HEARING OF
TEMPORARY COMMISSION
on
REVISION OF THE PENAL CODE

State of New York
November 18, 1964

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In the Matter

of

a Public Hearing of the
Temporary Commission on
Revision of the Penal Code

- -

Onondaga County Court House,
Syracuse, New York,
Wednesday, November 18, 1964.

Met at 9:30 o'clock a.m.

PRESENT:

Assemblyman Richard Bartlett, Chairman

Senator John Hughes

Mr. Raymond C. Baratta

Richard G. Denzer, Chief Counsel

Stanley Reiben, Assembly Minority

Peter Preiser, Associate Counsel

Peter S. McQuillan, Chief Assistant Counsel

Rubert Bentley, Senate Finance Committee

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P R O C E E D I N G S

ASSEMBLYMAN BARTLETT: I am Richard Bartlett, Chairman of the Temporary Commission on Revision of the Penal Code. With me are two members of the Commission, your own Senator Hughes and Asssemblyman Barratta. Richard Denzer, Chief Counsel, and other members of the Commission and ex officio members are in the row in front of me.

This hearing concerns itself with the proposed revised penal law which was introduced as a study bill at the 1964 session of the Legislature which subsequently has been printed and circulated by Thompson and Company, so that it has been available to most of the Bar of the State and to other interested agencies. We are on the second round of series of hearings throughout the State which will conclude in New York City next week, at which we are eliciting comment from the public and interested agencies and individuals as to the proposal itself.

Following our hearings, the Commission will convene in New York to consider those points raised at the hearings, then expect to make appropriate revisions to our proposal and to submit it to the 1965 Legislature for passage.

We welcome you all here this morning and thank you for having taken the time to come to speak to us.

I would like to first call on Dr. Abraham Halpern, who is Commissioner of Mental Hygiene for the County of Onondaga..

May I just make this one comment for those of you who plan to speak. If you have a prepared statement we would be very grateful if you would submit it and supplement it with whatever oral comment you feel appropriate.

DR. HALPERN: Mr. Chairman, gentlemen, I am Abraham Halpern. I hold the position of Commissioner of Mental Health for Onondaga County since February 1st, 1962.

My experience relating to the matter under discussion includes four years in Warren State Hospital in Warren, Pennsylvania, where I have dealt with a number of individuals who had been involved in criminal activities. Since I have been in this position, I have examined approximately 250 defendants for the Courts and the purpose of my appearance before you is to address myself to the proposal that the insanity defense be eliminated from the Courts in New York State. In other words, what I would like to have kept in mind as I say a few words would be that Section 60.05 of the proposed New York penal law be actually deleted.

I have worked very closely with the Courts

and with the District Attorney's office during the past three years. About two years ago, there were two cases where the plea of not guilty by reason of insanity was offered. In both of these cases, the defendants were found guilty, fortunately, and I say fortunately for them that they were, and they were appropriately dealt with by the Court. Since that time, we have been successful in convincing defense attorneys, when they contemplate raising the defense of insanity that they would be hurting and not helping their clients by this plea.

I would like to point out that Mr. O'Brien drew my attention to the proposed new law just last week and I obtained a copy of this only on Saturday and have therefore been unable to put my ideas down in the form of a formal presentation to you. I regret this.

I would like first of all to make a comment about the findings of the distinguished Foster Committee. This was the study committee of the Governors' Conference on the defense of insanity. This Committee made an assumption which I think should have been given a great deal of consideration and discussion by the Committee, but they made an assumption and proposed to make certain conclusions after they accepted the assumption. The assumption is one that I feel should have been very seriously challenged by the Committee and the assumption is this: That there are

compelling, practical, ethical, and religious reasons for maintaining the insanity defense. My own view is that there are compelling, practical and ethical reasons for doing away with the insanity defense.

Once they accepted that assumption, they were left then with attempting to modify McNaughten's rules and the result, of course, is the accepting almost in its full form the American Law Institute's draft proposal for the revision of McNaughten's rules.

As far as I can see, at least some of the members of the Committee and some of the individuals whose support they sought, individuals throughout the United States, for the recommendation that McNaughten's rules be revised, accepted the revision as the lesser of two evils. Assuming that, that the McNaughten rules were evil, the revision was the lesser of two evils; and I say this because they indicate that Manfred S. Guttmacher, M.D., who is Chief Medical Officer of the Supreme Bench of Baltimore, they indicated that he supported the revision and indeed he does, but only as the lesser of two evils.

This particular man, I think, is one of the foremost leaders in forensic psychiatry in this country. He has, as you know, been the Chief Forensic Psychiatrist in Baltimore for some 35 years now. I would like to quote what he said when he discussed the principal difficulties

with the present criteria of responsibility and possible alternatives in -- and his remarks appeared in the tentative draft No. 4 of the model penal code -- there he had this to say: "Many thoughtful psychiatrists who have had Court experience are so impressed with the difficulties in rendering conscientious service to the Courts in the determination of criminal responsibility under existing rules and are so overwhelmed by the challenge of devising a substitute formula satisfactory to law and medicine, that they have become biased.

"If some constitutional method could be found to do away entirely with the defense of insanity and have psychiatrical opinion used only in determining fitness to stand trial and in assisting disposition after trial, they would welcome it."

I agree with Dr.Guttmacher's conclusion, that many psychiatrists would indeed welcome the elimination of the insanity defense.

ASSEMBLYMAN BARTLETT: Dr. Halpern, may I ask a question? You are not troubled at all about the moral implications of finding of guilt and stigmatizing a person with an appellation of guilty in terms of being responsible or irresponsible for his acts? You don't think there is a moral issue involved?

DR. HALPERN: You are asking a leading question.

I certainly would be troubled with this type of stigmatism; but to say not guilty by reason of insanity means guilty but insane. So there is still a moral stigma. It is still guilt but it is by reason of insanity.

2-2 ASSEMBLYMAN BARTLETT: Really, you don't think it is meaningful that we really have used the reasoning that, by saying not guilty by reason of insanity, the jury says, they say this man is not guilty by reason of mental disease?

DR. HALPERN: I think we have to look at the consequences of this type of finding which is part, really, of the finding and I will make some mention of that.

I feel that the Committee overlooked some very important points when they made the proposal for the revision of the McNaughten rules. They seem to have focused on real or imagined progress in psychiatry, the science of psychiatry, as justifying this type of change in the law and they only focused on these advances. They did not, it seems to me, take into consideration the vast strides that have been made in law and in the disposition and the handling of offenders over the past 200 years.

Another thing that stands out in their discussions is the fairly definite equating of psychosis with non-responsibility for criminal acts. If you go through

the testimony of psychiatrists in this State in Court cases where the defense of insanity was proposed, you will see that that stands out more clearly than anything; one or two psychiatrists will hold that the individual was schizophrenic or psychotic and therefore he was not reponsible. He did not know what he was doing.

Now I think that as long as you have this type of thinking put forward before the Court, you are going to have tremendous difficulties with the administration of justice in this particular area because the law certainly does not say that psychosis automatically pre-supposes lack of knowledge of the act or incapability of conforming one's conduct to the provisions of the law.

I would like to say something now that might have some bearing, Assemblyman Bartlett, on the comment you just made. First of all, I think you all know that most cases of mental disorder of individuals who commit the criminal acts do not have as a defense the insanity plea; and you have very carefully taken that into consideration by revising, and I say in a very dramatic and enlightened way, the conditions of probation and of conditional discharge, so that if a mentally ill person -- not an insane person or a criminally irresponsible person -- but a mentally ill person who has been found guilty of a crime can indeed be re-evaluated after the plea of guilty or after the finding

of the verdict of guilty by the jury, re-evaluated in a variety of ways, including psychiatric examination, and the disposition of the offender be determined after the case has been concluded.

You have gone further, actually, in Section 130.20, manslaughter in the first degree. You indeed make provision that a person can plead not guilty to murder if he was under the influence of extreme emotional disturbance. So actually you have allowed a mentally ill person, a mentally diseased person, a person with a mental defect, to plead not guilty to murder and you allow him to actually be found guilty of manslaughter in the first degree even though he were mentally ill, even though you might say he could be stigmatized by being found guilty of a serious crime on the grounds that he was suffering from some extreme emotional disturbance. Now you and I know that when you get a psychiatrist on the stand, he is not going to say that extreme emotional disturbance means anything but mental illness, or mental disease as you have used the undefined words in Section 60.05.

ASSEMBLYMAN BARTLETT: Doctor, you are giving aid and comfort to the prosecutor's point of view that we have gone a lot farther than we intended to in the definition of manslaughter; but basically, it was our intention, I think it is fair to say, that we provide the heat of passion

exclusion from murder in place of manslaughter category where it traditionally has been in the law, and we use some new language, if you will, to describe the heat of passion which is precisely the point you are talking about.

DR. HALPERN: Yes, but you know, sir, there are no definitions that have been offered by the Committee in the use of these words and you are going to wind up with the very same troubles you have today, when this law is passed, so far as the insanity defense is concerned. The fact is, extreme emotional disturbance would be considered to be mental disease by any psychiatrist who appears to testify to either side and you know this yourself.

ASSEMBLYMAN BARTLETT: We are glad to have that pitfall put down by you. As I said, the fact is that the prosecutors, I think, take the same point of view, don't they?

MR. RICHARD G. DENZER: In your opinion, Dr. Halpern, if a defense of extreme emotional disturbance is defined here as interposed in a murder case, would psychiatric testimony on the part of the defendant be admissible to establish that defense?

DR. HALPERN: I would say that it would have

to be and if a defense attorney called as an expert witness a psychiatrist who had examined the defendant, it would have to be admissible, wouldn't it?

MR. DENZER: I am asking you. Your answer is unequivocably yes, isn't it?

DR. HALPERN: Yes. And I might say this. I think our views of psychotic individuals, schizophrenic patients and others are a little bit different. A psychotic individual, when he kills, says he is under extreme emotional disturbance and could fall under this particular section of the law and you know also that the vast majority of psychotic individuals who kill, if they come to trial at all, do not plead insanity. Their defense attorneys will avoid that plea knowing that this could easily result in what is the equivalent of life imprisonment without parole. You just have to look at the population in Dannemora to come to that conclusion.

I might say in a visit I made to Dannemora one day, I found an elderly gentleman who had been a bed patient up in one of their wards for some 15 years and he had first been -- he first came to Dannemora some 60 years ago. He is around 85 or 90, maybe even older, so that one wonders what happens to individuals when they are found not guilty by reason of insanity.

As I mentioned, in the past two years here

we have not had this plea offered by the Courts because if a defense attorney is really active in the best interests of his client, he will do everything he can to avoid this plea.

