

11/19/64

TEMPORARY COMMISSION
ON REVISION OF THE PENAL LAW
AND CRIMINAL CODE

.....

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JUDGE CONWAY : I want to to:welcome the members of the Commission to our hometown and to the people of Monroe County for having shown interest in turning out here this morning.

A very brief introduction, seated here in the middle is Richard Bartlett, Assemblyman from the Warren County, and the distinguished Chairman of this Commission. He has been working with the rest for three and half years on our project.

Immediately next to me is Mr. Pfeiffer, and on Mr. Bartlett's right is Raymond Baratta. In the hot spot is Richard Denzer, the Counsel of the Commission.

In front here are representatives Ex Officio of the Commission.

Allright, Mr. Bartlett, if you will.

MR. BARTLETT: Thank you, Judge Conway. I appreciate the generous intorduction and want to express our delight at being in Rochester. This hearing, ladies and gentlemen, is being held by the temporary commission on revision of the Penal Law and Criminal Code in connection with our proposed revised Penal Law which was introduced for study purposes at the 1964

session of the Legislature. Since that time it has been published by the Edward Thompson Company, and circulated among the Bar of the State.

We started our series of public hearings last week in Albany, and we will conclude them next week in New York. The Commission expects, after having heard the public reaction to our proposal to again consider those portions which have been criticized or commented upon, and we expect by early in the 1965 session of the Legislature to submit a bill for proposed revision of the Penal Law, and we will urge its passage at that session. I should note, however, that we expect to ask for a deferred effective date so that we may correlate the revision of the Penal Law with that of the Criminal Code, and the Correction Law, and also afford an opportunity to shake out any bugs we haven't encountered up until then.

Our first witness this morning is Mr. Charles Kenning. I believe Mr. Kenning speaks for the New York State Car and Truck Rentals; is that correct?

MR. KENNING : Yes.

MR. BARTLETT: If you would come up here and use the stand, please, Mr. Kenning.

MR. KENNING : Mr. Chairman, I speak for my client which has a franchise for the Hertz System, and locally we have three hundred fifty vehicles that are rented, plus a hundred fifty trucks.

Now, in particular I have reference to Section 170.10. This law as it is now written does not have adequate teeth to present a sort of Damocles to an individual who would come in and lease an automobile, rent an automobile for a few days, a few weeks, or what have you, and then at the expiration of the rental period would retain the vehicle and possibly within his mind he would have the concept of negligently or permanently keeping that vehicle.

We recommend very highly that the Commission consider seriously adding the clause to sub-paragraph 3, which I quote as follows:

"Having custody of a proposed propelled vehicle pursuant to an agreement with the owner thereof, whereby such vehicle is to be returned to the owner at a specified time, he intentionally retains or

withholds possession thereof without the consent of the owner for so lengthy a period beyond the specified time as to render such retention"or, we propose that the clause be added, "Such retention or possession for a period of ten days after the time specified for the return of the vehicle shall constitute presumptive evidence of a gross deviation from the agreement."

We submit that a time element is absolutely necessary here, due to the fact that an individual could very readily have the vehicle for, say, two months, or two years, for that matter, and say "Well, I always intended to return it", and we have no penal protection whatever.

MR. BARTLETT: Mr. Kenning, would you suggest that the period ought to be the same, whether the term of the rental was one week or one year?

MR. KENNING : Well - -

MR. BARTLETT: I am just suggesting that perhaps one year rental, for example, would make better sense for a longer period.

MR. KENNING : This is possible, but in particular, you have many companies that now lease cars and trucks. I

represent Rochester Truck Rental and they don't have such problem, because they have more of a continuous rental period, so what I refer to, particular, the problem comes up with the individual who rents the car who comes into the City for a few weeks, or something like that, and has the car possibly for a period of a week under the agreement, and then retains it for two months, and I understand from my client that there are nineteen vehicles running around in Monroe County now that they can't locate; that if this section were now there, and if they could locate the driver and the vehicle, the renter and the vehicle, they would have this sort of damocles under that ten day provision, where I think the District Attorney's Office, and certainly clever defense counsel could certainly say that this section, that we have not spelled out violation by the section as it now stands, so I respectfully submit that this section should be added as it is now phrased.

MR. PFEIFFER: You, of course, are covered by insurance.

MR. KENNING : That is correct.

MR. PFEIFFER: Now, at the present time the law being what it is now, if the car is kept an unreasonable time,

or what have you, when are you able to present a claim to the insurance company?

MR. KENNING : Well, you can present a claim immediately, but I would say this, when a thing is actually stolen, this is the most common case. This occurred about two weeks ago. A car was stolen from the Downtowner Motel. They put the insurance company on notice immediately, but within two weeks the car was recovered without substantial damage in Buffalo, see, but the fact that civilly, you have a recovery on insurance does not - - it is still a problem to lose cars and then have to submit claims and have no recourse against an individual who commits a criminal act. In other words, a civil remedy is not sufficient.

JUDGE CONWAY: Mr. Kenning, Mr. Pfeiffer's question was when do you now succeed in recovering under your insurance policy where the car is not stolen from the Downtowner, but a person who has rented it doesn't bring it back. What is your practice?

MR. KENNING : To be truthful on that, your Honor, I haven't actually handled any processing of claims against their insurance carrier, so I can't answer that with a degree of accuracy, but I do intend to bring a letter to the Commission, and in my letter I

will spell this out after I consult with my clients on that particular point in his carrier on theft insurance. I apologize.

MR. BARTLETT: Would you address yourself to two points in your written submission, the point raised by Mr. Pfeiffer, and also the question at what point you can test liability for negligence resulting in the operation of that vehicle beyond the term of your lease.

MR. KENNING : Well, not negligence, but the conversion of the individual who takes the automobile, say he has it for seven days. I believe that if he keeps it for at least seven and does nothing about making arrangements to continue the legal possession of that car, I think that criminally speaking, I think the ten day passage of time should be sufficient to make out presumptive evidence of his intent to permanently convert.

I agree with your consent that if it was a year rental that ten days in proportion would not be proper, but I think possibly we could add a clause there in the paragraph as well, where the term of the rental is for less than, say, thirty days.

MR. BARTLETT: Thank you, Mr. Kenning.

MR. KENNING : Thank you very much.

MR. BARTLETT: We now have the delegation from the Monroe County Bar Association, and I am delighted to have you here this morning. I don't know whether you have a batting order other than the one I have here. Mr. Sullivan is first, James Sullivan.

MR. SULLIVAN: Mr. Chairman, and distinguished members of the Commission:

First of all I would like to say that as a member of the Penal Law and Criminal Code Committee of the Monroe County Bar Association, we want to commend the Commission on the work that has been done, and on the splendid proposal that has been made.

MR. BARTLETT: Thank you, sir.

MR. SULLIVAN: We do have a number of speakers, and I have a few things to say, but I would like to, because some of the members who are here have to get away, I 'd like to go to Mr. Clay and on down the line, and then come back myself, perhaps a little bit later.

One other thing I would like to say is that we are speaking actually as individual members of the Bar Association, and the things we say represent our

individual ideas. We have not had a public hearing within the Bar itself to have everything that will be said.

JUDGE CONWAY: Mr. William Clay.

MR. CLAY : Members of the Commission, I have been assigned by the Committee to speak briefly upon Section 75.05 entitled "Entrapment".

It is my personal feeling and the feeling of the majority of the Committee of the Monroe County Bar Association in considering this matter that this is desirable and commendable legislation, but we also feel that one paragraph- - being a concluding sentence rather- - of the paragraph should be eliminated and that reads "Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment." We think that language is ambiguous and confusing and incapable of proper administration. We think it is so indefinite in its phraseology as to be almost meaningless, and we, therefore, recommend that that sentence be eliminated from the proposed section, but other than that, we feel that the section is a desirable one and should be enacted in law.

MR. BARTLETT: Mr. Clay, I think that I am stating accurately the position of the Commission in telling you that we wanted to be sure in enacting for the first time in the State of New York an entrapment statute that we did not preclude prosecutions based on law enforcement officers, simply being a customer, for example, where someone is dealing in illicit traffic of one kind or another, and I think that generally is what we intended to exclude from the prohibition of the entrapment statute by the last section.

MR. DENZER : That is a fair statement, yes.

MR. BARTLETT: And is it your position, sir, that entrapment, that is, the prohibition against entrapment ought to extend to the narcotic case, for example, where the law enforcement officer does nothing more than offer himself to a seller as a potential customer?

MR. CLAY : Yes. I have read the Commission's notes in that regard, and I agree with the Commission note, but we feel that the language here is so indefinite "Conduct merely affording a person - - "

MR. BARTLETT : So your concern is not concerned with the principle we are trying to establish, and the limits we are going to place on it, but rather our description of it.

