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Minutes of the Meeting of the New York State Temporary Commission on Revision of the Penal Law and Criminal Code, held at 155 Leonard Street, New York, New York, at 10:00 a.m. on Saturday, December 8, 1962.

Meeting commenced at 10:00 a.m. by Chairman Bartlett

Present: Richard J. Bartlett, Chairman

Timothy N. Pfeiffer, Vice Chairman

Nicholas Atlas

Philip Halpern

Howard A. Jones

William Kapelman

Herbert Wechsler

Richard G. Denzer, Chief Counsel

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

Robert Bentley, Representative of the Senate Committee on Finance

Excused: John J. Conway, Jr.

William Mahoney

Samuel J. Kearing, Jr., Representative of the Majority Leader of the Assembly

Herman Bass, Representative of the Majority Leader of the Senate

Joseph Kunzeman, Representative of the Assembly Ways and Means Committee

Also Present: William Bulman, Assistant Counsel, Judicial Conference

Arnold D. Hechtman, Assistant Counsel

Peter J. McQuillan, Assistant Counsel

Charles E. Torcia, Assistant Counsel

Peter Preiser, Associated Counsel

(Chairman Bartlett suggested a discussion of grand jury reports.)

Bartlett: "Homicide will be our principal discussion this morning. We will be expected to take a position--by this Session--on grand jury reports. I would like to have some policy determination made today, if we can, as to what the staff should be doing to draft a report."

Pfeiffer: "...Weren't we at an agreement that the whole idea of appeal...should go out?"

Bartlett: "I think there was strong sentiment for that position."

Denzer: "As the holding of the court below is adverse to the defendant mentioned...they can't be worse off with an appeal. You can have a defendant's appeal

Denzer: without injuring the persons referred to in the report."

Pfeiffer: "If the decision of the judge is not to make it public and there is no appeal, then that's the end of it."

Halpern: "...The court would get the grand jury testimony even though it weren't mentioned in the minutes...Even then, the defendant doesn't look at them."

Bartlett: "...Most of us there [at the Albany Public Hearing] had some serious misgivings about the whole process set up in the Robbins-Kuh bill."

Halpern: "I think that new position outlined in paragraph 3 of the bill are [sic] just fantastic...I think it requires us to consider the whole question of whether we should have presentments."

(Chairman Bartlett then read the Governor's press release of December 22, 1961.)

Bartlett: "I think we're expected to do something at this coming Session. Is there anyone here in support of the procedure outlined in the Robbins-Kuh bill?"

(At this point, Mr. Atlas and Judge Halpern stated that the grand jury representatives who meet in Albany were a "bad example;" Mr. Bartlett concurred.)

Denzer: "Theoretically, in New York, they're selected from a grand jury list...you see the Commissioner of Jurors and fill out an application...There are four grand juries operating all the time."

(Mr. Denzer here mentioned a case in which the composition of both the grand jury and the petit jury were attacked.)

(Judge Halpern also mentioned a case in which the jury list was challenged--in Wayne County.)

Bartlett (to Halpern): "...I think the old system is better...It is true that there is quite a sharp distinction to be made between the grand juries in New York City and in the rest of the State..."

Denzer: "It's accentuated in New York County by Lee Thompson Smith."

Pfeiffer: "He's devoted his whole life to grand jury presentments."

Bartlett: "...Have a return to the laws before Wood v. Hughes."

Pfeiffer: "...Have the law return to what the practice was before; not the law."

Wechsler: "I'd like to put one thing before you: Suppose we propose a statute to read as follows: Whenever in the course of an investigation authorized by §253 of the Code of Criminal Procedure (which is a basic section), if the grand jury

Wechsler: obtains evidence of official misconduct not constituting a crime, it may issue a report to the public authority having removal power, recommending proper disciplinary action of the particular official involved...The effect of it would be that the official who would be charged would have a forum to contest the removal."

Pfeiffer (to Wechsler): "The report would have to be made first to the court and then to the department [or authority]."