MR. STANLEY REIBEN: Suppose, Doctor, in avoiding this plea, he sends him to the electric chair; the man was not culpable. Don't forget, the very basis of our system of jurisprudence requires ability, and I think you will agree there are mental disorders that prevent culpability on the part of the actor. If they try to avoid the plea on the lack of culpability by reason of mental disorder, we may very well put him in the electric chair. Would you say that was a better way of handling the situation?

DR. HALPERN: Yes. I do not feel such an individual will be sentenced to the electric chair or be actually electrocuted. Remember, that long before the day comes when he enters the death chamber, he has had a review of his case following the verdict of guilty. He has had a review of his case after he has been placed in imprisonment awaiting the carrying out of the sentence. He has had a review of his case again before the execution takes place, so that I think that there is written into the law ample provision to protect an individual who is psychotic, who is mentally ill. We are no longer now

3-1 talking about understanding the charges. Mentally ill gives ample protection to these individuals who are not -- .

MR. REIBEN: If he is sentenced to the electric chair, found guilty of murder in the first degree, and the Court of Appeals affirms that sentence, how do we get him out of the electric chair, short of commutation?

DR. HALPERN: He can be transferred to Dannemora any time he is found mentally ill. It is right in the correction law. You know that. And this is what has happened on many occasions.

MR. REIBEN: It has also not happened.

MR. RUBERT BENTLEY: While awaiting a death sentence?

DR. HALPERN: It is right in the correction law.

MR. REIBEN: That requires initiation by someone other than defense counsel or the defendant himself, doesn't it?

DR. HALPERN: You are coming to a conclusion, sir, and I am trying to say the law is -- .

ASSEMBLYMAN BARTLETT: This may be a little off your point but this has been called to my attention. I think this is correct. A person under sentence of death found to be insane by commission, his electrocution is simply deferred and he may be examined a number of times, and I think he stays in Sing Sing.

DR. HALPERN: That is right, but remember also

that when an individual has had his electrocution deferred because of mental illness, it has been pretty well the rule that the sentence is not carried out in his case.

But let me point this out -- see, we are jumping ahead of ourselves. The provisions of the law are adequate to prevent such an individual from being found guilty of murder because of what I read from the 130.20, that if he has killed while under the influence of extreme emotional disturbance, he cannot, he may not be found guilty of murder and he would then not be sentenced to death.

MR. REIBEN: You misinterpret it, Doctor. That provision takes into account that in many jurisdictions, there are many jurisdictions where statutes or regulations take it into account, that the murder was motivated by what is commonly known as irresistable impulse. We do not take that into account in our penal statute, murder in the first degree, so we do take it into account under the provision you have just read, manslaughter in the first degree. But this is not necessarily an exact corollary of one whose culpability is completely impaired by reason of a permanent mental disability. They are two completely different approaches.

DR. HALPERN: It just does not work out that way in the Court Room.

SENATOR HUGHES: Would you state your position as briefly and concisely as you can as to what it is you propose?

ASSEMBLYMAN BARTLETT: Once we have excluded, now, we have done away with the test of insanity, where do you take us then?

DR. HALPERN: This is what I am now saying. I have proposed, Senator Hughes, the elimination of Section 60.05 which lays down some basis for an insanity plea. Now I am giving reasons why I think this is a good idea.

SENATOR HUGHES: What do you substitute in place of it?

DR. HALPERN: I am substituting the elimination. What else do you need? I am trying to point out that you already have in the law an adequate substitute.

So far as the last question is concerned, under Section 130.25, a person is guilty of murder when, with intent to kill another person, he causes the death of such person or a third person except when he engages in such conduct under the influence of extreme emotional disturbance so as to render him guilty of manslaughter. That would include mental illness, ill psychosis, schizophrenia, call it what you will. So there is a provision in the law as it has been rewritten which would prevent such a person being found guilty of murder.

MR. DENZER: What about other crimes? That applies to only murder.

DR. HALPERN: So far as other crimes are concerned, I believe you are all aware that the defense of insanity is not often proposed. It is just not even considered. Simply because the defense attorneys generally, you know they would not be acting in the best interests from their clients' point of view if they put forward such a plea. It would be put forward in say a third felony offender to avoid life imprisonment, get him into a mental institution, Department of Correction, and hopefully some day obtain their release; so it is used as a last resort by defense attorneys generally.

MR. BARATTA: Doctor, as I understand it, you believe the defense of insanity defense should be excluded completely from the penal law and you feel this could be properly handled after indictment by examination, what we have now under 658 or 870 of the Code.

DR. HALPERN: We are not really considering the Code of Criminal Procedure today but I think you are right, here. Under the Code of Criminal Procedure, if a man truly would have acted in some way on the basis of an underlying mental disease, the chances are great that he would not be found able to understand the charges or make his defense and he could be dealt with under the Code of

Criminal Procedure; so you see, the defense of insanity is not needed if he is dealt with under the Code of Criminal Procedure.

ASSEMBLYMAN BARATTA: Don't you open the door so wide by eliminating the insanity defense and relying solely on the broadened definition as set forth in the murder statutes as to what constitutes emotional disturbances, etc.?

DR. HALPERN: No, I am making this suggestion as a proposal to eliminate so many of the difficulties that are currently offered as a result of the insanity defense.

MR. REIBEN: Do I understand your proposal means the question of his insanity should be determined pre-trial or post-trial, but never within the trial itself and based on that determination the Code of Criminal Procedure be amended if necessary to provide -- well, you understand, don't you, sir, pre- or post-trial solely deals with whether he was capable at the time of trial to be able to put forth his defense, being capable of putting forth his defense. The pre- and post-trial proceedings have nothing whatsoever to do with the issue or fact as to whether at the time actor committed the act, his capability was so impaired that he did not know what he was doing and that under our system of jurisprudence we ask a jury to determine

You say that a jury should not determine that all?

DR. HALPERN: No, I did not say that.

ASSEMBLYMAN BARTLETT: Go ahead, Doctor. If you could just sum up in terms of what you would suggest, what we are to do once we have gotten rid of the McNaughten rule, what else is needed in your judgment in the penal law to make your system work.

DR. HALPERN: By the way, just to save time then, I will refer Senator Hughes' attention to the section on bestiality and the comments they made there where they regard such a person there as sick. They use the word "sick." Here is a crime to which a sick person who would fall under 60.05, such a person can plead guilty to that crime even though the commission itself has said he is sick and therefore excludable under 60.05. I draw your attention to that plus all the other sections in offense cases that are referred to here.

As to your question, Senator Bartlett, you are asking what I would suggest to replace the elimination of 60.05. Well, I tell you I am very pleased with what I have read in this proposed New York Penal Law. I think you have beautifully taken care of these problems in large measure. You have provided very liberal rules for probation and evaluation of offenders after they have been found guilty.

May I just read one little note here? Under 2510, conditions of probation, you state as a condition of probation relating to conduct in rehabilitation section Paragraph 2d, you state that the individual would have to "undergo available medical or psychiatric treatment and remain in a specified institution when required for that purpose." In other words, you have really written into the law very adequate ways of dealing with offenders of this type so I say that the 60.05 only continues to confuse the issue in the same way that the McNaughten's rules do. There is really not any basic change as far as the anticipated arguments of the psychiatrists called by either side to say that the individual understands or appreciates the nature of his acts or can conform his conduct to the requirements of the law. The words "know" and "appreciate" the wrongfulness of his conduct, these are not defined at all. What does know mean? What does appreciate mean? You wind up with the same arguments on piddling definition with the jury remaining essentially confused and making up their minds on the basis of data that had nothing to do with the psychiatric testimony. The only answer, in my opinion, is that 60.05 be eliminated.

I think Professor Guttmacher really, even though he has favored this modification, I think as the better of two evils, he, too, believes as many people do,

that the defense of insanity ought to be eliminated in the Courts. He raises the question of the constitutionality of eliminating it. I do not know of any constitutional prohibition toward the elimination of this type of defense.

One final point. You are going to get yourself into a great deal of hot water on this issue of culpability and I draw your attention to 4510, effect of intoxication upon culpability. You imply that recklessness, if it is an element of offense when the actor has engaged in voluntary intoxication, you imply that this is not going to affect his culpability. Let me tell you right now, and you just have to go to the law books and you will know, that this is a defense because a person who has been intoxicated -- .

ASSEMBLYMAN BARTLETT: We say it is, Doctor.

DR. HALPERN: No. You say recklessness is an element.

ASSEMBLYMAN BARTLETT: Yes, but -- .

DR. HALPERN: Let us take the case of recklessness in the face of intoxication. Such a person is perfectly authorized to plead not guilty by reason of insanity under Section 60.05. He really -- this type of individual is really insane because his brain has been altered as a result of the poison that he has taken inside of him.

ASSEMBLYMAN BARTLETT: You mean to tell me you think intoxication to be a mental disease or defect?

DR. HALPERN: No, sir. But under the rules of 60.05 -- .

ASSEMBLYMAN BARTLETT: Everything in 60.05 is predicated first on a finding of mental disease or defect.

DR. HALPERN: And that is exactly what the defense attorney will propose in order to show that his client is not culpable.

Take a man suffering from delerium tremens who has really consumed a vast amount of alcohol. Delerium tremens, any authority, legal or medical, will maintain is a mental disease. There is no one that

ASSEMBLYMAN BARTLETT: But the average drunk driver has not got to the d.t. stage.

DR. HALPERN: But once you get to that stage and therefore cause mental disease, you are in serious difficulties. Anyway, for this and many other reasons, I submit that you ought to seriously consider this year, because I know you are going to propose something in the coming Legislature, the elimination of 60.05 and the elimination of the defense of insanity in the modern enlightened State of New York. Thank you very much.

ASSEMBLYMAN BARTLETT: May I ask you just one last question? First, I must say we are very grateful for

your favorable evaluation of the over-all plan. I understand your concern with 60.05 but if we as a Commission find, even if we were to agree with you, that it is impractical to eliminate the culpability test from the penal law, do you have an opinion as to whether or not 60.05 as stated here, the A.L.I. rule would be improved or harmed by the elimination of that paragraph that I discussed with you before the hearing? I know this is a little unfair, but suppose we are stuck with the standard.

DR. HALPERN: Let me agree with my colleagues. If you have to choose between two evils, this one is the lesser of two evils so far as the wording of it is concerned. I think that even though it is the lesser of two evils, you are going to perpetuate practically all the difficulties that currently exist whenever the defense of insanity is raised.

I would want to make that prediction because I really believe all the problems are perpetuated regardless of the wording of the law. I do feel that if you are going to throw expressions around, like "mental disease," like "substantial capacity," like "to know," and like "to appreciate," one ought to attempt to define them. Many of your other expressions are defined; in the front of every section you have got definitions. You do not define these words. I do not know whether it is possible to, but perhaps

some attempt could be made by those who maintain this is a good section.

I would like to say that 1(b) really includes 1(a) and therefore if we are going to be strictly conformed to logic, we should eliminate 1(a).