MR. CLAY : Yes, that is correct. We think it is desirable, but we think it is meaningless, substantially, in its present form; that it is so indefinite that it can't be administered properly.

We also feel that it is probably unconstitutional, because of its indefiniteness. Other than that, we commend the legislation.

JUDGE CONWAY: What would you suggest?

MR. CLAY : I haven't given much thought, your Honor, to language to rephrase it, but I would be very pleased to formulate such language.

MR. BARTLETT: And submit it to us.

MR. PFEIFFER: Isn't your point, Mr. Clay, that the preceding sentence induce or encouragement to commit an offense means active inducement or encouragement with the last paragraph - - without the last sentence at all? Isn't that the fact that wouldn't need any substitute for the last sentence? You just excise it?

MR. CLAY : Yes. If the sentence prior thereto reading inducement or encouragement to commit an offense means active inducement or encouragement is left to stand, and the last sentence eliminated therefrom, we think that that would undoubtedly solve the

difficulty.

MR. PFEIFFER: I thought that was the burden.

MR. CLAY : That is correct. Thank you.

MR. BARTLETT : Thank you, Mr. Clay.

Mr. DiRaimo is next speaker, I believe.

MR. DIRAIMO : Mr. Chairman and members of the Commission:

The topic assigned to me by the Bar Committee is prejudicial publicity. I might say at the outset whether this is the time or place to attempt a discussion of this very broad area, it may properly be contained in the work of this Commission when it attempts a revision of the Code of Criminal Procedure next year.

MR. BARTLETT: I think that's probably so, but if you have prepared yourself on that, we would be glad to hear you, our both understanding it doesn't relate directly to the proposal of the Penal Law.

MR. DIRAIMO : I agree. Of course, I also like to say I don't appear as an expert, and one who has made an exhaustive study of research on the matter. I do feel it is an important matter in the light of the work the Commission is now doing. If the result is to effect a study to do away and prevent some

of the prejudicial material which is very often published in connection with pending criminal cases, I think the citizens of the State of New York and the administration of criminal justice would certainly be furthered by it.

As I see it, the issue concerns itself with the balance involved, that of the defendant for a fair and impartial trial by jury, the right of the - - the constitutional right of the freedom of the press, which is equally important, and certainly should not be necessarily, and the right of the sovereign, the state, and the duty to administer the criminal justice in the sovereignty.

My very limited study shows that the methods that we now have in employing minimize the effects of prejudicial publicity in criminal cases run in four main categories.

If a defendant feels aggrieved in the Appellate Courts he may secure a reversal of his conviction when it is found it was returned by his jury. The Court sometimes use contempt citations against particular news media for publishing an article which is found to have been prejudicial on the rights of the defendant.

But this particular method is a contempt citation isn't too often applied and when it is applied there is such a lack of the definitive standards to guide a court that it doesn't really have any teeth. There is always a standard admonition by the trial judge when a jury is impaneled not to discuss this case or read about it, or expose himself to any facet of it;

and lastly, the reliefs that a defendant has at the trial level, the motion to dismiss the prospective juror for bias or cause, motion for a mistrial, and for a continuance because of some prejudicial article, and in asking for a change in venue.

Now, these all have their functions and they do their job with very very strict limitations. A right that is very often overlaid in this whole area of prejudicial publicity is the unfortunate effect that it has upon the prosecuting government, the prosecutor. Many times the jury might acquit or will acquit, but would otherwise convict, but because of some prejudicial material that was published by any agency, and this, of course, goes up in its reverse and remanded to new trial and further expense, and trouble to the government, and many times the

opposite will happen. The Appellate Court will send it back down, or they will reverse and an otherwise guilty person may be allowed to go free to continue this criminal activity.

JUDGE CONWAY: This isn't a signal, Vince.

MR. DIRAIMO : I understand.

MR. BARTLETT: The dimming of the house lights just indicates we think you are getting into your main end.

MR. DIRAIMO : That being the case we will come to the main issue.

JUDGE CONWAY : You have too many out. Is there any way of controlling this series here?

THE ATTENDANT: I doubt it very much.

MR. DIRAIMO : Many writers have gone into this whole problem and they found very much the same problems that we have attempted very generally to outline here.

Now, I definitely feel, as an individual member of the Monroe County Bar Association, and as a private citizen engaged somewhat in the administration of justice, and as a defense attorney, that a new method should and must eventually be found in order to insure the equal protection to the civil rights involved. There has to be an ideal between the right

of the defendant, the right of the sovereign, and the right of the press. And how we find this, of course, will involve a very voluminous study, I am sure, and many things have to be considered, and perhaps some writers have hit on the answer when they suggest that perhaps a punitive statute might be the answer, and this might properly fall within the consideration of this Commission that attempts to provide the procedure.

MR. BARTLETT : Thank you very much.

MR. REIBEN : Are you familiar with the New Jersey Supreme Court ruling of Monday of this week?

MR. DIRAIMO : I am sorry, I am not. It was called to my attention just this very morning, and I have not had a chance.

MR. REIBEN : They went through it very extensively, and they feel to think it was a problem for the judiciary, rather than a legislative problem, and they go into that too in the formal opinion.

What would be your view of that?

MR. DIRAIMO : Well, it has been handled as a judiciary problem up to this point, I think, that with some degree of success, but not with the degree of

success that we need in order to do the job properly.

The time lapse between the arrest and the trial is a very crucial time, and once a harm is done by a prejudicial article, nothing in the world can correct the harmful effects of this unless there is some preventative action.

MR. REIBEN : Could you submit a detailed legislative proposal that you think would cover?

MR. DIRAIMO : I would be glad to try.

MR. BENTLEY : The judiciary does not come in at the time of the arrest. They don't come until the time of trial. That is a great open period.

MR. DIRAIMO : I was thinking in the terms of the judiciary coming in the appellate courts.

MR. REIBEN : This is something that has bothered all the lawyers, whether the defense counsel or prosecution attorneys; even in civil actions it is bothered with it.

MR. BARTLETT: Mr. DiRaimo, we would be happy if the Monroe County Bar would want to give further attention to this area and make specific recommendations to consider them in the course of our work.

I might suggest, sir, that you read, if you haven't, the reports of the New York County Bar Committee on this problem. They have done a good deal of work in it. I don't mean to suggest that you adopt or reject their suggestions, but it might be of assistance to you.

MR. DIRAIMO : I will look into it.

MR. BARTLETT : Thank you very much.

The next speaker is Mr. DeMaria.

MR. DeMARIA : Members of the Commission, the topic I have been assigned is that of felony murder.

Now, we of the Committee unanimously agree that presently constituted 1044 is somewhat odorous in that any felony, the commission of any killing, intentional, accidental, or otherwise, in the act of any felony is a little erroneous, and we do feel that some revision was in order.

Now, 130.25, subdivision 3, the proposed change of the felony murder statute by limiting it, first of all to the so-called dangerous felonies of robbery, burglary, etc., we feel this is a very good byway of restriction. But, however, the second part of the restriction requiring that the act itself be one that

is inherently dangerous to human life, we feel that the restrictive effect of both of these conditions is somewhat too great. In other words, first of all, to limit it to the five or six dangerous felonies listed is fine, but then in addition to say that the homicidal act itself is one that must be inherently dangerous, the combination of the two would be somewhat too restricted.

This is our opinion, and in addition - -

MR. BARTLETT : Dangerousness is established by the underlying felony itself.

MR. DeMARIA : Yes, in other words, if you restrict it to your burglary, robbery, arson, etc., then any killing while in the commission of any of those dangerous serious felonies would seem it would be a long way from the constituted 1044, wherein it is just any felony, any killing.

Now, in addition, the four affirmative defenses which may be set up by a defendant, we feel that this in and of itself is good. However, by making an affirmative defense you are, in effect, making the prosecution, putting him on the burden of proving beyond a reasonable doubt, negating anyone of the four sub-divisions; for example, that

the defendant was armed, and it is then the prosecutor's burden to beyond a reasonable doubt negative any one of those four subdivisions.

Now, it would seem - - and here we are split among ourselves - - that it would seem that if the defendant had a burden of showing by a preponderance of evidence that, for example, he was not armed, this would be more in line with fairness. Now, this, in effect, is by perusal of the 130.25.

MR. BARTLETT : Thank you, Mr. DeMaria.

Are there any questions or comments?

MR. DENZER : Let me just ask you, assuming that the burden were upon the defendant to prove these four criteria by a preponderance of the evidence, would you, for one, be in favor of it? This is a somewhat novel innovation. Do you approve of giving the defendant a chance to fight his way out of it on the basis of those four criteria with that additional burden of proof?