Wechsler: "The only thing of substance that grand jurors have is sloppiness." (Chairman Bartlett here interjected "negligence.")

Atlas: "...Whatever is in the record is also known to the District Attorney."

(At this time, Mr. Jones and Judge Kapelman appeared at the meeting.)

Bartlett (to Jones and Kapelman): "Howard and Bill--we're discussing grand jury presentments. Herb has proposed that whenever we have an investigation under §253, of public officials charged with misconduct of a non-criminal nature, the grand jury be authorized to transmit a report through the judge to the authority having removal power, pinning it definitely to some course of action being taken--not just to the newspapers."

(Judge Halpern then read from §253.)

Atlas: "Whom are you going to give the right to make this public: the grand jury...or are you going to give that power to the person concerned; to wit, the appointing power?--I don't like the whole question of presentments: I prefer indictments."

(Professor Wechsler mentioned a case of a removal proceeding in which there was insufficient evidence to indict.)

Bentley: "...There's really no way for the grand jury to make any recommendation in their private capacity since they are sworn to secrecy."

Halpern: "I think there are two problems here: (1) criticism of an individual and (2) Consider the 'usefulness' of a grand jury to make recommendations of a 'general and objective character --not criticism of any particular individual by name... There are too many opportunities for bribery, etc.[abuse]..."

Denzer: "...The strength of these presentments is illustrated by specific cases."

Halpern (to Denzer): "In some of these cases, an inference will be drawn by the public that some of these officials who are mentioned are involved..."

Atlas: "...What is there to prevent the District Attorney from making objective suggestions?"

Denzer: "...two things: (1) the District Attorney doesn't have to refer to the evidence presented before the grand jury and (2) a grand jury report has something of an official character."

Atlas: "Doesn't the District Attorney have any weight with the Legislature?...The courage of District Attorneys is diminished by the power of the grand juries."

Denzer: "...This was pretty much the situation in Wood v. Hughes."

Halpern: "...You can't find a panacea for all the ills of government."

(Chairman Bartlett here mentioned the name of an Assistant Attorney General, Dunton F. Tynan, who has made a study of grand jury presentments.)

Halpern: "The public would be in favor of a more limited power."

(Chairman Bartlett agreed that this limitation would have more appeal, as far as the Legislature is concerned.)

(Judge Halpern then read pertinent section of the New York State Constitution dealing with grand juries.)

Wechsler: "Why should we confine ourselves to one thing? Why don't we take a poll on how many of us would like to see the law stay as it is? Let us, in any event, say that if any restoration should be accomplished, we think it should go no further than this."

(Judge Kapelman agreed that this is a good suggestion.)

Kapelman: "The Commission should take a stand."

Bartlett: "Without expanding beyond public reports on particular individuals, can't we take a vote on Herb's suggestion: §253: removing power to the particular authority or to the Attorney General?"

(Mr. Atlas suggested taking a vote on whether or not the Commission wants any change in the present law.)

Vote on Change in Present Law:

Four members favored changing the present law (Bartlett, Halpern, Conway, Jones), and four members opposed changing the present law (Atlas, Kapelman, Pfeiffer, Wechsler).

Kapelman: "I now move that we abide by the Hughes decision."

Bentley: "Could we ask that if those who voted against grand jury presentments would vote for Herb's suggestion?"

Vote to Abide by Wood v. Hughes:

Four members favored abiding by the Wood v. Hughes decision (Atlas, Kapelman, Pfeiffer, Wechsler), and four members voted to change the rule (Bartlett, Conway, Halpern, Jones).

Kapelman: "Why don't we authorize Chairman Bartlett to call Mahoney [William] on the phone and get his view?"

Pfeiffer: "Do we present Herb Wechsler's proposal as an alternative?"

Bartlett: "A forum will be available to the public official only if the removing authority takes any action."

Jones: "If that bill does get passed in the Legislature and it comes before this Commission, it will be too late for the Commission to make recommendations--as to an alternative."