Now I understand that the District Attorneys Association would like to eliminate 1(b). If it will make them happy, fine. It is a good idea. It is a step forward; but a step forward only on the argument that it is the lesser of two evils.

ASSEMBLYMAN BARATTA: Doctor, in the presentation of your argument this morning, wouldn't it be more consistent to stick to the old McNaughten rule as you argue this entire thing? Won't it be more consistent rather than change it as proposed under "b"?

DR. HALPERN: Well, I would say you are absolutely right. I would agree with you on the basis that people, lawyers and psychiatrists included, might actually think that some progress has been made in New York State. By rewording McNaughten's rules, I do not think any progress can be made.

ASSEMBLYMAN BARATTA: All we are doing now is making this a more mixed and befuddled situation.

DR. HALPERN: Yes, all the difficulties under McNaughten's are perpetuated except one thing, people will

think there have been good changes made.

5-1 MR. REIBEN: May I ask a question? I think I understand what you are getting at. You want to leave the determination of their sanity in more expert hands than a jury. But I still do not understand in your proposal how we would determine the mental condition of the actor at the time of the act itself. What are you proposing?

DR. HALPERN: I feel that you would determine that in the same way you determine the problem when the defense of insanity is not raised.

MR. REIBEN: That is determined by a jury.

DR. HALPERN: Fine.

MR. REIBEN: But you say you want to extract it from a jury's consideration.

DR. HALPERN: No, I am not saying that the issue of whether the individual knew what he was doing at the time that he did it or not should be left to psychiatrists. That can be left to the jury. The mental state, the mental condition, the so-called disease of the individual, should be a matter for consideration by the Court and his advisors, namely his psychiatric advisers after the jury has given its verdict as to the act itself.

ASSEMBLYMAN BARTLETT: In terms of disposition.

DR. HALPERN: Yes, sir.

ASSEMBLYMAN BARTLETT: Thank you very much, Doctor.

Before calling the next witness, I would like to welcome here Assemblyman Chase, my colleague, and also welcome and acknowledge the presence of Senator-elect Boyle and Senator-elect and Mayor Barry who was just here a minute ago.

The next witness is Mr. Norman McIntyre, Director of Probation for Onondaga County.

MR. NORMAN J. MC INTYRE: Ladies and gentlemen, I just have a few questions. It will only take me a few minutes to ask them and I feel that possibly these points that I will raise may affect probation in one way or another.

Now under Section 25.05, the sentence of conditional discharge, I would like to know what machinery is available to determine if a stipulation of conditional discharge was carried out? Now if conditions are not fulfilled, what machinery or agency or individual is responsible to carry out the Court orders?

Now under our present suspended sentence type of thing, where the Court suspends sentence on condition that certain things happen, nothing ever happens unless somebody makes a complaint. For example, if the Court suspended sentence on condition that a man attend, we

will say, a medical clinic, now who is going to report back to the Court?

ASSEMBLYMAN BARTLETT: We would be happy, Mr. McIntyre, in the case of the condition, the carrying out of that condition be supervised by probation, by the department. I am talking about the personnel.

MR. MC INTYRE: It could be, I think it should be -- do you think it could be -- but I think it should be spelled out in the book how it should be done.

MR. PETER PREISER: The answer to your question where the Court desires supervision, the Court will impose a sentence of probation. If the condition that the Court uses is one where it feels no supervision is necessary, the Court will use conditional discharge. We envision conditional discharge as one which would carry very simple conditions such as usually are used by the Courts; such as, I am going to conditionally discharge you, or under existing law going to suspend sentence; but if I ever see you back here in a year or so, I will sentence you on both counts.

Where the Court needs supervision then, it would use the sentence of probation. That is what the sentence is designed for.

MR. MC INTYRE: Yes, I understand that. But the way it is now, it does not work. There may be some, well,

for example, such a thing as -- .

ASSEMBLYMAN BARTLETT: Reimbursement?

MR. MC INTYRE: Supporting reimbursement. Somebody would complain about that. But other types of things, say a medical clinic. No doctor is going to cal up the Court and say he did not report. I have seen that happen.

MR. PREISER: But the alternative to what you are saying, sir, in any case where the Court imposes a condition, it would have to impose probation supervision. In other words, it would eliminate conditional discharge altogether because the only substantial difference between conditional discharge and probation is the element of supervision and we felt there might be cases where the Court would feel there was no point in burdening the Probation Department; that would be in the discretion of the Court itself.

MR. MC INTYRE: I was wondering if it would not be possible to write it so that a person might be -- that these particular things might be followed up, perhaps the Probation Department and that the conditional discharge would not take effect until the report -- report out. would not be probation in the sense you are discharge does not become final until the satisfied or the

MR. PREISER: The

Ella H. Halm
ER – SYRACUSE, N. Y.

time expires.

MR. MC INTYRE: All right. Who is going to tell the Court that it is done?

MR. PREISER: In the case where the Court uses the sentence, the Court has already made a determination that the Court can adequately follow up the condition itself.

ASSEMBLYMAN BARTLETT: Let me interrupt. A sentence, take the case of reimbursement, for example. That is the only condition for discharge of the defendant. Would it not be practical to have the Probation Department as an agency, advise the Court as to whether or not the reimbursement has taken effect?

MR. PREISER: Then the Court could use the sentence of probation and reimbursement. That is almost universal method. The Probation Department, for example in New York City counties, almost always supervise reimbursement.

MR. REIBEN: Mr. McIntyre, under 2510 on Page 29, Subdivision 3.

MR. MC INTYRE: Yes.

MR. REIBEN: As I understand, you say that the idea we have is good but it is not specific enough so that you yourself and everyone else understands exactly where your jurisdiction begins and ends. Doesn't 3,

conditions relating to supervision, answer that?

MR. MC INTYRE: Yes, it does, if the man is placed on probation or sentenced to probation under this new set-up.

MR. REIBEN: The conditional discharge practically is an unsupervised thing.

MR. MC INTYRE: Yes. This is true except this is used many times where there is, perhaps, one condition and it is not followed up unless the man commits a new crime, you see. I have seen cases where, we will say indecent exposure, the Court does not go any further for particular reasons. And if the man continues and unless he is arrested again, he may be bothering people, but who is going to complain to the Court? Perhaps that is not a good example, but the example where a person is supposed to go to a clinic for counseling and this and that, many times they are not placed on probation and perhaps should not be.

MR. REIBEN: What is your suggestion?

MR. MC INTYRE: I would suggest some method of a short term follow-up, something like they do in the intake in a Family Court where you have, perhaps, 30 days under probation. If the conditions are satisfied, then the conditional discharge would be effective.

Now along the same line on Page 303, provision for parole on conditional release from a County correction

institution of a prisoner who, after serving 30 days, has an aggregate of 60 days or more remaining. Now again, I am asking a similar type question: What agency is to be responsible for supervising this parolee? Now is the County-wide parole system to be established, is the Probation Department to be involved in this area?

MR. PREISER: The administrative provisions for that section have not been drawn. The thought was, the pattern that we had in mind, the California system where each County or region can elect to have its own regional Parole Board and that would be set up in accordance with local needs. For instance, a city such as New York where you have an existing full time parole commission and a full time board is needed, you would use a full time board and there they have full time parole officers.

In some upstate Counties where you might only have five or six prisoners in the County Jail at a time, the board can be set up to consist of the Chief Probation Officer, the Sheriff, and a public member designated by the Senior Judge on a per diem basis. In other cities it could be set up to meet the needs of the city in any flexible manner that the regional governing body of the city desires, and full time probation officers, one or more, secretary for the commission, for example the secretary in California fills a dual function in some Counties

keeping the records, reporting to the commission and also doing limited supervision that is needed. You see, it has a flexibility that would depend on the local situation.

MR. MC INTYRE: Yes, I can see how the conditional release would work but the supervision I wondered about.

ASSEMBLYMAN BARTLETT: We have not spelled it out.

MR. PREISER: But we are going to spell it out in the correction law and we thought the supervision would be done in accordance with the local need.

ASSEMBLYMAN BARTLETT: Let me ask you this, Mr. McIntyre. Would you be in favor of a system whereby we use the same facilities now used for probation? I know you are not looking for more work, but do you think that is a practical approach?

MR. MC INTYRE: In principle, I would be in favor of it, yes.

Now my next point is on Page 260 and this is the statement that a sentence of probation cannot be imposed for a non-criminal offense. Page 257 and Section 15.15 states that any violation is a non-criminal offense. Carry it another step, according to the proposed revision, disorderly conduct is termed a violation.

Now in our business, probation, we see many anti-

social acts, including acts of indecent exposure, false fire alarms, bomb hoaxes, as serious acts that come under this broad category of disorderly conduct. The Courts very often use this, and our experience with people who commit these types of acts include many that are very disturbed and who, in many instances, could use probation supervision.

Now according to the proposed revisions, I do not see that there is any machinery for placing these people on probation who are convicted of a violation.

Also, in the same area, public intoxication is classfied as a violation, and these individuals cannot be placed on probation. Now in this County it is our plan, the first of the year, to establish a special unit to work in the City Court in the City of Syracuse with individuals who are deemed to be early-phase alcoholics and our objective, through intensive probationary programs, is to identify and help these individuals arrested for alcohol-related offenses from further advances in this illness and to provide a program of rehabilitation to restore them to normal life.

Now as I see the way this reads, these people cannot be placed on probation and I think this could be a mistake. There are alcoholics that could use probation.

MR. PREISER: Let's take alcoholics. First, I think that when the Commission was considering the

intoxication provisions, it was considering a person who might go out once or twice and become intoxicated and raise a fuss in the town or City, but not the person who is an habitual alcoholic. As to him, I think we have a civil problem more than a criminal problem and the Commission is considering recommending legislation in connection with civil commitments in civil procedures for the habitual alcoholic. I do not think by raising the degree of the offense from a misdemeanor and permitting longer term of his imprisonment that you would be accomplishing much. In the first place, there are very few penal institutions, I understand our own local does have it, but I understand very few have provisions for rehabilitation for alcoholics, and in the second place, it would work an injustice because: 1, as to probation aspects, there is no reason why probation cannot be worked in with the civil procedures such as it is under the Family Court Act.

I do not suggest that it be worked in under the Family Court act. I am suggesting it would be an analagous procedure. As to the disorderly conduct, the Commission is considering raising it to a misdemeanor.

And as to the others, you have a question whether the 15 day term of imprisonment would be sufficient for the probation department to do its work. After all, you would have no way of enforcing the probation other than

a recommendation to the Courts that they impose a maximum term which would be 15 days. To raise the degree of crime then, in order to get sufficient imprisonment to give probation a chance to work, would be to wag the dog by the tail; and I am not sure that when you have a crime that society classifies as a non-criminal violation, and that is all it is, that probation ought to be brought into it.