MR. DeMARIA : Yes, definitely, for the non-participating person, non-killer in a felony, we feel that he should have a chance to fight his way out, yes. But we are in dangerous ground there, while the burden should

never shift to the defendant, we certainly agree, nevertheless, by leaving it the way it is by merely his raising this affirmative defense, merely raising it, then automatically the prosecutor has the burden to go beyond a reasonable doubt to negative the raising of it.

MR. DENZER : In other words, the People, under this formulation, would have the burden of proving that the defendant was armed.

MR. DeMARIA : In effect, that's exactly what it would be. Once he raises it, then they would have to show beyond a reasonable doubt.

MR. DENZER : I see.

MR. BARTLETT : Thank you.

JUDGE CONWAY : Thank you.

MR. BARTLETT : Mr. Armer.

Mr. Armer, I should have remembered your last name. We have heard from you before, and I guess I was getting you confused with that other law enforcement man in New York, Mr. Arm.

MR. ARMER : I think it is Mr. Sullivan's writing here that is responsible this morning.

MR. BARTLETT : Thank you for letting me off the hook. I

think you are right. that has been plotted for
MR. ARMER: Mr. Chairman, and gentlemen: frequently
I would like to speak but briefly, in regards to
the proposed Thomas revisions on the law of homicide.
And unfortunately, when we start speaking of wonder if
homicide and murder in the 1st degree, it carries of
us to some extent into the realm of capital punishment,
but the proposal to replace our present two degrees
of murder with but one to my mind will extend the
factor of capital punishment as an aspect of prosecution
considerably beyond the present limits. Unfortunately,
when one becomes involved in a matter in which capital
punishment as an issue, the attorney is present often
not so much as an advocate, but as a gladiator of question
sorts, and the trial of the issue has overhanging it
at all points this question revolving around the
taking of the life of the individual on trial, and
I seriously question that it is necessary to lump
into the crime of murder in which capital punishment
is involved, the present crime of murder in the 2nd
degree in which it is not an issue.

MR. BARTLETT: I believe that historically and traditionally
MR. ARMER: Perhaps no one has supported you on the
question.

will involve many issues and subjective standards which must be applied by a jury in resolving the particular situation.

MR. PFEIFFER : Is that substantially different, Mr. Armer, from determination of the jury on the question of premeditation under the existing law? Don't you have subjective things there as well?

MR. ARMER : Well, you don't have that question of premeditation, the same situation. A jury can say to itself, well, there is evidence here that this man planned or did not plan to do this particular thing.

MR. PFEIFFER : Yes, but what kind of evidence is my point.

MR. ARMER : Circumstantial, ordinarily, yes, but here you are asking a jury to step into the position of the accused and determine from his viewpoint whether or not it was reasonable for him to do what he did. I think we are asking a jury to do something here that is almost impossible.

MR. REIBEN : Don't we do that now and when we interpolate self defense? When we use self defense don't we now use the jury to step into the mind of the actor at the time he committed the act?

MR. ARMER : I don't think the present law of self defense requires a jury to step into the defendant's position in the case and make a determination of what they would do if they were he, you see.

MR. REIBEN : Don't they have to determine that his frame of mind at the time of the act was of such a nature that he believed himself to be imperiled, or someone else was imperiled, even though to someone not in the position at the time he may not have had reason to think he was imperiled?

MR. ARMER : I think now they have to say, well, it was reasonable for this man under all the circumstances, the actual facts of the case to feel this case.

MR. REIBEN : That's what this says.

MR. ARMER : I don't agree with you.

MR. BARTLETT : Mr. Armer, I take it that the structuring doesn't disturb you, particularly, that is, employing the mitigating factor of heat of passion as a reduction from murder to manslaughter one. It is our attempt to sophisticate the definition of heat of passion.

MR. ARMER : What I feel is this, that a jury will not be able to follow and apply with any reasonable degree

of uniformity the rule that is set forth here, and we should seek some uniformity, and I feel that the present term "Heat of passion" as it is used is well understood by the courts.

I would like to make one comment further on the use of this term "Heat of passion." I have run into several situations in which, on the question of heat of passion, psychiatric testimony has been offered. In other words, in essence, a psychiatrist has been asked to give an opinion as to whether, under the facts and circumstances, in his opinion the man was acting under heat of passion. Those are the exact terms that are used. We do find in coming into these issues psychiatric testimony, and there are no standards that have been adopted with any uniformity as to how psychiatric testimony can be used to reduce murder 2nd to manslaughter 1st, under the present statutes, and I would suggest that the term "Heat of Passion" be retained with some attempt made to permit psychiatric testimony to be used in the question as to whether or not the person was acting under the heat of passion without getting involved in the question

as to whether or not he was sane or insane at the time.

MR. BARATTA : You feel this definition, Mr. Armer, requires a restricted simplification rather than this general broadened psychiatric attempt to redefine it.

MR. ARMER : That is correct. I feel we should let the juries at least have something they understand to work with.

MR. BARTLETT : I suspect you have some support of your point of view among the Commission Staff, Mr. Armer.

MR. ARMER : Thank you.

MR. BARTLETT : Thank you very much, Mr. Armer.

MR. The Chair would like to acknowledge and welcome Gene Goddard, Assemblyman Goddard. Glad to have you with us.

I believe the Bar Association has another spokesman, Mr. Buetens, is that right?

JUDGE CONWAY: He left. He was here.

MR. BARTLETT : Mr. Sullivan, do you want to come back on then?

MR. SULLIVAN : Yes, fine.

I won't speak of what Mr. Buetens was going to talk about - -

JUDGE CONWAY : May I interrupt for a second? Mr. Harris, we are going to call you next. Will you be able to wait?

MR. HARRIS : I would wait then, your Honor.

MR. SULLIVAN : I would be glad to let Mr. Harris speak if he has to go. I have made arrangements to be free.

JUDGE CONWAY : Could you, Mr. Sullivan?

MR. SULLIVAN : Yes.

MR. BARTLETT : Fine; Mr. Harris, we will be glad to hear you.

MR. HARRIS : May it please the Commission, I am appearing here on behalf of the Monroe County Conservation Council, that some five thousand organized sportsmen in the County.

I realize that the Commission in this proposal, by the notes of the Commission, has not necessarily made a study of the sections of the Penal Law pertaining to firearms, but because there is a Burkowitz Commission in existence at the present, I would submit that there may be some changes in this Commission that we have been working with the Burkowitz Commission, but we do feel that in reviewing this particular

section of this law that we would like to bring to the Commission's attention certain things we feel are not good, and that we would like to see changed.

I would refer you specifically to Section 270.35, and refer the Commission to its definition of the use of a toy weapon or an imitation pistol, specifically, and I would submit to the Commission that this particular section as it exists now, and proposed, and it is proposed could bring about the conviction of a number of people very wrongfully, I believe.

The definition is extremely broad, and I think it is not a wise definition. I would refer the Commission then to Section 270.35, subdivision four, and here I think again this whole subdivision, subdivision A, portions of B, the use of weapons. Any of you gentlemen who like to hunt or things of this nature, you will find here situations where you and your hunting companion can be guilty of a misdemeanor with the flick of a finger.

JUDGE CONWAY : You could be guilty of murder with the flick of a finger.

MR. HARRIS : That is absolutely true.

MR. BARTLETT : You wouldn't blame us too much, Mr. Harris,

if we left this whole nutty area to the Burkowitz Committee or its successors?

MR. HARRIS : That is just the problem, because there may not be a successor. We don't know this.

MR. BARTLETT : Let me say this, that there is no guarantee as to the futur@ of this Commission either, but - -

MR. HARRIS : That is true.

MR. BARTLETT : But we have felt the field of weapons has really been pre-empted by the Legislature through the Burkowitz Committee, and for that reason we have done nothing more than to adopt wholesale their proposals as they are enacted into law, but in the event there is no successor or group, then I would agree we probably should give our attention to it.

MR. HARRIS : This is the reason I am before the Commission today, because of the situation that has taken place, and I would refer you then, gentlemen, to just one other section, and that is 420, which is the section to me, it is quite important. This is the one that is the actual licensing provisions for pistol permits, and I would say to you that it is our organization's opinion - - and I think you will find that many organizations in the field of

firearms in the State that the Sullivan Law is ineffective, that it only tends to restrict those people who are law-abiding citizens.

I should say that this section should, by a very minimum, be modified to the effect that it provide that if a person does not have any previous convictions the ones that are set forth in this section, and that if there is no mental situation, as far as the persons concerned, that he shall be granted a pistol permit, and I would submit further to the Commission that in the revocation of the license that there be specific provisions for the revocation, and only on that basis the revocation, and that there be an attempt to make these laws uniform both in New York City and in Upstate New York. Up until this past year there was a great difficulty. You could hold a very valid permit here, go to New York City and violate the law; and some people obviously did this unintentionally.