Wechsler: "...The Commission is closely divided and we find ourselves unable to make a recommendation...We're all agreed that it shouldn't go any further than this."

Denzer: "Since there are nine members of this Commission, they expect a definite decision on this."

Halpern: "In 1938, I said that there was doubt under existing law whether the Legislature had this power."

Bartlett: "This discussion has produced the need for a draft on: To what extent do we want the grand jury to be able to report on public affairs in terms of recommending legislative and executive action?"

Wechsler: "A grand jury ought to be able to have that information made available to a legislative

Wechsler: committee...Isn't there a way to authorize the use of information in support of legislation at the request of a legislative committee?"

(Mr. Bentley mentioned an example of death by hunting: the grand jury might recommend a change in the qualifications for a hunting license--or the abolition of hunting.)

Vote on Allowing a Report for the Purpose of Removal or Disciplinary Action:

The Commission unanimously agreed on this proposal (Bartlett, Pfeiffer, Atlas, Conway, Halpern, Jones, Kapelman, Wechsler).

Vote on an Objective Report dealing with Matters of General Public Concern for Legislative or Executive Action:

Five of the members were in favor of this type of report (Bartlett, Pfeiffer, Halpern, Jones, Wechsler), and two of the members were opposed to this type of report (Atlas, Kapelman).

Bartlett: "In connection with public officials, the report may also include the finding by the grand jury that there is no ground for an indictment, information or removal or disciplinary action."

(Professor Wechsler felt that the public official should not be "let off the hook.")

Wechsler: "The proposal is only that they should be able to report..."

Denzer: "...Judge Murtagh...when he was Commissioner of Investigation, Judge Liebowitz and then District Attorney McDonald wanted to get him... It was found that it was a 'frame-up.' Without this power, all you're getting is a dismissal."

Bartlett: "This may be the basis of a short amendment relating to the returning of no true bills."

Wechsler: "...I think we're creating two categories unnecessarily, and I'm going to vote against it."

Vote on the Proposition that when after the Grand Jury has Completed its Investigation it Finds no Grounds for Recommending Disciplinary or Removal Proceedings in Connection with a Public Official, it May so Report:

Four of the members were in favor of the proposition (Bartlett, Pfeiffer, Halpern, Jones), and three of the members were opposed to the proposition (Atlas, Kapelman, Wechsler).

Bartlett: "We're voting on what we want the staff to include in a draft bill."

Halpern: "...We ought to crystalize the judge's power..."

Bartlett: "...The judge may quash the report on a finding (i.e., grounds for suppression by the trial judge)."

Grounds for Suppression:

1. If he finds that the report was not a product of an investigation properly conducted by the grand jury under the powers of §253.
2. That the report was not supported by competent evidence.
3. The person whose conduct is criticized in the report was not given an opportunity to appear before the grand jury.

In the course of the investigation the grand jury must afford an opportunity to the public official involved to appear after execution of an appropriate waiver.

Halpern: "If he wishes to be heard, he has to sign a waiver."

Czechlewski: "What is the result if he does not appear?"

Halpern: "No public disclosure shall be made of the fact of non-appearance pursuant to the invitation."

Bartlett: "I think it would be unfair of me to call Bill [Mahoney]. I think it might be better if I see him next week; I'll try to have a copy of the minutes with me. I think it most important that none of us discuss this outside of this room. How about the question of

Bartlett: appellate review?"

Wechsler: "Leave the bill alone."

Bartlett: "Let's have the draft prepared without any appeal machinery."

(Mr. Atlas suggested discussion on when the next meeting would occur.)

Bartlett: "Presentments, homicide--and our presentments report. This is what the Commission will be occupied with prior to the Session. We must meet early in January. Is there any contrary opinion?"

Wechsler: "Let's meet here [New York City]."

(The Commission agreed on January 18, 1963, 10:00 a.m., as the date for the next Commission meeting, with the understanding that there may be more than one day's work.)