ASSEMBLYMAN BARTLETT: I see your point, Mr. McIntyre, and I think it is something that will have to be considered carefully as to the fact that there would be no probation in this category.

Any other questions? Are there any other questions that you have?

MR. MC INTYRE: That was my point, but I would like to say that we do handle non-criminal cases, youthful offenders.

MR. PREISER: Youthful offender category is something different. That has been especially drafted. That could be any type of felony.

MR. MC INTYRE: I would like to answer your point about these people in Court. Probation rarely gets these people in and out of Court, the long term drinkers, this type. We are looking for the drinkers. We see a young man who is in for public intoxication.Now he needs help. Now where is he going to get it if he does not get it from us?

I do not say you would have to raise the criminal degree.

MR. PREISER: Do you think that should come better under the civil type procedure rather than the penitentiary type of procedure?

MR. MC INTYRE: Well, the civil type procedure, you mean where probation could enter into it even though there was no penalty?

MR. PREISER: Well, the penalty, so to speak, might be civil commitment to a mental hygiene institution or something of that sort, if out-patient treatment were not successful. I realize it is unfair just to throw the concept and not be specific.

MR. MC INTYRE: Of course, we have seen many times where the threat, we will say, of the consequences for a drinking act will stop a person for a short time, perhaps a month of two, and during this month or two, very often then we can get some help started and perhaps overcome this drinking problem to the extent that they control it. Very often, the fear the first time in jail, we will say the first time that this has ever happened where they would be caught, it is a very serious thing for this person. So during this first 30 or 60 or 90 days, many people won't drink at all during this time. This gives us our chance to get started. Then we can do our re-referrals, whatever we need to do; counseling perhaps, in some cases can be successful.

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ASSEMBLYMAN BARTLETT: Your point basically is that this type of case would need some method of supervision.

MR. MC INTYRE: I think so, in certain cases.

ASSEMBLYMAN BARTLETT: Fine.

MR. DENZER: Under the present public intoxication statute, I forget the number which is applicable, outside of New York City there are a great number of complex and, apparently, partly obsolete or largely obsolete provisions as to the commitment of defendants under that section. I believe you are familiar with that.

MR. MC INTYRE: The public intoxication section, yes.

MR. DENZER: Do you operate under that or partly under that section? I am not clear as to what you do in this County. Your provision is in your City Court Act?

MR. MC INTYRE: Yes, we do.

MR. DENZER: Are they based partly on the present statute or do they get their authority to confine alcoholics for certain -- defendants for a certain period of time? Do you depend upon the present penal law provision to any extent in your treatment of these defendants?

ASSEMBLYMAN BARTLETT: I do not think Mr. McIntyre's idea is their treating them but they would like to be able to.

MR. MC INTYRE: We feel that is an area we are not in enough.

ASSEMBLYMAN BARTLETT: Presently it is County Jail or a penitentiary sentence.

MR. MC INTYRE: Yes.

MR. DENZER: Up to what period of time?

MR. MC INTYRE: Well, 6 months maximum.

ASSEMBLYMAN BARTLETT: Yes. Some of them get it.

MR. PREISER: Do you provide probation services to all the Courts?

MR. MC INTYRE: To all the Courts in the County.

ASSEMBLYMAN BARTLETT: Thank you very much, Mr. McIntyre. I want you to know I speak for the Commission, that we are concerned, and I am concerned about this problem. Mr. Preiser and I, in our studies, found in our County Jail in Warren County a man who has spent about one-third of his adult life in our county institution and even the nice view of Lake George does not take the sting out of that. Thank you.

We have a number of witnesses yet to be heard from, so I am going to suggest that we move along fairly rapidly.

Mr. E.Tefft Barker. Mr. Barker, you are

appearing for the Planned Parenthood Center. Is that correct?

MR. E. TEFFT BARKER: That is correct.

Mr. Chairman, members of the Commission, I appear here on behalf of the Planned Parenthood Center in Syracuse, and I address myself to the penal law sections 1142 and 1145 which I believe it has been suggested or recommended that these sections be transferred from the penal law to the Public Health Law.

If I might be permitted, I might just say a word about the Planned Parenthood Center, so you know the type and kind and scope of organization upon whose behalf I am here today. This is a voluntary association and it was organized back in 1920. It has been in existence since that time. It started then with a budget of $600. and now has a budget of some $60,000.

The activities of the center are basically consultation for family planning, including medical examination and prescription of birth control methods with special sessions for those desiring instruction in the so-called rhythm method of birth control.

We also engage in education for marriage for those who are about to be married, premarital counseling, we engage in marriage counseling for families with marital problems. We also engage in infertility counseling for

childless couples who desire to have a family.

We are staffed by 17 full and part-time professional staff members which include doctors, nurses, social workers and social service workers, and some 60 volunteer workers. We have a present case load of 3500 people and by the end of this year, there will have been made to the Center 12,000 patient visits.

I think our feeling on the sections in question are that they should not be re-enacted into law. That means, of course, that any transferral from the penal code to the Public Health Law we are opposed to. Our basic position is this, that these laws were first adopted, as we understand it, in 1881 and whatever might the validity have been at that time, they are, certainly it seems to us, irrelevant to the present conditions of American life and the practices of families in the State of New York today.

The best available evidence is that 90 percent of fertile American couples practice family planning in order to eliminate family size for social, economic reasons and to perpetuate in the State laws a law which labels effective means of contraception as indecent articles, is to categorize in a most unfortunate manner practices which have come to be adopted by the majority of our citizens. We feel that the laws are particularly restrictive in terms

of their interpretation by the officials in charge of public medical agencies and public welfare agencies. Health reasons are given a very wide and broad interpretation in private medical practice, and by the leading medical thinking in the State. In many public hospitals and in many public welfare agencies a much narrower interpretation is placed upon the meaning of the statutory words. The result of this seems to cause a discrimination severely against lower income families who depend upon public agencies for medical services in that medical birth control prescriptions are available to them only in cases of grave medical necessity.

In conclusion, it is for these reasons we support the position which was taken by the American Law Institute in drafting a model penal code and deciding that contraception ought to be included in that model code. I think basically one of our concerns here, and I can be brief on this subject, as Planned Parenthood Center was originally established with considerations of maternal health uppermost in the minds of the founders, I think the whole crux has changed somewhat, and we look at the clinic in the center here as somewhat of a means of some socio-economic control, so to speak. We on the Board of Directors who are active in planned parenthood view with great alarm the mounting welfare costs that we are faced with in the State and in the local area. Practically 50 percent of our

welfare budget here in Onondaga County goes in the category of aid to dependent children. We are spending something in excess of $6 million in this category here in Onondaga County and it is mounting every year. Not only that, we are spending some $700,000. in the category of foster home care for children.

What I am saying, basically, is this, that with these statutes on the books, it casts a cloud over the whole question of contraception and population control, it seems to us, and therefore we think these laws are anachronistic and should be thrown into the discard pile.

8-2 ASSEMBLYMAN BARTLETT: Of course, Mr. Barker, I am sure you understand there are other organizations who are disturbed about our even moving it.

MR. BARKER: I am quite aware of that fact but I am cautiously optomistic that those organizations over the years will modify their thinking on that subject, too.

ASSEMBLYMAN BARTLETT: There seems to be some discussion under way at present.

MR. BARKER: Yes, indeed.

I should be glad to answer any questions that any members of the Commission may have.

ASSEMBLYMAN BARTLETT: Thank you very much.

MR. BARKER: Thank you.

ASSEMBLYMAN BARTLETT: You should know the Commission is narrowly divided on this point and whether it is finally resolved or not, it is hard to say. We will certainly consider what you have had to say.

Robert Alexander, Executive Director, the Onondaga Council on Alcoholism.

MR. ROBERT J. ALEXANDER: Mr. Chairman, Senator Hughes, members of the Commission, I would like to say that I appreciate this opportunity to speak to you a little bit this morning about the revised penal law proposed and that I draw from some experience as a police officer in the City of Syracuse for some 16 years, and also as a voluntary probation officer assigned to the City Court in attempting to help those people who were brought before the Court on a charge of Section 1221 of the penal law dealing with public intoxication and related offenses.

I have not had a great deal of time, I must apologize, in reviewing the proposed change in the law; but I might say that as a police officer with some experience that the stratification and classification of the law itself, the terminology, certainly contributes to the tremendous work that must have been done by this body of men that were assigned to your staff in attempting to bring many of these offenses and crimes together so that they can be better understood and used by the various police agencies throughout the State of New York.

Gentlemen, I would like to reinforce, if I may, just for a few moments, something of what Mr. McIntyre the Probation Director here in Onondaga County had to say. And unfortunately at these hearings, it is unfortunate where we have to rely upon what is happening regionally or locally to attempt to bring about some changes in that which affects the entire State of New York; but nonetheless, this is where we live, this is where we work, and this is what we have to rely upon.

I would like to say that I am sure you are all aware that 65 percent and better, sometimes, of the total activity involved in by police officers, deals with intoxication or some related offense to it. I think the F.B.I. uniform crime reports show down through the years that public intoxication or its counterpart throughout the country, in cities of 25,000 or more population, that 65 percent of all the police activity deals with this so-called social offense and it has been so for many years. Until recent innovations have been embodied by local counties it has been utilized more as a criminal statute than a social statute or an offense that has implications other than criminal in nature.

Here in Onondaga County, and to reinforce this gentleman's question a few moments ago to Mr. McIntyre, I would like to point out to you that the City Court in

Syracuse had built into it a statute allowing the judge of that particular Court at any time, upon a request from the Commissioner of Correction or the Superintendent of the County Penitentiary, allowing him at any time to release this person from completing the maximum portion of his sentence when he could present to the Court adequate facts stating why this person should be released to the best interests of the individual or the best interests of the community itself. And I would submit to you in lieu of other legislation that may be lagging behind the revision of the penal law, I understand even if it is at once passed it is not going into effect until 1967, the Director of Alcoholism dealing with the concept that alcoholism is a disease, I fully recognize the value of this law, recognizing also that there must be other type of legislation dealing with helping the alcoholic and the offender such as the civil offense that you mentioned a few moments ago.