MR. BARTLETT : Hasn't this worked to our intention Upstate, those of us who favor a less restrictive licensing provision, however, the distinction between the City and the rest of the State?

MR. HARRIS : I thought you meant in New York City.

MR. BARTLETT : That is one. The other is if we make it uniform we aren't going to meet the legitimate needs.

MR. HARRIS : I think this is the very point that you put your finger on. The Sullivan Law restricts an individual and there is not one in this room, I am sure, that believe that if a person wants to acquire a pistol without going through these provisions, there is no difficulty whatsoever that the individual who seeks and secures a pistol permit is certainly not the person who the Commission, or the Burkowitz Committee, or the Legislators want to restrict.

I think there should be uniformity in our law. No other State that has these different variances, difference on the law

MR. BARTLETT: Thank you, Mr. Harris.

MR. HARRIS : I wish to thank the Commission for permission to speak here.

MR. BARTLETT : The Chair would like to acknowledge the presence of Senator LaVerne, my colleague from the other House, and Commissioner Lewis is with him. Good to see you both.

And now, Mr. Sullivan, back to you.

MR. SULLIVAN: I would like to address the Commission on Section 30.10, "Sentence of imprisonment for persistent felony offender," with regard to the application that a previous felony conviction is a conviction of a felony in this State, or of a crime in any other jurisdiction, provided that a sentence to a term of imprisonment in excess of one year, or a sentence of death was imposed thereafter.

Now, that appears to be a change in the existing law in a couple of regards. One, of course, that a life imprisonment sentence is possible or authorized now upon a second felony conviction, rather than a greater number - -

MR. BARTLETT : You mean a third, two previous.

MR. SULLIVAN : Yes; and also - - and I don't have any particular quarrel with that, inasmuch as it is in the discretion of the sentencing court whether this will be used or not, and the mandatory effect of the third felony and fourth felony convictions has been taken away. I think that is salutary. However, the use of an out of State conviction which is measured as to whether or not it is a felony by the application of the one year sentence rule, it seems to me to be - -

to allow an unfair determination under certain circumstances, although, again, it would be within the discretion of the sentencing court whether or not to accept this out of state conviction, even though it were a one year sentence, and I am referring to those situations in many states where presently many crimes for which there is a sentence of over one year would not be felonies under the laws of the State of New York; to take it to a ridiculous point, spitting on the sidewalk down in Georgia where they are very clean, they might want to penalize that with a two year sentence, and I don't think it fair to authorize a court to send a man to jail for life on what would really be a one felony conviction, that is, the felony in the State of New York, and take into regard something which is not a felony under our laws, and accepting what was done in another state.

MR. BARTLETT : Mr. Sullivan, if I might just interrupt you for a second. Mr. Preiser should be speaking to this, but I will make this comment.

We all know the great difficulty that the older doctrine has given us in New York in

trying to determine what appropriately may be considered on sentencing for second and third felonies for out of state convictions.

I think it fair to say it was the Commission's view that where the defendant has been through the corrective mill twice before to the extent that he has served in State Prison twice before, his third conviction here in New York for whatever the prior convictions may have been sort of suggests that he isn't so receptive to the rehabilitative process, and I think it was predicated on that that we want this and not mandatory after having twice been through a prison system of this or another state. So related more to the fact that he has been in prison twice and hasn't been able to straighten himself out than to the relative seriousness of the act itself for which he was sentenced.

MR. SULLIVAN : But it isn't twice; it is once.

MR. BARTLETT : Twice.

MR. SULLIVAN : That's right, it is on the second - -

MR. BARTLETT : On the third. It is upon conviction of a felony in New York with two previous terms of imprisonment of over a year, he may get the optional

life sentence.

MR. SULLIVAN : My suggestion would be - - and there is merit to what you say, certainly - - that to avoid the problem which I have posed, that the term, it be done either of two ways; go back to the older doctrine and look into the facts and the law which can be done and has been done, in order to assure fairness; or increase, where you are talking about a crime in another jurisdiction, the arbitrary figure from one year to something more than that, two or three years, to insure that it would be a more serious offense which would probably be a felony under our laws.

JUDGE CONWAY : Wouldn't it solve your problem if we used the arbitrary distinction of the Mason-Dixon Line?

MR. SULLIVAN : That is a good idea.

JUDGE CONWAY : That's what we are doing right now.

MR. SULLIVAN : The other point I would like to raise, another one, is this. Under Section 265.10 of the proposal regarding "Endangering the welfare of a child."

"A person is guilty of endangering the welfare of a child when:

He knowingly acts in a manner likely to be

injurious to the physical, mental or moral welfare of a child less than sixteen years old."

That is made a Class A misdemeanor, and it appears to be about the same as the present law.

Of course, usually, when you get into a parent-child situation the answers maybe are in the Family Court or in some measure of correction other than criminal. However, certainly, we need some criminal statute on the books, and it doesn't seem to me that in a situation where the acts are done and they actually do cause - - not that they are likely to - - but they actually do and can cause physical, mental and moral prejudice and damage to a child under sixteen, that that should be of a greater penalty than the misdemeanor class, and I would suggest that this statute as it says "Likely to be injurious" allowed to be remained as a misdemeanor, but where actual damage is shown that it get into the felony category.

MR. BARTLETT : You suggest that perhaps there ought to be two degrees of this?

MR. SULLIVAN : Yes.

MR. BARTLETT : One a misdemeanor, and one a felony?

MR. SULLIVAN : Yes.

MR. DENZER : You are aware, Mr. Sullivan, that there are other sections that would apply which predicate more serious crimes which would apply in some of the more serious cases; for example, the sex offenses, rape and sodomy involving children can be very serious offenses, so part of that field is covered by other sections in the Penal Law.

MR. SULLIVAN : Yes. I am not thinking of that, or the assault, actual assault, because that is covered too, but I am thinking of the criminal act of care, where there is no affirmative assault, but the result is just as bad or worse, where the child is made so unhealthy and so sick as not to die, perhaps, but to be so damaged that it becomes, I think, a felony category. As of the present time, that's not the case.

JUDGE CONWAY : If the child dies, there would be great difficulties encountered in establishing what the parent is guilty of.

MR. SULLIVAN : I agree.

The other point I would like to briefly mention is under Section 65.15, having to do with justification of physical force in defense of real property, so-called, which states that a person

in possession and control of real property, when and to the extent that he reasonably believes it necessary to prevent or terminate another person's criminal trespass may use deadly physical force only when he reasonably believes it necessary to prevent such other person from committing arson. Of course, he could also use deadly physical force to prevent the imminent use of unlawful deadly physical force on himself to prevent the imminent commission of kidnapping, robbery, forceable rape, sodomy, but I am thinking of the situation, and I think under the present law of burglary, particularly where the man or the woman lies in their bedroom and see the window opening and the hand reaching in, must they wait to determine that rape or robbery or sodomy or kidnapping or arson is the intent of the burglar before they can take action, will protect them, which action might be grabbing of a lamp or something and hitting him on the head, which could very well kill the burglar. Must they wait, or should we not allow and add to the Section 65.15 that deadly physical force can be used not only when he has reasonable grounds for believing that arson may be committed, but also burglary,

but there should be some limitation on that too.

I don't agree with Adolph Hitler when they say Himmler came to him and said "Fuehrer, there are too many burglaries going on now in Berlin", and he said "What are you doing with them?" And he said "We arrest them and put them in jail." He says "Shoot them. Keep shooting them until they stop." I don't agree with that, but I think that what should be done is to use the language of this Section 65.15 which says that you may use this deadly physical force to prevent the imminent commission of the kidnapping, robbery, forceable rape, or forceable sodomy, add to that burglary, and then continue with the language, but the use of deadly physical force is not justifiable if the actor knows that he can avoid the necessity of using such force with complete safety. I think that would protect against the person who sits in wait, assuming that it can be shown that he has done that and yet leave the door open for the innocent party.

MR. BARTLETT : You don't think he ought to interrogate the intruder and find out what his intentions are?

MR. SULLIVAN :: Mr. Buetens and Mr. Mastrella are not here. I would not go into detail. We will send a

memorandum to the Commission, if we may, on what they were going to speak about.

MR. BARTLETT : That would be fine. The Commission wants to thank the Bar Association for its interest, and its very helpful comments.

JUDGE CONWAY : I am very proud of our Bar Association and its interest. It has been more extensive than any we have encountered in the State.

