?

MR. CONDON: I don't wish or feel we should go further. If psychiatry agrees with the terms used in the model code, we have no argument.

THE CHAIRMAN: Would you favor us with a memorandum on the facts in the Worth case?

MR. CONDON: I would be delighted to.

MR. WILEY: In connection with that interim report that you have made part of the record, I would like you to make part of the record the results of a questionnaire that was a joint questionnaire put out in 1959 by the Council of the Governor and Dr. Hoch on that interim report.

THE CHAIRMAN: And the replies you had?

MR. WILEY: And the replies I have supplied to your staff, and you have the material and a chart that --

THE CHAIRMAN: We can put it in another report as a package, as a matter of fact. That is a good suggestion. Fine.

This concludes our hearing on the insanity test question.

This afternoon at two o'clock we will hear witnesses on the question of grand jury reports.

MR. MC QUILLAN: David N. Field, General Counsel for the Association for the Improvement of Mental Health, 36 W. 34th Street, asked that this statement be made part of the public hearing minutes.

THE CHAIRMAN: That will be done and we will also make a part of this record the report of the Committee of the State Bar Association headed by Mr. Berman. I do not believe we received the report yet.

MR. MC QUILLAN: We have not.

THE CHAIRMAN: We will add it to the report when we get it.

Except for that, the hearing is closed on the insanity question.