But I would like to say that in this concept of correction, I believe in dealing specifically with public intoxication, now that we are sort of not allowing maybe enough elasticity to either the Judge or the Commissioner of Correction or the Superintendent of the Penitentiary, to provide the necessary aid in the individual community to help the person; and maybe until such a time as such other legislation provides other means, that we should think in

terms of allowing some latitude to both the Court and the individual who was responsible for this correction in the various Counties and subdivisions of the State of New York. Such a thing might very well and, off the cuff, go something like this with respect to this violation of P.I., public intoxication, which I notice in this new proposed law also includes narcotics, that the Superintendent of Correction or the officer in charge of the penitentiary may petition the Court for release from the remainder of his sentence. Any time when he, the Commissioner, either is convinced by the means of reports from his professional staff that he, the person sentenced, and society, may benefit most by his release or when a more adequate alternative for aiding the individual may be implemented; so that we find we are dealing with the individual, the 65 percent total of the police work, yet at the same time we are providing a latitude or an area here for aiding the individual until such time as perhaps the civil commitment could be brought into view or there are other substitutions authorized within the mental health or mental hygiene law either to aid this individual as he comes into difficulties in the various communities in the State of New York. Thank you very much, gentlemen. I appreciate your helping.

MR. PREISER: Would you then advocate raising the sentence on a public intoxication charge from 15 days that

we have provided for violation to say some other sentence?

ASSEMBLYMAN BARTLETT: So you could have a meaningful period of supervision.

MR. ALEXANDER: Yes, sir, I would advocate that the present stipulation of 6 months in a penitentiary be written into the new law with the additional information as to release upon petition by the Superintendent of Correction.

MR. DENZER: Aren't we dealing with a rather peculiar situation here? We have a lengthy statute, the present public intoxication statute, with varied provisions here about the treatment of defendants convicted of public intoxication. I think you and almost anyone would admit that it delves into the past and it is sort of an archaic obsolete section. It talks about the Board of Inebriety which goes back how far I don't know. Evidently this was to provide some kind of treatment of alcoholics who were convicted of this crime, but the statute itself is not very much good any more. It doesn't operate. Apparently, you in Syracuse here have used it as a base to try to do something by implementing it with your own Court rules. Isn't the true solution here some large study of the whole alocholic problem, perhaps to be measured with the criminal law much in the way that narcotics is being studied? Isn't this really the subject for a special commission to attack?

It is such a large problem.

Now I do not think this Commission felt that it was an appropriate agency to go into this, any more than it was to try to set up or establish a whole narcotics program. That is a specialized subject and I think we were only trying to deal here with just the narrow offense of public intoxication, which in New York is a problem; you have all the Skid Row people, without crimes. This very elaborate machinery which we are not really capable of establishing, at least in the time we have, is the difficulty here.

9-1 MR. ALEXANDER: I can appreciate your position and I am sympathetic with it. I think you have done an outstanding job.

MR. REIBEN: I may very well stand corrected, sir, but I believe that all of the extraneous matter in Section 1221 of the penal law has been amended except for a fine of $10. and up to 6 months in the penitentiary. The Board of Inebriety was taken out some time ago. The classification of misdemeanor was taken out some time ago by an act of the Legislature.

MR. DENZER: We still have some of that stuff in there.

MR. ALEXANDER: I was only aware of 1221 providing a $10. fine or up to 6 months in the penitentiary.

I hate to talk about regional issues but the attempt to help the individual who is being subjected to this ignominy was built in by this particular County and very well could apply to any other County in the State of New York.

MR. BARRATTA: You do not feel that 15 days in most instances is enough to clean this man up and keep him out of the cold?

MR. ALEXANDER: No, sir. Most of the Judges in the State of New York would use the conditional discharge, if you will, in first and second offenders.

MR. BARRATTA: I think you have got a good point.

MR. REIBEN: Since this is the second request for a 6 months jail sentence, I feel I must raise this point. If you have many for 6 months, let me ask you this question: What causes chronic alocholism and I will answer you, you don't know. Number two, since you do not know, if you have them for six months in a cage, you do not know how to treat him, so you are just incarcerating someone who under the best authority that is today available, is ill and locking him in this cage for a six months period and not advancing his cure, if there is one, one iota. As a matter of fact, the only organization that has ever been successful in any way with chronic alocholism is one that

relies on exactly the opposite theory and that is, complete going about your normal daily life and that is Alcoholics Anonymous, and their theory is exactly the opposite. I speak to you, sir, as probably, for reasons which I need not go into now, the best expert in this whole field on the subject of alcoholism. Are you going to treat him under the new theory that it is a metabolic disturbance? You have no facilities if it is a metabolic disturbance, which we have not checked out yet. We do not know.

Actually, it requires a 3-pronged attack because it comes somewhere within the three areas, social, psychiatric and medical. None of those are available to you while you have him incarcerated, so I must respectfully, sir, although I certainly understand the problems the alcoholic causes you in your police work, say I am still concerned also about the alcoholic, his family and his place in society, and I do not believe you are curing that at all. You are harming it.

ASSEMBLYMAN BARTLETT: As I understand Mr. Alexander's point, he was interested in a longer sentence in terms of some meaningful probation.

MR. ALEXANDER: In terms of ability to release this man when a professional staff at the penitentiary level or the detention level determines that it would be to his best interest and society's best interest to

be released.

ASSEMBLYMAN BARTLETT: We all agree it is a very difficult and knotty problem in the administration of criminal law and I think the Commission are in entire agreement on that; but we are not just sure how to attack it or if we can.

MR. ALEXANDER: Thank you, Mr. Bartlett.

ASSEMBLYMAN BARTLETT: Is Mr. Moran here?

Mr. Shapero?

MR. SHAPERO: I am M. Leonard Shapero. I am an attorney. I am also the Chairman of the Onondaga Advisory Committee on Alcoholism and Rehabilitation, but may I speak however, as an individual member of the Committee rather than as its Chairman, in view of the fact that our intention was not directed as to this hearing in time to have an official action of our committee, and that is another reason why I have not prepared any formal written approach.

What I want to talk to you about is substantially a follow-up of what Bob Alexander, who is, incidentally, a member of our Committee, has spoken to you concerning. First, may I add a few figures to the incidence of alcoholism as it relates to our Courts. Last year in the so-called Police Court, of course we have changed our name here but we still refer to it as Police Court, there

just over 80 percent of all the business transacted in that Court was public intoxication. The other less than 20 percent was made up of the arraignments on felonies and other cursory procedures and its small incidence of Court work was made up of the various crimes properly handled by the Court, so we have some slight indication of the importance of the incidence of alcoholism.

First, may I congratulate you on recognizing public intoxication and reducing it to a violation. I think this is a step in the right direction. It has already been indicated by some of the other questions, it is a step in the direction. We who have spent a good many years working with this problem recognize the problems and pitfalls of alcoholism as it affects the entire community, both as far as the individual is concerned and the community, the tax structure, your welfare case loads and all of the various incidents that are associated with the problem. There is no easy solution. However, we are dealing here with two provisions, both as to its classification currently -- I hope some day it will even be eliminated completely from the aspect of the criminal Courts and handled independently both as to arraignments and its ultimate disposition -- but we are here associated with a current problem and a current attempt to cure it.

However, I must comment about the sentence of

Section 30.15 as it relates to all violations. Here the provision is that for a violation the sentence must be a definite sentence not to exceed 15 days. I would recommend to the Commission that a further study be made of this provision separating from this particular sentence those cases of intoxication because I think you have a sufficient number of cases to warrant a separate interpretation.

Now it is commendable that the general aspect of the Commission in looking at this particular problem appears, I believe, in a comment on Page -- and may I say also that I just got my copy of this this morning and just learned of this recently -- on Page 289 in commenting about the 15 day maximum as it relates to violations, going on to say, however, where an offense is not deemed to be grave enough to be a crime, a sentence of imprisonment is a severe sanction and then goes on to interpret that any sentence for a violation should merely be a tax or a fine or something to point out to the individual that they have not committed a crime as such and therefore should not be penalized. However, unfortunately, in dealing with alcoholism, I think our problem is a little different, that a sentence of 15 days is a severe sentence to the individual because you are sentencing this person, not to 15 days in the penitentiary but currently to a maximum of 10 days because as the Commissioner would say, for good time at the

penitentiary, you get one-third off, if it is a weekend, then only serve 8 days. This is penalizing the individual because we cannot do a thing for him. However, we would be if there was a discretionary provision relating primarily to alcoholism where the sentence would be commensurate with the situation, with only one thought in mind, of helping this individual rather than penalizing.

Now here in Onondaga County, I think some of you gentlemen may be acquainted with the fact that I think on a State level we have probably been forerunners in this entire field. I happen to have been some years ago on the State Commission to the Legislature in setting up the Governor's program three or four years ago and I think you gentlemen are well acquainted with the efforts being made there. We here in Syracuse, for instance, have established as a result of that program the Soule Clinic, which by the way would be most interested to see the results of what can be done on a voluntary basis for the aid of alcoholism.

May I point out one comment that was made by one of the individuals here relating to Skid Row. I think a lot of us know that the doctors finally realize that alcoholism is a disease and are also learning that the Skid Row element of alcoholism is one of the smallest percentage of alcoholism. Your alcoholism runs across industry, across professions, it is a universal costly problem.

In a presentation four years ago concerning a welfare problem, at that time I submitted a paper to a similar Commission pointing out the fantastic costs of welfare, all relating from this same instance. Now, as Mr. McIntyre pointed out, it is our Committee that has been associated and working with the probation department in its efforts which it plans to start next year. Now what is this effort going to be? This is not primarily an effort to try and take a person who has gone to the penitentiary 30, 40, 50, 60 and 75 times. Some of these cannot be halped. What good is it to pick that fellow up and send him to the pen for 8 or 10 days? It is a burden upon the police officer, a burden upon the penitentiary. It is a costly procedure. There should be some other method of handling this individual because there are certain elements that cannot be helped. But what about the individuals, for instance, who are first starting into the field of becoming an alcoholic? In other words, for years the first approach has been complete rehabilitation rather than prevention. There has been established an educational program in the various schools and it is daily growing so that it is developing. It is our hope, for instance, that this pilot program at the probation level of police court, will be in a position to examine not all, because there are not sufficient funds

for it, but at least an appropriate number of primary cases, where a person is coming in for the first, second, third or fourth time, to determine what is causing this situation and can it be rectified, so you wouldn't have an alcoholic in its developing stages. This is the thought of that particular program.

At our penitentiary, we have a far reaching rehabilitation program which has had a marked degree of success and that program is being studied and followed, not only in various other Counties of the State but in various other parts of the United States. It has had a remarkable degree of success, including a good many who have spent not a third, but a half or better of their life in the penitentiary who today are regularly employed tax-paying members of the community.

I think some of you gentlemen may be acquainted with the development of the Brick House, which is the next step beyond our penitentiary which is another pilot program but working very successfully in rehabilitation. But what would all of these be good for if for instance you had no control of an individual other than sending him to a penitentiary for, as I say, a maximum of 10 or 8 days, if a weekend were involved; so I would strongly urge the Commission to make the change within the sentencing procedure of adopting primarily and, of course, when I say sentence, up

to approximately six months with the right as had been indicated of completing the permissive release, as we now have in Onondaga County, in the area; so that you actually cannot be penalizing but helping an individual who is sentenced for this particular situation.