[Note: Everything must be mimeographed before February 1, 1963.]

(Chairman Bartlett then discussed the contents of the Commission's 1963 Interim Report. He suggested the following rough format:

1. An introductory section.
2. Then, a section relating to Excision and Relocation.
3. A report on the articles that we are in the process of revising--make as many public as we can. They will include specific recommendation in 1963.
4. Capital Punishment; Grand Jury; Homicide; McNaughton.

(Judge Halpern suggested having another meeting in December.)

(The Commission decided on December 18, 1962, at 10:00 a.m., in New York City.)

The meeting then turned to a discussion of Capital Punishment--and Homicide, in this connection.

Bartlett: "I'm not sure that I'm prepared this winter to take a final position on abolition--and I don't think it's necessary."

(Judge Kapelman indicated that he wants a clear, strong position--not a tentative one; and that the Commission should recommend a two-trial system.)

Bartlett: "I think we have to come to a tentative decision on Capital Punishment before we can discuss Homicide."

Kapelman: "I move that the Commission adopt the position for the abolition of Capital Punishment."

(Chairman Bartlett stated that the Commission would discuss this prior to a discussion of Homicide.)

Bartlett: "Would this position be stated unequivocally to the Legislature?"

Pfeiffer: "In view of the fact that we're going to have another hearing in Rochester and another meeting of this Commission on the 18th of December, I don't see why we can't perfectly well postpone this sampling until the 18th [December]."

(The members of the Commission agreed on this.)

(Judge Halpern suggested that copies be made of the bill submitted by Mr. Baratta on behalf of the District Attorneys Association.)

Atlas: "On page 3, of Homicide Article No. 4: the word 'defense': I would like to see that language strengthened."

(Mr. Atlas was excused at 12:30.)

(Mr. Denzer distributed copies of his latest Homicide draft, indicating he had drafted alternative felony-murder provisions.)

Discussion ensued on prejudicial evidence during the second-stage hearing. Judge Halpern suggested having two appeals. Professor Wechsler read the California split-verdict section from the A.L.I. Model Code Tentative Draft #9.

Bartlett: "The staff is going to prepare a bill on two-stage proceedings."

Bartlett (to Kapelman): "How do you feel about the California rule: the items to be considered should be charged to the jury?"

Vote on the California Rule:

Four of the members present were in favor of the California provision respecting jury discharge in the event of a disagreement and the discretionary imposition of a life sentence by the trial judge (Bartlett, Pfeiffer, Kapelman, Wechsler), and Judge Halpern was opposed to this provision.

Vote on Permitting the Trial Judge to Impose a Sentence of Life under Certain Circumstances without the Necessity of Submitting the Penalty Question to the Jury in the Second Stage:

The members present were unanimously in favor of this provision.

Bartlett: "The judge shall have the power to obviate the necessity for a jury trial in the second stage and sentence to life imprisonment.

"Anything we recommend must be accompanied by a bill to accomplish it."

(Mr. Bentley was excused at 1:30 p.m.)

(The meeting then turned to a discussion of Homicide Article No. 4.)

Denzer: "I added 'with just intent to kill' which is the only change in §1, subdivision 2."

(Professor Wechsler questioned the use of the word "intent" in lieu of "design.")

Halpern: "I couldn't understand subdivision 2."

(Professor Wechsler discussed the Wisconsin position on this.)

Bartlett: "They [Wisconsin revisors] made it mitigating."

Denzer: "'Justifiable homicide' will be discussed in the General Provisions. Maybe we'll have to repeal 'justifiable homicide.'"

Bartlett: "...The product of our determination on Homicide will have to be rewritten (i.e., the three provisions on page 1 will be transferred to the general part of the revised penal code."

Wechsler: "Say that a person who commits a criminal homicide does so under mitigating circumstances..."

Denzer: "With manslaughter..."

Wechsler (to Denzer): "You've got to make sure...the words 'without justification' must be included."

Denzer: "No homicide is criminal if it is with justification."