MR. BARTLETT : Henry R. Dutcher.

MR. DUTCHER : If the Commission please, I am appearing on behalf of the Humane Society of the State of New York for the prevention of cruelty to animals, as well as the Humane Society of Rochester, and Monroe County for the prevention of cruelty to animals.

I would like to personally get some comment from you, Mr. Chairman, and from the Commission as to what is your intention in regard to all of the other Sections of the article, which includes Section 185 of the Penal Law. Is it your intention, or have you included all of the other provisions that you wish to follow out or not? There are many sections of the Penal Law that pertain, say, to the cutting of horses' tails, and cutting of dogs' ears - -

MR. BARTLETT : I thought we solved that horses' tail at the last session.

MR. DUTCHER : And the sale of baby chicks, and other things.

MR. BARTLETT : Let me say I am trying to find a precise reference to it in our table of disposition, but some of these we have moved to Agricultural & Markets, and some to General Business.

JUDGE CONWAY : It is listed on page 216, Mr. Dutcher, and at least it was our intent to transfer or deem that it has been included within 250.35.

MR. DUTCHER : What was that page now?

JUDGE CONWAY : Page 216. That enumerates each of the present sections and what we conceive to have been the disposition of it.

MR. DUTCHER : I see.

MR. PFEIFFER : The paging is at the bottom of the page.

MR. DUTCHER : Yes, sir.

MR. BARTLETT : There is a long list of sections there.

You asked about 185, I believe.

MR. DUTCHER : Yes. 185, of course, you have a new section written.

MR. BARTLETT : Right.

MR. DUTCHER : But I was wondering in regard to all of the other sections.

MR. BARTLETT : A number of them we feel are covered by our 250.35, but a number of others are transferred to Agricultural and Markets, and General Business Law.

MR. DUTCHER : I haven't made an examination of that, and I will do so.

Now, in regard to the proposed change to Section 185, we feel that in the present statute it seems to cover the situation quite well, and on behalf of the Humane Societies we don't recommend any change in 185.

Now, I notice that you have had some controversy and discussion in regard to the inclusion of the word intentional.

MR. BARTLETT : That seems to be our biggest difficulty.

MR. DUTCHER : There seems to be some difficulty. I personally have no fault to find with it. In the statute itself and in the present statute we use the word unjustifiable, and we also use the word wilfull and upon examination of the definitions of these words, what I think that they are is somewhat comparable with the word intentional

It would seem to me that this question would have to be passed upon by the Court or by the jury, based upon the action of the alleged wrong-doer, and that I wouldn't find, I don't think, any greater difficulty in obtaining convictions.

I have been prosecuting these things for thirty-five years in this County, and with the present statute, but we have had good luck with the present statute, and I don't see, particularly, any reason for changing it. The information is rather interesting. I might bring it to your attention of the forms that are sold at the lawbook stores, and so forth, and among the language are the words used as follows: "Feloniously, wrongfully, wilfully, corruptly, falsely, maliciously, and knowingly", and it doesn't contain the word "Intentional." And it says at the bottom, it says to cross out those words that you don't think cover the situation.

MR. BARTLETT : I think we can all agree that intentionally is certainly swept up in that long list somewhere.

JUDGE CONWAY : We think it covers a multitude of those sins.

MR. DUTCHER : It covers all of them in some way or other.

MR. BARTLETT : What would you think about this combining of language for the cruelty section?

Unjustifiably and intentionally, or recklessly.

MR. DUTCHER : That would be all right.

MR. BARTLETT : Fine.

MR. DUTCHER : We have always been reasonable in this area, and on the prosecution of these misdemeanors, and as I say, we have had very very good luck with them, because we have only prosecuted those cases where we feel that we have a very good chance of conviction, and we find that by quick investigation and discussion with the wrong-doers, and explaining to them the violations that they have committed, that we get further with them by their cooperation than we do with immediately prosecuting them, and yet, those that we do prosecute we find that both the judges and the juries in those cases, where juries are asked for, that they are quite sensible about these things and seem to come up generally with the right answer, and so the position we take as an organization is that we would have no objection if you transfer the entire article on animals in the Penal Law over to the Agricultural and Markets Law.

There are several sections in there, as you know, in regard to licensing a dog and killing of dangerous dogs, and all that sort of thing, and perhaps if they were all in there with no change made in 185 in that it would meet with everybody's approval.

MR. BARTLETT : Mr. Naramore, do you want to be heard on the same thing?

MR. NARAMORE: Mr. Chairman, and members of the Commission:

I am C. Raymond Naramore, Executive Vice-President of the Humane Society of Rochester and Monroe County. I have served as secretary and president of the New York State Humane Association and now am a member of its Board of Directors. For eleven years I have been a member of the Board of Directors of the American Humane Association with headquarters in Denver, Colorado.

The Humane Society of Rochester and Monroe County was organized in 1888 with thirty members. Memberships now number in the thousands.

Since its inception this humane society has been the principal authority for enforcing anti-cruelty laws in Rochester and Monroe County and

in those adjoining counties in which there have been no incorporated humane societies. The Humane Society of Rochester and Monroe County is therefore most anxious to have continued in the penal laws of New York State the present strong anti-cruelty laws which have served so well as a deterrent to acts of cruelty.

The Humane Society has been given to understand that the members of this Commission, when they began their revision proposals, wished to transfer the anti-cruelty laws to the Agriculture and Market Law. We honestly believe that a very fine idea and wholeheartedly recommend that it be done.

Section 185 of the present law gives definite, specific statements. These give strength to the law.

The present law states "A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animal of necessary sustenance, food or drink, is guilty of a misdemeanor."

We repeat: These definite, specific statements

do give teeth to the law.

Why exchange tried and tested specific laws, laws that are understandable, workable, and enforceable for an experiment? The present anti-cruelty law is a good law. Why weaken it?

The New York State Humane Association at its 75th annual meeting in Poughkeepsie on October 31, 1964, adopted a resolution asking the Temporary Commission to exempt the existing Anti-Cruelty Laws from the proposed revision or alternatively to transfer the existing laws in their entirety to the Agriculture and Market Law, or to other appropriate laws or to the unconsolidated laws.

The American Humane Association has also expressed the conviction that the proposed revision will greatly weaken the Anti-Cruelty Laws of New York State.

I have received many letters from people throughout the State asking me to convey to you, the members of the Commission, their hopes that you will exempt the existing Anti-Cruelty Laws from the proposed revision.

It is our sincere hope that this most serious

problem facing the Humane Movement in New York State can be solved so that animals will continue to receive the same legal protection they do now, and that it will not be necessary to involve law makers and humane societies in legislative battles to guarantee that protection to animals in New York State.

The Humane Society of Rochester and Monroe County strongly opposes any weakening of the penal provision of the present anti-cruelty laws and respectfully but urgently requests the members of the Temporary State Commission on Revision of the Penal Code to recommend that the present anti-cruelty laws be exempted from the revision or be transferred in their entirety to the Agriculture and Market Law.

I have here two resolutions adopted by the Board of Directors of the Humane Society of Rochester and Monroe County.

Whereas the proposed revision of the New York State Penal Law - -

MR. BARTLETT : Excuse me. We have had these resolutions twice now.

MR. NARAMORE : No, you have not. This is the Humane Society of Rochester and Monroe County.

MR. BARTLETT : Excuse me.

MR. NARAMORE : Whereas the proposed revision of the New York State Penal Law we feel is a backward step with respect to laws protecting animals, and

Whereas it is most important that New York State anti-cruelty laws be not weakened and that necessary provision for their clear understanding be maintained in said laws,

Now, therefore, be it resolved that the Board of Directors of the Humane Society of Rochester and Monroe County at its regular quarterly meeting in Rochester, Thursday, November 12, 1964, opposes the proposed revision and strongly requests the Temporary State Commission on Revision to exempt all those sections of the Penal Law relating to cruelty to animals from the revision, or to transfer them to some other section.

Gentlemen, on behalf of the Board of Directors and the several thousand members of the Humane Society of Rochester and Monroe County, I wish to thank sincerely the State Commission on Revision of the Penal Law for its courtesy in permitting me to make this plea for animal welfare in New York State.

MR. BARTLETT : Thank you.

JUDGE CONWAY : I would like to comment for a moment that Mr. Naramore has literally risked his life and limb more often in an attempt to save an animal than any other human being; I know he has done so in an attempt to save a human being, and that is literally correct.

Ray, as you may know, the switch to Agricultural and Market Law was our intent, but your fellow laborers in the vineyard, the SPCA hollered murder, so here we are.