Of course, I might add that if we had other associated legislation to take the alcoholic completely out of the penitentiary, completely out of the Police Courts, it would be one of the other proper procedural aspects in answer but I do not think we are quite ready for it, legislative-wise, cost-wise, or any way at all. Of course, one of the Metcalf bills already indicated its procedure in that direction. I think it is something we all should be headed for when that day comes; but in the interim, as far as the proposed adoption of this new penal section, I think that the section of sentencing for violations should be brought into one specific aspect as it relates to the sentencing of alcoholics.

May I say that our Committee has been working with our local Judges in analyzing the sentencing procedure of an individual on the basis of what will do this individual the most good. Would a suspended sentence help? Would a six months sentence more benefit him because would he be a person who would indicate eligibility

for a participating rehabilitation program? This is the primary thought I would like to give you gentlemen.

ASSEMBLYMAN BARTLETT: Thank you very much, Mr. Shapero.

We will suspend until 11:30 and then start again. I think we will try to go right straight through and then complete before breaking up for lunch. I think we can do that.

(Short recess.)

ASSEMBLYMAN BARTLETT: First we will hear from District Attorney Frank Moran of Onondaga County.

MR. FRANK MORAN: Mr. Chairman, honorable body, I apologize for being a little late. I got stuck in Court this morning with my duties as District Attorney. I won't take much of your time.

I have not had a real opportunity to thoroughly examine all of the matters that are before you but there is one thing I did want to point out and ask that you consider when you take up your study, if you have not done so already, on the code; and that is relative to the 15-year-old children.

I have found in my limited experience as District Attorney here that we have a great number of youthful offenders. Roughly about 40 percent of all of our indictments are youthful offenders and of that percentage

we find, say, three or four involved in a burglary or robbery or some such, that one or two generally are 15-year-olds and are treated as juvenile delinquents, downstairs. And we also find that oftentimes these 15-year-olds are the leaders and yet, of course, we have the older ones who we treat as youthful offenders.

I would request that you seriously consider lowering the age to 15 at which children could be treated as criminals. I think this is necessary. I recall some 15 years ago, and Senator Hughes will recall, too, Senator Gittleson implored the Legislature to do just that, as a result of occurrences happening down in New York where these 15-year-olds maybe were not smart in the ways of the book but they were very smart in the ways of crime. They would carry the instruments of damage to the place where they were going to do a job, the 15-year-olds would. When they got there, then the older boys would do whatever they had to do with the instruments, knives, etc., and when they completed the job that they had done, then they would turn them back over to the 15-year-olds. And, of course, upon arrest they would be treated as juveniles with the instruments that of course, as you know, would be considered against someone who was picked up and older.

Now at that time, of course, upstate we did not have any problems relative to that but I say to

you that crime is on the increase and I am sure that this is general throughout the State and perhaps throughout the country. I might state that as of this date or as of the end of this month, I will have 360 indictments here in County Court. Last year, the full year, they had 263. I think that is a fair comparison generally of the increase in crime. And I found that much of this, as I said before some 40 percent, is youthful offenders and a good many of these lads are 15 and being treated as juveniles, downstairs.

I would ask that you consider reducing the age, then, to 15 at which they could be treated as criminals. I would further ask that you consider the treatment of youthful offenders from the age of 15 to 18 in preference to what it is now, 16 to 19. It is my feeling, in my limited experience again, that a boy when he is picked up at the age of 19 or 18, it is not the first time. He has started when he was 13, 14, 15 and the records, I think, will bear this out. He should be treated -- he is a well developed person and he should be treated as a grown-up person on the statute books. Many of the crimes, you know, are of a very vicious nature; assault in the first degree, and robberies, and they are becoming more prevalent. This is the reason I propose this particular change.

We do have problems, I do not know if you are in a position to do anything about them, they are brought about by the case load in the higher Courts and I do not feel that

perhaps the Legislature can do much. However, I would ask that you consider something in the way of changing the law relative to second offenders and third offenders. I feel it would be a better application of the law in view of the recent decisions that have come down which put us to a test that is oftentimes impossible; and I say this because people who ten years or so ago were put in prison now come back with a coram nobis. I would ask that you make the law now extend the amount of time which the Judge could give to anyone that is before the Court and being sentenced and not put us to the task of determining and setting forth that he is a second, third or fourth felonist. Just give the Judge the discretion. Say if the present penalty is 10 to 20, give the Judge the discretion of 10 to 40 where he could take into consideration the background of this man. Oftentimes, and I say to you it is impossible though we know that previous felonies have been convicted, but it is almost impossible or it is impossible for us to get the records of Texas, California, and various other states and put in the necessary proof which we need now to establish the previous felonies.

Your Honors, I would like to join with the gentleman who did ask that special consideration be given to the alcoholic. I feel with my own experience both as a Judge and as a District Attorney that the present way the law is

written will not be constructive in respect to rehabilitating these people and I ask that you seriously consider making an exemption relative to that. I thank you kindly.

ASSEMBLYMAN BARTLETT: Mr. Moran, I am sure you probably know that the Committee on Court reorganization recommends that jurisdiction of Family Court be increased by the raising of their top age limit rather than decreased. Would we be doing you a service if we at least held the line?

MR. MORAN: I hope so because it would be a disservice, as I see it, from my own experience.

MR. BARRATTA: We are certainly aware of your problem. Is it your point and your view that the age should be lowered from 16 to 15 in all categories of crime?

MR. MORAN: All categories of crime.

MR. BARRATTA: Not limited to crimes of violence, a particular type of crime as we now have it on the books, such as murder?

MR. MORAN: I say all types should be reduced to 15, where it is 16 now.

MR. BARRATTA: A full fledged criminal.

ASSEMBLYMAN BARTLETT: Second offenders, we are aware that the law has been repealed entirely and we believe at least sufficient latitude is given the Judge

under our minimum-maximum structure to take into due account the prior criminal activities in imposing sentence, so the precise situation you are describing we would be faced with under the provision.

ASSEMBLYMAN BARTLETT: Thank you very much.

Mr. Westlake, on behalf of the State Humane Society. Is Mr. Westlake here?

MR. BERT S. WESTLAKE: Mr. Chairman and members of the State Commission on the revision of the Penal Law, my name is Bert S. Westlake of Auburn, New York. I am a member of the Board of the New York State Humane Society, Chairman of the Cayuga County S.P.C.A. and a Justice of the Peace in the Town of Sennett.

Speaking for the New York Humane Society and humane-minded people in this district, I wish to register a protest covering the revision of the Cruelty Laws as set forth for the proposed study of the State's Penal Law, Section 250.35. The following resultion was adopted by the New York State Humane Society, held in Poughkeepsie on October 31st.

ASSEMBLYMAN BARTLETT: Mr. Westlake, let me interrupt. You are aware, are you not, that Mrs. Walter testified for the State Society in Albany and did give us the benefit of the resolution you adopted?

MR. WESTLAKE: She did give you the benefit of

the two resolutions?

ASSEMBLYMAN BARTLETT: Yes.

MR. WESTLAKE: Did Mrs. Walter give you any information as to a letter or an article that was written by Mrs. Emily Leavitt?

ASSEMBLYMAN BARTLETT: I believe not. You can submit those resolutions again, if you like.

MR. WESTLAKE: It is not necessary, if you know what they are. I think it is only repetition and taking up your time.

Mrs. Emily Leavitt had this article to present at the New York State Humane Association in Poughkeepsie:

"In humane legislation, New York State holds a unique place among the United States. New York was the first State in the Union to pass legislation to protect animals from cruel treatment.

As you know, it was through the relentless, determined efforts of the great humanitarian, Henry Bergh, that the ASPCA was granted its charter on April 19, 1866. Nine days later, on April 28, the law for the prevention of cruelty to animals was enacted by the New York State Legislature.

The New York law, based on the English Cruelty to Animals Act of 1849, has remained substantially

the same from that time until today. Today we are in danger of losing this law completely in a weak, ineffectual revision that offers animals inadequate, if non-existing, protection.

12-2 A strong, effective law to prevent cruelty to animals must be specific, you must know definitely what is meant, you must be able to cite definite unlawful acts, to warn a person that he is breaking the law.

And a strong, effective law must have no qualifying loopholes, it must not require proof that the cruelty was intentional cruelty, or wilful cruelty, or malicious cruelty. Animals must be protected from all cruelty, regardless of the intent.

One hundred years ago, New York State was the pioneer, the leader, in humane legislation. Today, New York is among the States which have the best detailed anti-cruelty laws so far constructed.

To sum up, in order to have a law that you use with authority, you must know exactly what the law means, you must not have to prove the cruelty was intentional, sadistic, or a moral issue.

Any revision should serve to point up all details more clearly and precisely."

Up to the present time, I have received 27 personal letters supporting this resolution. We have three

Humane Societies located in nearby cities who also support this resolution. They are the Cayuga County SPCA with 275 members, Tompkins County SPCA, and the Central New York SPCA of Syracuse, New York.

The Syracuse Society has done an outstanding job as to investigation, prosecution, and obtaining conviction on cruelty cases, and I would like to read Mr. Rapp's letter:

"Our Society was incorporated in 1891, over 70 years ago, and during the present anti-cruelty laws have been in effect, we have investigated many cases of cruelty involving starving cattle, dogs, cats, etc. We have cooperated with the State Police, Sheriffs and City Police in these investigations.

We believe that the present laws involving animals should not be changed inasmuch as they have given us the necessary power to make arrests where cruelty is involved."

Now speaking as a Justice of the Peace, and from personal experience, and as all cruelty cases emanate in either Justice or City Courts, the law must be so worded and clear that the lay Judge can understand and properly hear and decide as to the handling of complaints. Where a case goes to a jury trial, it is very difficult to get a conviction by a jury of neighbors.

Therefore, it is my belief that the law should be made stronger and not weakened and that the present law be considered on this basis.

ASSEMBLYMAN BARTLETT: Mr. Westlake, you are aware, are you not, sir, that the present case law in interpreting cruelty to animals section requires proof of intent?

MR. WESTLAKE: Yes.

ASSEMBLYMAN BARTLETT: Don't you think it is more honest lawmaking to put in the statute what would require proof of intent rather than in Court?

MR. WESTLAKE: That is in the way of intentionally, do you mean?

ASSEMBLYMAN BARTLETT: Yes.

MR. WESTLAKE: Well, that word "intentionally" covers a tremendous amount of latitude.

ASSEMBLYMAN BARTLETT: One of the most important words in our language, yes, sir.

MR. WESTLAKE: And I have seen where it has been used,as an example we had a case in the last three months where people locked up a dog in a trailer and two cats were also in there. They failed to come back for three consecutive days. The complaints came through from the trailer camp advising us as to the conditions but the man just said he forgot them. He did not intend to actually leave them. He just forgot them. You see, he was a man

living with another woman. He had other things on his mind.