Wechsler: "Keep 'erroneousbelief' (subdivision 2 of §1)."

(Chairman Bartlett asked for clarification on §1--if there will be a separate Homicide article.)

(Professor Wechsler and Chairman Bartlett suggested that for now, it would be better to have this speak more clearly as an essay.)

Bartlett: "'Mitigating circumstances' will only have been used once--in paragraph 4."

(A discussion of §2, subdivision 2 ensued.)

Denzer: "Whether it's 'mitigating circumstances' or not, it's Murder in the First Degree."

Bartlett: "The question is whether we need a separate

Bartlett: definition of 'recklessly.'"

Halpern: "If someone creates the impression that life is at stake, this should be felony murder (i.e., pointing a gun at someone, during a robbery, and the person dies of a heart attack). Felony murder should apply only to crimes of violence (i.e., murder, arson, rape)."

Wechsler: "Substitute for 'inherently dangerous to human life' [the following words]: 'which the actor knows to be dangerous to human life.'"

Pfeiffer: "If we didn't have the death penalty, how simpler all our problems would be."

(Judge Halpern then read §2.10-2, the Murder provision from the A.L.I. Model Code.)

(Professor Wechsler here suggested to Mr. Denzer that he bracket several phrases--multiple choice.)

Bartlett: "Are we in every case satisfied to exclude from the felony doctrine interpretation when one of the perpetrators is killed?"

Halpern: "How is the killing of an innocent bystander covered?"

Wechsler: "Make the language uniform (i.e., kills, causes)...Forget causation for now."

Bartlett: "On the question of accomplices..."

Denzer: "Throw the burden on him [the defendant]... "Section 3 is drafted on the basis of a

Denzer: two-stage thing; we'll have to wait on this."

Bartlett: "We've got to have two Homicide bills."

Wechsler: "We can submit two bills: (1) an abolition bill and (2) leave Homicide alone; change death to life imprisonment."

Bartlett: "We don't want to recommend a two-part trial unless we make the necessary changes in the Homicide Article."

Proposed Changes in Draft No. 4 of the Homicide Article:

It was agreed that §1, "Mitigating circumstances," should be merged with subdivision 2 of §4, "Manslaughter."

It was agreed that the clause "Except when his crime constitutes manslaughter as defined in subdivision 2 of section 4 of this Article," which is the opening paragraph of §2, should immediately follow subdivision 1 of §2. Professor Wechsler suggested that the words "an extremely" in subdivision 2 of §2 should be deleted. It was agreed that the words "to prosecution under this subdivision that a defendant, though an accomplice in the felonious enterprise," in subdivision 3 of §2 should be deleted and the following phrase should be substituted: "if the defendant establishes by a preponderance of the evidence that he".

It was agreed that the following phrase in subdivision 3(a) of §2 should be deleted: "therein pursuant to standards of accessorial responsibility enunciated in this code,". It was

agreed that the following phrase in subdivision 3(b) of §2 should be deleted: "personally to commit" and the following phrase should be substituted: "that he or any of his confederates committed". It was agreed that the following words in subdivision 3(c) of §2 should be deleted: "felonious enterprise" and substituted by the following words: "commission of the felony". Professor Wechsler suggested deleting subdivision 3(c) and enlarging subdivision 3(b).

The Commission noted that the decision must be made as to the term of imprisonment to be applicable to Manslaughter. It was noted that, presently, Manslaughter in the First Degree is punishable by 20 years imprisonment and Manslaughter in the Second Degree is punishable by 15 years imprisonment. With respect to the word "severe" in subdivision 1 of §4, the Commission suggested that the staff provide alternate terms; for example, "serious" or "substantial".

The Commission also noted that penalty must be provided for §5 of the draft, "Criminally negligent homicide."

The Meeting was adjourned at 4:00 p.m.

Respectfully submitted,

Rita Cheren

PROPOSED HOMICIDE ARTICLE

NO. 4

Pertinent definitions of General Provisions

Act. The noun "act" means not only a physical movement, but also a verbal utterance and, where relevant, an omission or failure to act.

