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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 Friday, January 18, 1963.

Present:

Richard J. Bartlett, Chairman
Timothy N. Pfeiffer, Vice Chairman
Nicholas Atlas
Philip Halpern
Howard A. Jones
William Kapelman, William Mahoney
Herbert Wechsler
Richard G. Denzer, Chief Counsel

Herman Bass, Representative of the Majority Leader of the Senate
Joseph F. Czechlewski, Representative of the Speaker of the Assembly
Stanley J. Reiben, Representative of the Minority Leader of the Assembly
Robert Bentley, Representative of the Senate Committee on Finance

Excused:

John J. Conway, Jr.
Samuel J. Kearing, Jr., Representative of the Majority Leader of the Assembly
Joseph Kunzeman, Representative of the Assembly Ways and Means Committee

Also Present:

William Bulman, Assistant Counsel, Judicial Conference

Arnold D. Hechtman, Assistant Counsel
John R. Kelligrew, Assistant Counsel
Peter J. McQuillan, Assistant Counsel
Charles E. Torcia, Assistant Counsel
Peter Preiser, Associated Counsel

Capital Punishment

The Chairman informed the Commission that during the past week he met separately and informally with Senate Majority Leader Mahoney, Assembly Speaker Carlino and Mr. Corbin, Counsel to Governor Rockefeller, and discussed with them the question of capital punishment. Initially he had expected to meet personally with the Governor. The Chairman said that he received a good sounding of opinion from the Executive Chamber and from the leaders of both houses of the Legislature. There was no objection to the Commission's plan to announce publicly its opposition to capital punishment. However, he continued, there was unanimous concern that the Commission not act precipitously by recommending immediate abolition of the death penalty.

The time element, the Chairman said, was discussed at these meetings. It was noted that the public hearings were recently concluded and that the Commission's interim report would be submitted February 1st. The Legislature, he said, obviously needs time, not only to study the issue but to determine the public view. If an abolition bill is proposed by the Commission at the 1963 Session and is defeated, the Commission's image, he observed, is not helped. The Commission on the other hand can express its opinion in favor of abolition. The Chairman suggested that the question really is how to tactfully say that a majority of the members favor abolition. The Commission, he continued, can recommend to the 1963 Session a change in New York's mandatory death penalty provision and the adoption of a two-stage procedure. The Chairman

said that he feels strongly that the Commission make such recommendations for a number of good reasons. He noted that the views of the public on capital punishment are scattered.

The Chairman suggested that the Commission announce that a majority of its members favor abolition of the death penalty, adding however, that because of the time element, and because each member of the Legislature must form his own judgment and because of the danger of precipitate action, the question must be deliberated upon by both the Legislature and the public. The Commission, he continued, might also issue a special report in the spring (comparable to those recently released in Maryland and Pennsylvania) in which all the evidence pro and con would be marshalled, testimony of the public hearings summarized, and a detailed bibliography included. This approach, he concluded, meets with the approval of the Executive Chamber and the legislative leaders.

Mr. Pfeiffer suggested that the February 1st report affirmatively state that the Commission will present an abolition bill to the 1964 Session or at some later time. Mr. Bentley observed that if such a report were issued, there would be strong pressures on the Governor to commute the sentences of defendants awaiting execution. The Chairman said that if the permissive bill is enacted at this Session, it would be useful to gain some appreciable experience of its operation in practice. Mr. Denzer said that this bill in reality is a step toward abolition. Professor Wechsler disagreed, noting that even with such a bill the number of death sentences will not decrease although such sentences might perhaps be more justified.

Professor Wechsler said that the Commission has an obligation to give the reasons for its recommendation to abolish the death penalty. The Chairman said these reasons could be spelled out in the February 1st report. Judge Halpern said that the Commission should not follow a half-way course: it recommends obolition, but takes no action. He noted that the Commission is not mandated to report on capital punishment by February 1st. He suggested that the interim report indicate that the question is still under study, stating, for example, that public opinion on the issue is still unknown. Professor Wechsler said that the Commission could be subjected to criticism for not making up its own mind on the question.

Judge Kapelman said that the Commission wants the passage of an abolition bill. Without support of the leadership, he observed, such a bill will not pass the Legislature. He then moved that the Commission recommend to the Governor a one year moratorium. The Commission rejected this motion.