ASSEMBLYMAN BARTLETT: If that same man had called a veterinarian to pick them up and the veterinarian forgot about it, do you think we should penalize him under the cruelty section?

MR. WESTLAKE: Definitely not, sir.

ASSEMBLYMAN BARTLETT: You would require they do it intentionally?

MR. WESTLAKE: Yes.

MR. DENZER: Are you saying our definition of the term "recklessly" in the Penal Law, Mr. Westlake--it is a word that is defined pretty much the way it sounds--Would it change your mind if it were "intentionally or recklessly?"

MR. WESTLAKE: I think possibly it would simplify the determination.

ASSEMBLYMAN BARTLETT: We see your point, that there may be inexcusable neglect resulting in cruelty.

MR. WESTLAKE: Precisely. And when you are dealing with a Justice of the Peace who must issue that warrant of arrest, you are dealing with a person like myself who is very humble when I come before a Board of this size. I am not accustomed to making arguments. I handle my cases in a very simplified way, you see.

MR. BENTLEY: But practical.

MR. WESTLAKE: I try.

MR. BENTLEY: I know.

MR. WESTLAKE: I handle probably 400 cases a year.

ASSEMBLYMAN BARTLETT: Mrs. Miller, did you want to be heard?

MRS. MILLER: Not necessarily.

ASSEMBLYMAN BARTLETT: Will you come forward, please?

MRS. MILLER: I am appearing for the State Society. I am very new Syracusan. I am very much interested in the animal welfare wherever I have lived -- Air Force Base. I am a member of most of the Humane Societies. I just met Mr. Westlake and last year worked very hard in Albany to try and get some of these laws passed and I am just interested in knowing why the wording should be changed to make it weaker when it is all right now. It is just fine and apparently it is much better this way. We wondered why you would want to change it.

ASSEMBLYMAN BARTLETT: I do not think we can engage in a debate on this point, Mrs. Miller, but suffice it to say we want to have the statute say in terms of the required elements of proof exactly what will have to be established in Court to make a finding of guilty. Now we require proof of intent in cruelty to animals and

we think it should say so in the statute.

MRS. MILLER: I agree with Mr. Westlake that the word "intent" is very difficult to describe and judge.

ASSEMBLYMAN BARTLETT: Surely you would not want a person who unintentially committed some act which might have resulted in pain to an animal to be criminally prosecuted, would you?

MRS. MILLER: I think so.

ASSEMBLYMAN BARTLETT: Would you want to be prosecuted if a dog ran in front of your car here today and you killed him?

MRS. MILLER: No, but I feel that I perhaps would have to pay for it and very gladly take care of it.

ASSEMBLYMAN BARTLETT: We have to require intent, do we not, for the injury or killing of an animal, if we are going to prosecute criminally?

13-1 MR. MILLER: As Mr. Westlake says, I do not know anything about law but we wondered why we would have to have a change.

ASSEMBLYMAN BARTLETT: I might ask the same question Mr. Denzer put to Mr. Westlake. Would you be happier if we at least broadened what is required by saying "intentionally" or "recklessly" to take care of inexcusable neglect?

MRS. MILLER: Could you use "inexcusable neglect"?

ASSEMBLYMAN BARTLETT: I think if you read our definition of "recklessly" -- .

MRS. MILLER: Like the veterinarian, if he were asked to stop by and did not do it, I feel he should be.

ASSEMBLYMAN BARTLETT: He was talking about prosecuting the owner of the dog.

MR. BARRATTA: Suppose the veterinarian had a flat tire and did not get there?

MRS. MILLER: Oh, that does not take three days.

ASSEMBLYMAN BARTLETT: I see Mr. McLaughlin is back with us and I would be very happy to hear from him and welcome an old colleague.

MR. EDWARD J. MC LAUGHLIN: John, Senator, I think everyone on the Commission realizes what I want to address myself to, at least initially here today, being Article 235 titled "Prostitution" and related offenses. The equal morals standard committee has submitted a number of very detailed briefs to the Commission already in the past, so I shall not take the time during a crowded public hearing to restate any of those arguments. Suffice to say that I was asked here today and I want to appear here just to go on the public record to advance the position of the equal morals standard committee and to suggest again to the

Commission that the proposed legislation be amended to permit the prosecution of the patron of the prostitute as well as the prostitute herself or, as the new law provides, himself. You cannot state, I suppose, for any legal reason, why the law should be changed in this way. I think the argument in favor of it is simply one of communitive justice between these two violators. You certainly cannot have prostitution without the customer; and it seems that New York State, by prosecuting only one party to this grantedly illicit relationship, is somehow or other entering into a nasty business with the customer. It is sort of a contract with the customer. Well, we will not prosecute you so you will not be an accomplice, so we can use you to testify against another criminal. I think it is beneath the dignity of the State of New York to enter into this type of, at least, implicit contract.

Another, possibly more practical reason is this. At the present time, in the United States, we are having a rise in venereal type diseases, especially syphilis. The American Health Association has always maintained and continues to maintain this problem is directly related to prostitution and its customers. If the customer of the prostitute is held to have at least some criminal liability, society has the opportunity to demand that he take an examination and possibly submit to cure, be committed to cure,

if he is so infected. At the present time, the prostitute must do this but the customer who could infect the prostitute today would just go out and he will be infecting prostitutes faster than the State of New York can catch up with the prostitutes it is trying to cure.

If I might have a moment here to congratulate the work of the Commission on two particular sections of the law which I, as Assistant District Attorney in this County, have had problems with, I speak particularly about our Article 145 and the Article relating to the harboring of fugitives from justice. The Article 145, which now makes it criminal to trespass on someone's property, indeed takes care of an area of the law of New York State which needed to been taken care of. Under the existing law, thousands -- literally, I suppose, millions of people in the State of New York who live in unincorporated areas of the State, I think, are now covered by protection which already existed for other citizens of the State. I think this is a tremendous improvement. I think if the Commission did nothing else but have enacted Article 145, it would have more than justified its existence.

In this County, we have a problem today with the rather notorious case of a fugitive of justice who was harbored for several weeks by at least a dozen people. I only can see this from the prosecutor's point

of view, I only wish the proposed penal law was already adopted and I was not having to operate under the existing law. Both of these sections, I think the people of the State of New York will be eternally grateful for the work in this area, and of course there are so many other improvements in so many other sections with people criticizing, I suppose it is only fair that at least one voice stand up and say, as far as I am concerned, it is really a terrific job.

MR. REIBEN: Mr. District Attorney, you now want to make both parties to an act of prostitution criminals.

MR. MC LAUGHLIN: Yes, sir.

MR. REIBEN: I have often, throughout my entire career, been puzzled as to why even make the first party. Why do you want to make the prostitute herself a criminal? What is criminal about the act of prostitution?

MR. MC LAUGHLIN: Let me say, without going into the law enforcement problems or the ethical problems there, I am working from a premise, if we are going to make the prostitute guilty of the crime, the customer should be guilty of the crime.

MR. REIBEN: Would you be agreeable to making them equally, without treating either one of them as criminal?

MR. MC LAUGHLIN: I think I am not in a

position to answer this. For three years, I was a trial attorney in the crime and racketeering section. We were primarily concerned with the Federal law of the interstate transportation of women for immoral purposes, alcohol violations, and narcotic violations, and there is no question, sir, that these three things go together. And I know from a practical point of view that the prostitute is probably the law enforcement's and the District Attorney's best friend. She is the weak link in organized crime, right down the line, from a very pragmatic point of view. I would want to continue a prostitute to be considered a criminal for the purpose of the people to exert some pressure on her so she would cooperate in other more serious investigations.

I am not prepared to argue the moral point of view. I could, but I do not think this is the place to do it.

I have taken my position up with various law enforcement agencies in the County of Onondaga and they have no objection. In fact, I think they would at least favor the patron being charged with an offense as the prostitute is. I never talked to them about eliminating the whole thing, and I think their voice certainly should be heard on that. I would not speak on whether or not we should treat them equally by abolishing.

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MR. REIBEN: As I understand, your major support of the prostitute is to create a class of professional informers.

MR. MC LAUGHLIN: I think we have to consider this as a possibility. There are probably 100 other reasons. I am just citing one reason I know a little about.

ASSEMBLYMAN BARTLETT: Thank you very much.

MR. JOHN E SHAFFER: Mr. Chairman, members of the Commission, as I sat in the room this morning, I have seen very few people who are involved, perhaps, on the side of the law I am involved in. I happen to be a member of the National Association of Defense Counsel in criminal cases, as a result of which I get tremendous literature covering the laws, the Commission reports of various and sundry other states. I also happen to be an active member of a number of associations involving trial attorneys in the civil field. I have read and re-read the proposed changes in the penal law. I also have some basic knowledge due to some experience in the Appellate Courts in the criminal field with reference to the case law involving the individual.

So far I have only heard statements this morning with reference to strengthening the law for the people of the State of New York. I have heard nothing with reference to the effect of the law on the individuals of the

State of New York.

I was interested to hear the Chairman state that the statutes proposed by this group contain all elements of the crime; in particular, with reference to your Section 5.00 carrying over the previous statutes stating that the penal law should not be literally construed but the statutes should be construed in fair import of their terms. I think we are all aware that the Courts themselves have held on a great number of occasions in reference to a great number of statutes, the old penal law or the one we are presently operating under, that a statute of a penal nature should be strictly construed, and that statement in the face of the section, I believe it is 21, of the present penal law. Now I am concerned with the loss of individual liberties and individual rights. I am sorry I did not have an opportunity to speak before the Commission. I am also sorry that the voice of the individual attorney who represents the people of the State of New York as individuals and not as a corporate entity representing all the people has not been able to speak against and perhaps to stop this law. You have the right now to arrest on suspicion alone, more particularly with reference to the infamous wiretap laws of the State of New York -- perhaps one or two or three other States may have something like that -- which authorizes our law enforcement officers to commit a crime in violation of

Federal statutes.

ASSEMBLYMAN BARTLETT: Mr. Shaffer, you are not laboring under the misapprehension that either of those are the product of this Commission, are you?

MR. SHAFFER: No, but other Commissions. I am now going to come back to my original premise. These are things that have happened in the last few years. The 800 series in the code, etc. A penal law is to apprise a person of the crime allegedly committed by him. The Courts, prior to the last code, held that a penal law should be strictly construed. The Courts in an attempt to promote the ends of justice have held the penal law should be strictly construed and again in contradiction to the section of the present penal law. Now I think it is about time that the people of the State of New York correct the difference between the opinions of the members of the Legislature and the Court on the construction of these statutes and on behalf of the individuals who are presumed innocent until convicted of a crime, I request that this section be changed to require strict construction of the statute.