MR. BARTLETT : I wish to convey to the other members of the Humane Society, Mr. Naramore, our flat assurance that we don't intend at all to weaken the law as it relates to animals. We don't think we are doing so by the addition of the word intentional, and as I suggested to Mr. Dutcher the staff, at least, is considering recommending a combination of words, unjustifiably and intentional or recklessly, which would really expand the present law.

MR. NARAMORE : I think that would be a great help.

MR. BARTLETT : And we do have this jurisdictional difficulty between the two major groups in the State as to

whether or not it should be transferred to Agricultural and Markets, or left to the Penal Law. We will do our best to resolve that fairly and please be assured that we are interested in maintaining the present standards against cruelty.

MR. NARAMORE : Thank you. I am sure you will.

MR. BARTLETT : We will next hear from Mr. Smith, Mr. Robert Smith.

MR. SMITH : Mr. Chairman, members of the Commission:

I appreciate this opportunity to bring to you some concern we have for the alcohol offender, and referring to the Section of the Penal Law 250.20.

I am speaking as a health educator and not for the council on alcoholism, and I am the Director of the Council. I am also the consultant to the New York State Department of Mental Hygiene insofar as the problem of alcoholism is concerned.

The proposed reduction of intoxication from an offense to a violation, to my thinking, seems paradoxical.

I think it is good to regard the alcohol offender, most of whom are alcohol addicts, as being more sich than criminal, and thereby reduce the charge.

But I think it is bad for alcohol offenders that need extensive and long term treatment, training and rehabilitation. They should not be returned to the community while physically and socially ill.

The Rochester studies, "The Revolving Door" by Doctor Doctors Gordon and Pittman, and the more recent study "Man on the Periphery" by the Bureau of Municipal Research, clearly indicate that the present procedure that we are now using by incarcerating alcohol offenders is expensive, and by and large, ineffective.

If meaningful treatment and rehabilitation is not available, a long term incarceration does nothing for the addict, and may even favor his becoming institutionalized. Institutional alcoholics use the jails and penitentiaries as way stations between drinking bouts.

We spend \$600,000.00 per year to maintain the Monroe County Penitentiary. The Bureau of Municipal Research found that seventy-six percent were incarcerated for drinking. Now sixty-three percent of these were there from

three to one hundred and ten times. These alcohol offenders, so-called, represent 707 out of over 1100 inmates studied. The repeated incarceration has been sometimes referred to as a lifetime sentence on the installment plan.

It is therefore recommended that the treatment-training program set forth by the Bureau be established, and that legislation be enacted to permit holding alcohol offenders needing extended treatment long enough to accomplish it.

MR. BARTLETT: Could that be accomplished, Mr. Smith, by some method of civil committment, rather than sentence?

MR. SMITH : I think so.

MR. BARTLETT: Wouldn't that be more appropriate?

MR. SMITH : May I proceed and perhaps this may be of some help.

The legislation needed, I think, is similar to the 1913 Huber Law of Wisconsin, and this has been emulated by fourteen other states that I know of. This permits

a rehabilitation program within the penitentiary structure that will release prisoners on a furlough, or release to pursue jobs, business, attend schools, receive treatment, and so forth.

To properly attack alcoholism, which is our nation's third greatest health problem, steps toward secondary and primary prevention are necessary. The Bureau's study indicated that the alcoholic was first arrested for drinking problems at age 28, but not incarcerated until age 40.

Now, twelve years of the development of the addiction took place in the average case. It seems to me that the police and courts came into contact with many budding alcoholics, and on this basis I would recommend that laws be enacted to enforce a diagnostic evaluation at the second or third or fourth offense levels.

And then in summary, I think if we are going to reduce alcoholism, one of our major penal problems, we are going to need three things.

1. We are going to have to be able to

diagnose the problems early.

2. We need treatment-training programs for early, middle, and advanced alcoholism, and

3. a work release program.

Our council on alcoholism would offer any assistance that it could give to you on this problem. We are meeting tomorrow, and I would like to take some expression back to them, if I may.

MR. BARTLETT: You agree, do you not, Mr. Smith, that the present practice prevailing in some counties, including my own, of giving the more annoying alcoholics up to six months, for example, as is permitted under the present statute isn't advancing the fight against alcoholism one bit?

MR. SMITH : Not at all, unless rehabilitation takes place during this period of incarceration.

MR. BARTLETT: Do you think it is possible? I don't know if it is up to this Commission, or we would be able to devise a program. Do you think it is possible, if the State can put together such a plan, it could be carried out by civil commitment to other institutions than the

County Jail?

MR. SMITH : I think so. However, if the intoxication offense is reduced, it it is reduced to a violation where you only have a maximum of fifteen days to do something about the problem; you don't have enough time to get some of these very sick people back into physical condition. You do not have enough time to make a good diagnostic evaluation of the problem, and then, of course, after diagnosis is made, you have to have some means, some facility to deal with the problem.

I would make copies of the Bureau's report available for those that would like - -

MR. BARTLETT: We would like to have one. We don't need enough for the whole commission, but if we had two or three copies we would appreciate it.

Thank you. We share your concern about the problem. We are not sure about how we ought to go about attacking it. Thank you.

Mr. Keefe, the City Court Probation Department.

MR. KEEFE : J. Maurice Keefe.

Mr. Chairman and gentlemen of the
Committee:

I am concerned about the classification
of violation. I am, of course, in the
Probation Department of the City Court of
Rochester - -

MR. PFEIFFER : We can't hear you.

JUDGE CONWAY : Would you speak up more?

MR. KEEFE : Yes. As I understand it, in reading
this law, many of the people who come into our
Court will have to be treated for a violation which
would give them a maximum sentence of fifteen
days. There is no provision I can see for a
probation for this type of offense.

Many of these people are in court because
the charge is a minor charge, but they do have
serious personality problems, and in the past many
of these people have been placed on probation,
and they have responded to treatment, and we
have been able to help them.

JUDGE CONWAY : What kind of case would you be
thinking of specifically.

MR. KEEFE : Well, for example, you remember when

they had this disturbance in the first part of the year and we had, I think it was something like thirty-eight young people in court on disorderly conduct, and investigations were ordered on them, and the judge was able to make an appropriate disposition in each individual case. Some of them were suspended; some of them got some time in the penitentiary; and some of them were committed for longer periods of time.

If this - - under the new law, this wouldn't happen. The most a judge can do would be to give them fifteen days, and it seems to me that it is the meaning - -

MR. PFEIFFER : In those cases where the court did give a longer sentence would not the appropriate charge have been something more serious than disorderly conduct?

MR. KEEFE : Well - -

MR. PFEIFFER : Now, there was something aggravated by those situations, was there not, which was the occasion for the court giving a longer sentence?

MR. KEEFE : There was not necessarily in the crime, but in the background of the individual. There were some of these people who seem to be unable to maintain themselves in the community without getting into difficulty.

MR. PFEIFFER: You mean they have had some previous criminal record?

MR. KEEFE : Not necessarily criminal record. Some of these people were young, still too young to be known to a criminal court, but they had been in difficulty. They had shown their difficulty in relationship with adults and authority. They had manifested this by assaults against juveniles, and this sort of thing, and it was obvious that the parents and school and community is not able to help them.

MR. BARTLETT: Mr. Keefe, would your difficulty be met by our providing some method of probation even for violations?

MR. KEEFE : I think that that would be helpful.

MR. BARTLETT: Some period obviously longer than the maximum term.

MR. KEEFE : That - - it would have to be longer

than fifteen days. You see what happens - -

MR. BARTLETT: I mean a period of probation with the threat of a fifteen days in jail for its violation. I am just suggesting, would that be a possible solution to the difficulty you are describing to us?

MR. KEEFE : I think that would help. Of course, if you ran into the situation where an individual needed further treatment, I think maybe you would have a person you would have to send to Elmira Reception Center. We would not be able to do that, and it seems to me as though so many of these people do have symptoms which show up in the minor events.

MR. PREISER: :Do you think that the proper way to handle a person who has committed a non-criminal offense, such as disorderly conduct, be given an indeterminate commitment to Elmira?

MR. KEEFE : Well, all the people in Elmira are not felons. They are committed to the Reception Center, and then they are assigned to the appropriate institution.

MR. BARTLETT: You are going to have to speak up.

MR. PREISER : They are filtered out into the reformatory system by and large. Now, if the social value of the event doesn't meet the status of the crime, do you think it is fair and proper to commit the offender to a place such as the Reception Center, or do you think that whatever might be in the background could be handled by some other social agency?

MR. KEEFE : Well, many of the people that come to us have been through the social agencies and they do not respond to the treatment.

MR. BARTLETT : You are not finding many disorderly conduct cases from Rochester going to Elmira now, do you, Mr. Keefe?