Criminal negligence. A person who commits an act which creates a substantial and unjustifiable risk of human fatality, physical injury, property damage, public catastrophe or public disorder, does so with "criminal negligence" when he should be aware of that risk but fails to perceive it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his failure to perceive it involves a gross deviation from the standard of care that a reasonable person would observe in his situation.

Recklessly. A person who commits an act which creates a substantial and unjustifiable risk of human fatality, physical injury, property damage, public catastrophe or public disorder, does so "recklessly" when, though aware of that risk, he consciously disregards it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his disregard theeof involves a gross deviation from the standard of care that a reasonable person would observe in his situation.

must in 98 of Article for Cows

ARTICLE X

HOMICIDE

§1. Definitions

Mitigating circumstances. A person commits a homicide under "mitigating circumstances" when he kills under (1) the influence of extreme emotional disturbance for which there is reasonable explanation or excuse, or (2) an erroneous belief that he has a right to kill or to inflict grievous physical injury, when such erroneous belief is based entirely upon a mistake of fact on his part for which there is reasonable explanation or excuse.

will be made part of sub. 2 of § 4

In either instance, the reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as the actor believes them to be.

§2. Murder

Except when his crime constitutes manslaughter as defined in subdivision 2 of section 4 of this Article, A person is guilty of murder when:

1. With intent to kill another person, he commits an act which causes the death of such person or of a third person.

2. Under circumstances evincing a depraved indifference to human life, he recklessly commits an act involving ~~an extremely~~ grave risk of human fatality and thereby causes the death of another person.

Conform suggested deletion "extremely" throughout

3. Either alone or in concert with others, he commits or attempts to commit a felony, and a person other than one of the perpetrators thereof is killed by an act inherently dangerous to human life committed by

one or more of the felony perpetrators in the course of and in furtherance of their felonious enterprise or of their immediate flight from the scene thereof; except that, it shall constitute an affirmative defense to prosecution under this subdivision that a defendant, though an accomplice in the felonious enterprise,

(a) did not commit the homicidal act, nor aid, abet, induce, counsel or procure it in such fashion as to render him a principal pursuant to standards of accessorial responsibility enunciated in this code, and

(b) did not contemplate or intend, under any circumstances, personally to commit any act inherently dangerous to human life, and carried no weapons designed for or capable of such use, and

(c) at no phase of the felonious enterprise when effective withdrawal on his part was possible, was aware of the existence of a reasonable possibility that any of his confederates might commit an act inherently dangerous to human life if such should become necessary or helpful to the effectuation or advancement of the felonious enterprise or of the perpetrators' escape from the scene of the crime.

§3. Punishment for murder; plea of guilty to murder with lesser penalty

Murder is punishable either by death [life imprisonment] or by a lesser penalty consisting of life imprisonment [a prison term or not less than twenty nor more than forty years], as provided in section X of this Article.

With the consent of the court and the district attorney, a person indicted for murder may plead guilty to murder with ~~a~~ the lesser penalty, in which case he must be sentenced accordingly.

provide sentence?

§4. Manslaughter

A person is guilty of manslaughter when:

1. With intent to inflict severe physical injury upon another person, he commits an act which causes the death of such person or of a third person.

suggest adding those elements

2. Under mitigating circumstances, he commits an act which causes the death of another person, which act, absent such mitigating circumstances, would constitute murder as defined in subdivision 1 of section 2 of this Article.

3. He recklessly commits an act involving a substantial and unjustifiable risk of human fatality and thereby causes the death of another person.

§5. Criminally negligent homicide

provide sentence?

A person is guilty of criminally negligent homicide when, with criminal negligence, he commits an act involving a substantial and unjustifiable risk of human fatality and thereby causes the death of another person.

Cover vehicular, negligent homicide

abortion homicide and aiding a suicide must be considered under §4 Manslaughter

RGD/cd
12/3/62