Mr. Chairman, you yourself say that all elements of the crime are contained in these various sections. If that is true, then we should not leave it to the discretion of various judges to determine interpretation to be put upon these particular statutes. We will again be flooded

in the Appellate Courts, who are very busy now, for construction of these various statutes in terms of liberality or strict construction. There is no question but where a statute that might be conceivable, the basis of two separate opinions, under those circumstances it should be strictly construed. Many of our statutes have been held that way. I feel that if this Commission is doing its job and doing it properly and is in fact producing a work here that we, and now I am speaking we as people of the State of New York, can count on being enforced by our Police investigatory agencies, that we should have a document that when we look at it we know for a fact that this is right and this is wrong.

A penal law should not leave shades of grey. When you put in the term "literal construction, there are shades of grey.

MR. DENZER: This present section goes all the way back to the old penal code. I say that is back -- .

MR. SHAFFER: Back about 1912, if I recall it.

MR. DENZER: Well, isn't your position because of this section, statutes have been construed in a manner unfavorable to the defendants? Do you contend that that statute has had that effect?

MR. SHAFFER: I do not say favorable to the

defendants. I say favorable to the individuals.

MR. DENZER: You say the individuals in general have suffered from this provision?

MR. SHAFFER: Only to the extent that there is case law that they said they should have been strictly construed. It means that someone was convicted and had to take an appeal.

MR. DENZER: Isn't this largely a semantic question? It talks about the fair import of its terms; that certainly sounds unobjectionable.

MR. SHAFFER: It does sound unobjectionable and I assume we will have a decision or two or three out of the Appellate Division within three or four months after this is in effect, if it does go in effect as is, and right after that we will have some decisions in the Court of Appeals.

My feeling is that if it is designated as being strictly construed: number one, there will be a great number of people who will be apprehended and placed uner arrest designated as violators of some of these statutes; and we do know that that happens and we do know that the cases get dismissed when it gets down to the point where you pull out case law where it says perhaps this statute should be construed this way or that statute construed the other.

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MR. BARRATTA: Isn't that what the Appellate Courts attempt to do in any event, to give a fair import of the terms?

MR. SHAFFER: Perhaps that is so. However, they have held and there is no question about it, there is case after case after case on it, that a statute penal in nature should be strictly construed. That is subsequent to the statute. That is in the sheets that came across my desk in the last couple weeks.

MR. DENZER: Then they are saying the statute should be ignored, is that it?

MR. SHAFFER: You are asking me what the Courts are saying? I do not attempt to interpret what the Courts say. I take a few phrases that are useful to me when I am handling a particular case. As to the thinking of the Court, I cannot tell you that.

ASSEMBLYMAN BARTLETT: Mr. Shaffer, aren't you referring to the decisional law interpreting law outside the penal law, that of penalties attached to them?

MR. SHAFFER: No. With reference to statutes that are penal in nature;some without the penal law, some within.

ASSEMBLYMAN BARTLETT: All right. Do you have any comment on it? We got your point, I think, as to the rule of construction recited in 500. Do you have any

comments on the rest of the provision?

MR. SHAFFER: No, I do not. There is one other point I would like to make, however, and that is with reference to Section170.10. Again, as an individual representing people who are accused of crime and my clients are individuals and, being a father as well as an attorney, I am not in agreement with some statements that have been made with lowering the age of the criminal responsibility from 16 to 15. As a matter of fact, my feeling is quite the other way along the line. I have got a 17 year old son. However, with Section170.10, we are talking in terms unauthorized use of a motor vehicle. I can remember when I was a child that perhaps somebody might borrow a car under those circumstances where somebody left the keys in the car and you were out with a bunch of kids and as a prank you might pick up that vehicle and go for a little joy ride. Now really, there was no criminal intent. It seemed like a good idea to a bunch of juveniles. Sometimes you wonder whether they do know the difference between right and wrong. You hope that they do but sometimes they do not act that way.

I am particularly concerned with one portion of your wording in here. I will assume for the moment that the juvenile that swipes a car, takes it out for a ride for a short period of time, is a criminal who shall be punished

by long terms in prison and perhaps we should use the ball and chain on them, I don't know. However, with reference to this same juvenile, he is liable to stop and pick up two or three of his friends. Now ordinarily he would not admit that he has borrowed a car without the permission of the owner thereof and we have now a situation where we have the person who took that vehicle together with three other boys in that car. We find that they are now apprehended as the boy that took the car said, yes, I took it; and we have the other three boys in that car, who entered that car at that time, and they say, we did not know it was stolen. You have placed a presumption in this statute that each of the boys who was in that car is presumed to know these facts and in a trial of the action on behalf of these boys it becomes a defense to show as far as they are concerned. We are putting a weapon in the hands of the prosecutors of young boys or girls as the case may be, raising a presumption that each person in that car participated in the taking of that vehicle. You are putting an unfair burden on these young people in the vehicle.

I have heard about how concerned people have been about the terms of intent,etc.,with reference to animals. I think these kids ought to have just as much a break and, as far as I am concerned,I think that it would be a disgrace to

include this presumption on this type of crime with reference to juveniles who had no more intent than to have a good time and make lifelong criminals out of them.

ASSEMBLYMAN BARTLETT: You are aware that we are reducing classification of this crime from a felony to a misdemeanor?

MR. SHAFFER: Mr. Chairman, I have had people come to me recently who in their youth were convicted of a misdemeanor, requesting that I -- .

ASSEMBLYMAN BARTLETT: I am not suggesting this still is not serious, Mr. Shaffer.

MR. SHAFFER: But I am saying because of this one misdemeanor, no matter how you put it, it is a crime and they live with it the rest of their lives. They have been mugged, they have been fingerprinted, they are a criminal.

ASSEMBLYMAN BARTLETT: You are not suggesting that unauthorized use of a motor vehicle not be a crime, are you?

MR. SHAFFER: No, I am not.

MR. DENZER: If three people are found in a car which has been taken, A, B and C, and they are asked about it and they say well, he told me he borrowed it from his uncle; and C says he told me he borrowed it from a friend; nobody admits anything. What do you think should

happen in a case like that?

MR. SHAFFER: You are talking in terms of what would come out in prosecution for the crime.

MR. DENZER: There would not be any prosecution, I suppose. You could not attribute guilt to anyone under those circumstances. A car has been taken, there is an alarm out for it, and each one says he does not know, that he thinks one of the others had authority to take it.

MR. SHAFFER: I will answer you in a paraphrase of a great Justice of our Court. "Better that the guilty go free than one innocent man shall suffer."

MR. DENZER: In that case, you could not have prosecution of anyone.

MR. SHAFFER: The question is: Are we trying to set up a system of laws here where it makes it simple for the prosecutor to obtain his conviction or are we setting up a set of laws here that are to protect the public at large? It is a question whether we are talking in terms of the people who are driving down State Street out here, or whether we are talking about a few elective individuals who have chosen to go into the prosecution of the law and those who are working for the various and sundry police investigatory agencies who have chosen that for their career. Who is more important, the individual or the person who has chosen that career? I say the individual.

MR. DENZER: The statute does not say they are all guilty. It simply writes the presumption under the fact. A admits and B and C say they thought he had authority. Isn't it almost certain that they won't be convicted of that crime?

MR. SHAFFER: In a case where there is a presumption in law, that means there is no necessity for the prosecutor to prove that point. It becomes a burden upon the defendant to negate the point.

MR. DENZER: I disagree with you to a certain point only. Won't it -- the burden is on the prosecution. You would destroy it beyond a reasonable doubt.

MR. SHAFFER: This I understand and I am also aware of the effect this has on a jury. We can talk in terms of the written situation here but I am also aware of the effect that it has in the Court Room when the Judge says from the fact that they were there, it is presumed they all knew.

Now say it is up to the District Attorney to prove it beyond a reasonable doubt, and I would assume that is a very good idea. The point is, people are individuals and they hear that term "presumed" it is like with an indictment. You can tell people time and time again that an indictment is nothing but an accusation. They think in their own minds unless there was something there, this

piece of paper would not have been written.

ASSEMBLYMAN BARTLETT: Well, are there any other points, Mr. Shaffer?

MR. SHAFFER: No, sir.

ASSEMBLYMAN BARTLETT: Thank you very much.

The Chair would like to acknowledge the presence of Assemblyman Terry. We are glad to see you.

ASSEMBLYMAN TERRY: I am glad to be here, Assemblyman Bartlett.

ASSEMBLYMAN BARTLETT: Are there any other witnesses who would wish to be heard?

(No response.)

I want to thank you all very much.

MR. REIBEN: If there are no other witnesses, I want to ask Mr. Shaffer -- may I ask a couple questions of our last witness, if there are no other witnesses?

Mr. Shaffer, as long as we have a few moments, may I ask you a couple questions?

I understand you stated you are a member of the National Association of Defense Counsel.

MR. SHAFFER: Yes, sir.

MR. REIBEN: I ask for some further aid. The subject which you just discussed of the addition of presumption of fact which in effect spells out intent, and which has been added to a series of crimes under our proposed

act, and thereby shifts the burden to the defendant to prove his innocence, is a subject which interests me greatly and I was wondering if we could get the aid of your Association to examine this proposed code very carefully and to prepare a memorandum dealing with the constitutional phases which I believe exist, and the historical phases of administering these presumption of facts to ease the prosecution.

A point you just dwelled upon in connection merely with the taking of a vehicle, you will find if you examine carefully that has been done with other crimes.

MR. SHAFFER: I noted that for instance with the issuance and the uttering of checks, intent in that. I cannot speak for the organization. All I can say to you, I am quite sure that group will welcome the opportunity to undertake a study. I do know that with reference to the hearings that they had in California, particularly with reference to McNaughten rules which I am pleased to say, gentlemen, I agree with your section allowing the doctors to determine what a defect is rather than our legal term of insanity which nobody could agree with, I know that they worked with the California Commission to a great extent.

ASSEMBLYMAN BARTLETT: Let's say that although our hearings are concluded next week, Mr. Shaffer, we would be very happy to hear from your group by way of a memorandum,

if you would submit one. I suggest that it be done very quickly because we have got to make our recommendation to the Legislature in a couple months.

MR. SHAFFER: I will be very glad to submit it to the National group and I assume they would take some kind of immediate action on it.

ASSEMBLYMAN BARTLETT: I want to thank you all again for your having joined us this morning and having given us the benefit of your views. Be sure that the Commission will carefully consider them in making our final proposal to the Legislature in the 1965 session.

The hearing is closed.

(Whereupon, the above proceedings were closed at 12:34 o'clock p.m.)

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS:
CITY OF SYRACUSE)

I, Ella H. Holm, do hereby certify that I am the Stenographer who attended the hearing of the Temporary Commission on Revision of the Penal Code, held November 18, 1964, and that the foregoing is a true and correct transcript of said proceedings.

Ella H. Holm