MR. KEEFE : We find very very few. I am not concerned with the number. But I am concerned about the ones that really are in need of something which the community cannot offer to them, and I - -

MR. BARTLETT : Your principal concern is with the lack of probation, possibly, in the violation category; is that right?

MR. KEEFE : Yes, and the short length of the sentence.

I mean, I can agree with what the previous speaker said about the people who are brought in for intoxication, but this may be a symptom of a much more serious trouble which the person has.

MR. BARTLETT : Well, do you have any thoughts you want to convey to us as to what you think the maximum sentence for a violation ought to be as we have used violation?

MR. KEEFE : Well, I think that I would have the confidence in the discretion of the Judge, that he would not always sentence the maximum time. I would think six months.

MR. BARTLETT : For a violation. You think a year is appropriate for a misdemeanor class A as we have defined it? You understand our category? We have two classes of misdemeanor in our scheme, and then the violation as the lowest non-criminal offense.

MR. KEEFE : That compares to an offense under the present law?

MR. BARTLETT : Yes.

MR. DENZER : Some of the offenses under the present

law carry penalties higher than some of the misdemeanors.

MR. KEEFE : I realize that, as I read your text.

MR. BARTLETT: Well, thank you very much, Mr. Keefe.

We will give consideration to the problem you have told us about.

MR. KEEFE : Thank you.

MR. BARTLETT: Mr. Napier, may we hear from you?

MR. NAPIER : I wish to thank you, Mr. Chairman, and all the members of the Committee for their courtesy in hearing me when I did not previously announce that I wished to be heard.

I appear here unretained for that great faceless, maligned, harassed, but the backbone of the financial structure of our State to a great extent, and from what I read in the newspapers they will be asked to do more in the future, New York State's horsebetters.

Now, what I take exception to in your proposed penal law, Mr. Chairman - -

MR. BARTLETT: We are going to go off the record for a second.

On the record.

MR. NAPIER : Now, what I take exception to in your proposed Penal Law is the possession of gambling records.

Now, the history of gambling laws, with which I am quite a bit conversant, in the State is that I always understood, and in your Commission notes you say the same thing, that the player is not culpable under the proposed penal law. This has always been true with three exceptions. The three exceptions, as I understood them to be, betting on prize fights, betting on election, and policy playing.

Now, policy playing, it was my understanding, was made an exception a number of years ago because of its prevalence in New York City, and it was thought to be a great danger, and a great font of great crime.

The player, horsebetting-wise, was never made culpable until 1960 by 986 B, and whereas the player is not held directly culpable under 986B as it is now he is prospectfully, and the ironic part is that the same legislation in 1960 made the possible heretofore held to

be a great danger less culpable by stating under 975 that possession of ten or more bets of his own, that he would not be guilty of the crime of possession of policy slips, a misdemeanor

Under 986 B as it is now drawn, possession of bookmaking records made by one engaged in bookmaking or poolselling as a crime. Now, obviously the intent of the Legislature was to confine it to the bookmaker, but prospectively this is not so.

The possession of these bookmaking records, and I am well conversant with this because I took a case on this point to the Court of Appeals, and I received a seven to nothing ruling, and I went on this exact point that possession must be the people must show that it is made by one engaged in bookmaking or poolselling, the record itself.

MR. BARTLETT: That the possessor must be engaged in this?

MR. NAPIER : The records, plural, as is set forth in the statute must be made by one engaged in bookmaking or poolselling. The Court of Appeals did not agree that the People, as part of their proof, had to prove that this record was made by one engaged in bookmaking or poolselling, so being that as it may, today, under

the law and under your proposed 230.15 you make the same exception as to policy playing, that the possession of ten or more slips is not a crime, but the horsebetter would have the misfortune of being in a cigar store, or whatever, at the time the police came in, and had the further misfortune to say, "Yes, I just received this slip from Frank," he is culpable under the law as I read it. He is possessing records made by one engaged in bookmaking or poolselling, and I think that it is most ironic, particularly when, as stated at the beginning of my argument, or whatever here, that the policy player has now in effect, if he only possesses ten or less is not culpable; the horsebetter, prospectively, if he possess one or more is culpable for a misdemeanor.

MR. DENZER : When would the better have a record made by a bookmaker?

MR. NAPIER : He would have a record when he goes into the place. He wants to know to have proof on what he bet so that there is no argument that he bet such and such a horse on such and such a race, that he bet such and such a sporting event. The Bookmaker makes

out a duplicate, an original and the duplicate.
Possession by this is made by one engaged in
bookmaking or poolselling.

MR. BARTLETT : I will be glad to see what we would do for
the horseplayer.

MR. NAPIER : Thank you very much.

MR. BARTLETT: Mr. Fitch, Julian Fitch.

MR. FITCH : I am a practicing attorney speaking individually
on the subject of contraceptive devices, which are,
I found to my surprise some years ago, a subject of
the Penal Law, and they are now under Section 1142,
and it is proposed to transfer that section,
apparent insofar as it has anything to do with
contraceptive devices, to the Public Health Law.

I think that it will help me in making my
very brief remarks if I read the section as it
now stands so I may comment upon it.

MR. BARTLETT : You are referring to the indecent article
section?

MR. FITCH : Yes. "A person who sells, lends, gives
away, or in any manner exhibits any instrument,
article, drug or medicine for the prevention of
conception, or for causing unlawful abortion, or

holds out, representations calculated to lead another to so use or apply any such article, drug, recipe, medicine or instrument, or who writes or gives information orally, stating when, where, how, of whom, and by what means such an instrument, article, drug, etc, can be obtained, or who manufactures it is guilty of a misdemeanor."

And then Section 1145 makes an exception for physicians, saying that they can prescribe these things for the cure or prevention of disease, and a druggist may carry out their prescription or their orders for these things that don't require prescriptions.

It is my contention that this law which was enacted in 1880, when contraceptive devices may have been a burning issue, although, I doubt that even then they would be deserving to be linked with abortion, and no matter what was the atmosphere at that time, that this law is now archaic, and should be left entirely out of the statutes of the State of New York and not transferred to the Public Health Law where they may lie in limbo for another eighty years before anybody gets around to do anything about them. I think it

goes without saying that the modern attitude is quite different.

We know, or we think we know, that ninety percent of married couples use some form of family planning. We know that all religious groups, including our own Catholic Church, agree on the principle of family planning, and the only difference between them is the means, and, of course, even the Catholic Church is reconsidering their position on this.

My one further point is it is really worse in the way it is practically applied, and I am referring to this, those that can afford private physicians don't have any trouble with this law. The private physicians have no trouble deciding in the appropriate case. They will prescribe this, and we know that the drug companies sell great quantities of these devices, both those that require prescriptions and those that do not, but those medical staffs associated with the public welfare agencies have to be a little more careful in their interpretation of the law, and they look at these words and they see that physicians can do these things

for the cure or prevention of disease, and some of them take a rather narrower - - or feel that they must take a rather narrow interpretation of those words, and so this law really is applied in a discriminatory manner, because those people who can't afford their own physicians must make use of public agencies, find they are up against the restrictions of this article.

MR. BARTLETT : You can imagine, Mr. Fitch, that there are people urging us not even to take it out of the Penal Law because they think it will weaken its effectiveness.

MR. FITCH : They urge you to keep it in the Penal Law?

MR. BARTLETT : Yes, indeed.

MR. FITCH : Well, I urge you otherwise.

MR. BARTLETT : I think I understand your point.

MR. FITCH : To single out this one thing out of all of the drugs, and devices that are sold as an indecent article, when it is no more indecent than an enema bag, and I think it is not too ridiculous to require my time to come down to talk to you.

JUDGE CONWAY : This is the distinguished, as we used to say in the Assembly, the former President of the Bar Association, Mr. J. Boyd Mullan.

MR. MULLAN : Mr. Chairman, and members of the Commission:

I said I have but one sentence to make, and I will restrict myself to that.

Because of the change of the thinking and the circumstances and the convictions and the opinions of the Bench and Bar and the community throughout the state, yes, and certain religious orders, I would, for the reasons expressed by the preceding speaker, urge that you give serious consideration the the exclusion of 1142 and 1145, in order that we might bring the Penal Law so that it may be administered properly in line with the thinking and conscience of the various communities of the State.

Thank you.

MR. BARTLETT : The Commission will suspend for about five minutes to give us all a chance to stretch and may I ask Mr. Sanders, is Mr. Sanders here?

(No response)

MR. BARTLETT : Mr. Eves?

MR. EVES : Yes.

MR. BARTLETT : Are there any others? I am sorry, I also missed some names.

(Whereupon a recess was taken at this time)

(Whereupon the Hearing was called to order by the Chairman at 11:46 A.M.)