The Chairman read the following from the Report of the Committee on Capital Punishment to the Legislative Council of Maryland (October 3rd, 1962; p. 38):

> "Therefore, it is recommended that the Legislature accept the principle of abolition as a goal and adopt a plan for the gradual removal of capital punishment in our State. The first step would be to restrict the death penalty to <u>allow</u> its use only for the following offenses:
>
> First degree murder of a law enforcement officer or a prison employee while acting in line of official duty.
>
> Felony murders: that is, murders

> committed in perpetration of burglary, arson, rape or robbery.
>
> After this reduction in the use of capital punishment has had a fair opportunity to permit its evaluation, another detailed study should be made and presented to the Legislative Council for further action toward complete abolishment of capital punishment."

The Chairman expressed the view that this approach appears reasonable. The Commission, he said, could adopt similar language, substituting for the "first step" in New York the abolition of the mandatory death rule and the enactment of the two-stage procedure. The Chairman showed the members a report submitted in June, 1961, to the General Assembly of Pennsylvania by the Joint Legislative Committee on Capital Punishment. He said that he was not favorably impressed by its contents or its approach.

Professor Wechsler observed that nothing would be gained in merely stating that a majority of the Commission members favor abolition. Expressing no view, he said, is preferable to a mere ~~xxxxxxxxxx~~ statement. One of the purposes of a study group is to bring material together. He suggested that the Commission prepare a definitive factual report, presenting the material in a convincing way leading up to its view on abolition. He suggested further that the Commission's action at this Session be limited to the type of amelioration that it favors. The Chairman proposed that the February 1st report state that the Commission is preparing a special report on capital punishment. In the meantime, he suggested, the staff will seek the opinions of experts who did not testify at the public hearings. The Commission then unanimously agreed to

defer public announcement of its position on abolition until the special report is issued.

Professor Wechsler asked the Chairman for his opinion of what action the Legislature might take. The Chairman said that the passage of legislation eliminating the mandatory death rule is possible. Judge Halpern suggested that an interim proposal to eliminate the mandatory death feature is better than a quasi-revised homicide article. He proposed also that the two-stage procedure not be submitted to the 1963 Session. The Chairman and Professor Wechsler disagreed with the latter proposal. Judge Halpern then withdrew this suggestion. Mr. Denzer agreed with Judge Halpern's first suggestion that a revised homicide article might endanger passage of the "mandatory death" and "two-stage" proposals. Professor Wechsler agreed with this observation. He suggested, and the Commission unanimously agreed, that a defendant indicted for murder in the first degree be authorized to plead guilty to that crime with a life sentence. The Commission then unanimously agreed that (1) the revised homicide article not be submitted to the 1963 Session; (2) the February 1st report point out some of the difficulties with the present homicide law; and (3) drafts of the revised homicide article and other formulations be given wide circulation throughout the state at the earliest possible date, preferably before May 1st.

Two-Stage Sentence Procedure

Judge Halpern criticized the provision in proposed subdivision 5, §1043, which directs the court to impose a life sentence

if the jury is unable to agree upon a penalty verdict. Traditionally, he said, a jury disagreement requires a new trial. This provision, he continued, might hamper passage of the bill. Professor Wechsler agreed and moved that subdivision 5 be amended to read, in part, as follows: "If, after the lapse of such time as the court deems reasonable, the jury report themselves unable to agree, the court shall discharge the jury and in its discretion either impanel a new jury to determine sentence or impose life imprisonment." The motion was seconded by Judge Halpern. Voting in favor of the motion were Commissioners Wechsler, Jones, Pfeiffer and Halpern. Voting against the motion were the Chairman and Commissioners Kapelman, Atlas and Mahoney. The vote being evenly divided, the Commission authorized the Chairman to communicate with Mr. Conway. (On January 28th, 1963, he informed the Chairman that he voted in favor of the motion.)

The Chairman, having excused Mr. Jones, next called for discussion of the three alternatives listed in subdivision 6 (disposition of case where Court of Appeals sets aside sentence of death because of error in sentencing proceeding). The first alternative ("the trial court shall impanel a new jury to determine the sentence") was unanimously rejected by the Commission. The following Commissioners, including the Chairman, favored the third alternative (impose life imprisonment): Kapelman, Wechsler, Atlas, Mahoney and Pfeiffer. Judge Halpern, however, favored the second alternative (impanel a new jury or impose life).

Grand Jury Reports

The Chairman began the discussion by noting that the Commission previously decided, by a 5-4 vote, to recommend to the Legislature that no change be effected in existing law. He said that the staff prepared a bill in the event that the Legislature desires to authorize some power to report. This staff bill was mailed to the members prior to the meeting.

Professor Wechsler noted that paragraphs A and B of subdivision one of the bill lack symmetry. Judge Halpern criticized the "sealing" provisions in the bill, relating to reports critical of public officers or employees. If sealed, he said, the purpose of the report is defeated. Professor Wechsler suggested a middle ground: give the court discretion to file such report as a public record or to seal it.

Judge Halpern moved that the following changes be made to the grand jury bill:

1. In paragraph a of subdivision one strike out "non-criminal", and amend the paragraph to read: "Concerning misconduct, nonfeasance or neglect in office by a public officer or employee as the basis for a recommendation of removal or disciplinary action."
2. Amend paragraph B of subdivision one to read: "Stating that after investigation of a public officer or employee it finds no misconduct, nonfeasance or neglect in

office by him; provided that the public officer or employee involved has requested the submission of such report."

3. Amend the subdivision to read: "The court to which such report is submitted shall examine it and the minutes of the grand jury and, except as otherwise provided in subdivision four hereof, shall accept and file such report as a public record only if the court is satisfied that it complies with the provisions of subdivision one hereof and that:".

4. Amend paragraph A of subdivision two to read: "The report is based upon facts revealed in the course of an investigation..."

5. Amend subdivision three by striking out the following (lines 11-13): "the court shall order it sealed and it shall not be subject to subpoena or public inspection, except upon order of the court. However, the".

The Chairman and Commissioners Wechsler, Atlas, Halpern and Pfeiffer voted in favor of the motion. Commissioners Mahoney and Kapelman opposed.

The Chairman next called for a discussion of paragraph C of subdivision one (matters of a general and objective character). Judge Halpern said that Chief Judge Desmond was of the view that

even today grand juries have the self-evident right to issue reports concerning matters of a general and objective character. Professor Wechsler, noting that the Legislature might oppose giving grand juries the right to file such reports, said that he would favor the deletion of paragraph C. The following Commissioners voted to delete paragraph C: Kapelman, Wechsler, Atlas, Mahoney and Pfeiffer. The Chairman and Judge Halpern favored including paragraph C in the bill.

The Defense of Insanity

The Chairman called upon Mr. Kelligrew to outline briefly the insanity defense formulation proposed by the Study Committee of the Governor's Conference on the Defense of Insanity (Foster Committee). Mr. Kelligrew said that the first paragraph of this proposal is unnecessary ("A person may not be convicted of a crime for conduct for which he is not responsible"). He noted that the Illinois statute reads in part: "A person is not criminally responsible for conduct if at the time of such conduct..." The Commission unanimously agreed to adopt this language.

Professor Wechsler pointed out that the Foster Committee formulation provides in part: "he lacks substantial capacity to know or to appreciate the wrongfulness of his conduct." He said that the words "to know" were suggested by Judge Van Voorhis to avoid a court construing "appreciate" as meaning "know." The Commission unanimously agreed to adopt this language. It also unanimously agreed to use the word "only" rather than "principally" in

the final paragraph. As thus modified, the Chairman and the following Commissioners agreed to submit this bill to the 1963 Session: Atlas, Halpern, Kaelman, Mahoney, Pfeiffer and Wechsler.

Scope of Psychiatric Testimony

The Chairman distributed to the members a copy of a bill which he introduced at the 1962 Session concerning the scope of psychiatric testimony (A. Intro. 700, A. Pr. 700). Mr. Denzer expressed the view that statutory authority is not necessary to broaden the scope of psychiatric testimony under the new insanity formulation. Professor Wechsler pointed out that the bill is designed to change the practice in the courts. He said that psychiatrists would like some affirmative basis in stating their opinions at a trial. Judge Halpern said that he agrees with Mr. Denzer and favors not submitting a bill on scope of testimony because courts might perhaps be more liberal than the language in the draft. Professor Wechsler said that many psychiatric groups have examined this bill and favor it.

Judge Halpern referred to lines 16-27 of the Chairman's bill (admissibility of statement made by defendant). He suggested that the staff study this problem of waiver of privilege when the court orders a psychiatric examination. The Commission then unanimously agreed to submit a bill to the 1963 Session adopting the language in lines 3-15 of the Chairman's bill. It also agreed that this provision be placed in the Code of Criminal Procedure, rather than in the Penal Law.

Notice of Defense of Insanity

Mr. Atlas suggested that the onus be placed upon the district attorney to demand notice of the defense of insanity, similar to the alibi provisions in the Code. The Commission rejected this proposal. Professor Wechsler suggested, and the Commission agreed, that a defendant be required to serve notice that he intends to rely on the defense of insanity: such notice to be served within a certain number of days after the not guilty plea is entered or at any time in the court's discretion. It was agreed that this provision be placed in the Code, and that a bill be submitted to the 1963 Session.

The Commission adjourned until February 15th, 1963.

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