MR. BARTLETT : The Hearing will proceed now, and if I may, I will call on Mr. Sanders.

(No response)

MR. BARTLETT : I call on the other witness who wanted to address himself to the cruelty to animals.

MICHAEL MOUKHAFF: Mr. Chairman, your Honor, gentlemen, I am President of the Humanitarian League of Rochester, New York, Incorporated. I am speaking on behalf of our League. Any law is valid primarily inasmuch as we have the facility for its effective enforcement, and this depends again on the precise and detailed phraseology of the law.

At the present time we have anti-cruelty laws in the State of New York starting with paragraph 185 of the Penal Law, which is specifically suffice to make enforcement possible. We are very strongly opposed to the generalization of the law. It is even difficult at the present time for humane organizations to implement the law sufficiently.

If the law was generalized, it would only give loopholes to the offenders.

We feel that particularly, the proposed idea of introducing intention in cruelty is a very dangerous proposition. There is an awful lot of cruelty which, theoretically at least, is unintentional.

We have to remember another thing, Hitler in Germany had an education in cruelty. We want here an education in humaneness, and that can only be possible if we have strong anti-cruelty laws standing back of us. Anti-cruelty laws give us the facility for humane education which is so important for the character of the young people of the State.

The Humanitarian League of Rochester strongly urges you to maintain the Penal Code concerning the anti-cruelty laws as they stand today, and certainly not to modify in a sense of generalization.

MR. BARTLETT : Mr. Moukhaff, would you agree with the statement of Mr. Dutcher that if we combined unjustifiably and intentionally or recklessly that we would be satisfactorily stating the law?

MR. MOUKHAFF : No, I feel that primarily that any act of cruelty should be investigated and prosecuted, irrespectively where it was intentionally or unintentionally.

MR. BARTLETT : Do you think you should be arrested on the way home from this hearing if your automobile strikes a dog you didn't see?

MR. MOUKHAFF : Under the present existing law if I struck a dog on the way home, I am supposed to stop and take necessary measures and find the owner, and so on.

Of course, that is an entirely different point of view from an intentional criminal act or one which is accidental. I think that the courts will always recognize that.

MR. BARTLETT : Shouldn't the law state that, sir?

MR. MOUKHAFF : That's right.

MR. BARTLETT : Shouldn't the law confine itself to those acts we want to prescribe which is intentional or reckless conduct resulting in cruelty to animals?

MR. MOUKHAFF : Yes, but if we modify the way it is proposed now, I think we will provide a loophole.

MR. DENZER : If the word reckless were in there, recklessly as well as intentionally, would you still say there is a loophole?

MR. MOUKHAFF : Well, there is a lot of cruelty from neglect which is not necessarily with an intentional cruelty, but nevertheless, acts and results in cruelty.

MR. DENZER : The term recklessly, as we define it here, covers broadly speaking cases of neglect, that is, where the person is aware of the risk that certain suffering will accrue to the animal, and so forth. That is, recklessly. If that kind of thing were included in the statute, intentionally or recklessly, would that overcome your objection?

MR. MOUKHAFF : Yes. Except that, as I say, the more precise the law, the more easy it is to enforce it, and the more we generalize the more difficult it becomes for the agency to bring about enforcement.

That is why we feel that the law, as it stands today, gives a better opportunity for humane organizations to enforce it than if it was modified in more general terms.

MR. BARTLETT : I take it you agree with Mr. Naramore, that you would rather have it transferred to Agricultural and Markets?

MR. MOUKHAFF : Yes.

JUDGE CONWAY : Members of the Commission, I feel that I should like to have on the record the fact that previously it was stated at another hearing that New York County was unique in the arrangement they

had with the Humane Society being the prosecutor rather than the district attorney in violations of cruelty to animals section. Monroe County also has the same situation that prevails here, as it does in New York, and our local Humane Society has full control of prosecutions for cruelty to animals. The district attorney has been relieved of that responsibility for something over thirty years by specific agreement between the County and the Humane Society, and Mr. Dutcher, who referred to this in the course of his remarks, but I thought it perhaps ought to be made clear. He has been, in effect, the district attorney for these sections for over thirty years.

MR. BARTLETT : Thank you Judge Conway.

Mr. Eves.

WALTER C. EVES: Mr. Chairman, members of the Committee, I appear here today as representative of Universal Eastway System of Rochester, of Hallman Budget Rent-a-car of Rochester, and of Rochester Truck Rental, to speak on the proposed Section 170.10, which I can say at the outset is certainly considered by myself and my clients as an improvement over the existing

situation with which they are faced under Sections 1290 and 1293A.

If it were to be adopted as it is proposed now, it would be certainly an improvement. However, we feel that there can be a change in addition to the language of the proposed statute which would prevent what we think will be a great difficulty in implementing the intent of this section, that is, the use of the phrase "Gross deviation" in the section without more. It would seem that the language proposed by Mr. Kenning earlier this morning would be - - or language similar to that - - would be a substantial instructive addition to this section. Without it, I think that if the time comes when an aggrieved party or a leaser of a vehicle should try to get a warrant or if at a time of trial the court is charging the jury, there may be a substantial difficulty in determining what is such a length of time as to constitute a gross deviation from the contract.

If the statutes were to confine the provisions for a ten day period, or such other period of time which would be definite, I think it would be a great step in implementing the intent of

this section.

MR. BARTLETT : I take it, Mr. Eves, that you are speaking for the creation of a presumption rather than our flatly defining deviation as amounting to ten days or more.

MR. EVES : That is correct. I think that the presumption would be of great benefit in this particular section of the statute. Without it, there is always the question, was it or was it not a deviation.

MR. BARTLETT : What about the problem I discussed with Mr. Kenning about the use of the ten day presumption in a monthly contract as opposed to an annual contract, for example.

MR. EVES : I concede that would be somewhat incongruous to say that on a daily rental there must be or should be a ten day presumption, whereas on violation of a four year lease the same ten day presumption would apply.

On the other hand, we would have periods ranging from the four year lease back down to the one day rental. I think it would be almost, perhaps not an impossibility, but certainly an unwieldy statute if an attempt were made to lay out a period

of time which would connect with the agreement which was being violated.

In order to get a workable solution by the addition of a presumption, I think that a period of time which must necessarily perhaps be arbitrary in type of occasion to any particular type of contract would have to be used and - -

MR. DENZER : Do most of your difficulties come with the short term rentals?

JUDGE CONWAY : Much more likely.

MR. EVES : Most of the difficulties would be with the short term rentals.

As you undoubtedly know, with all these contracts there is only a short deposit, a small deposit of \$25.00, and even on a \$16,000.00 unit or tractor, it may not be more than a hundred dollars, but generally the difficulties come in where it is a daily rental.

JUDGE CONWAY : Would your past experience afford us the answers to the questions which Mr. Kenning was not able to answer? At what point do you make a claim against your insurance carrier for a theft loss? How many days after the car is no longer accountable?

MR. EVES : Judge Conway, I would not be able to answer that. I have not been involved in that aspect directly. My particular client here, Universal Leaseway System, engages primarily in leasing with some daily rental of truck equipment. In that respect, I think this statute would be of much more value to a daily rental such as Mr. Kenning's client.

MR. BARTLETT : Will you see if you could find out, Mr. Eves, and write us if you find there is any practice in the trade as to their considering the cars stolen and making claim for theft loss?

MR. EVES : I certainly would be happy to.

JUDGE CONWAY : And the companion question about when do they deny liability under the grounds if it is no longer effectively owned by you on the negligence claim.

MR. BARTLETT : Mr. Kennedy.

JUDGE CONWAY : Mr. Robert Kennedy is the Assistant District Attorney of our neighboring County.

MR. KENNEDY : I am also - - I also have the honor of being the acting president of the Bar Association, and a member of the New York State Bar Association Penal

Law and Criminal Code Committee.

Of course, this morning I am here speaking only for myself. I detest negative attitudes, but I must adopt one this morning. I am against this Penal Law in its entirety, proposed Penal Law in its entirety. It is completely alien, far-afield from anything we have ever had in this State.

One of the worst, in my way of thinking, vices of it is that if this was passed we would be throwing away a hundred and fifty, two hundred years of precedence, and one of the meetings I attended in relation to the proposed penal law, it was said that the words that we are now using have no meaning. It seems that everytime I hear a jury charge, I hear the words that we are using explained. I have heard no complaint that the present penal law is not understood or that the words culpability have no meaning.

MR. BARTLETT : What makes you think that those words won't have the same meaning in the future, unless they are otherwise defined here?

MR. KENNEDY : They are not used here. The words of culpability are changed. You don't have the same

culpability in this law.

MR. DENZER : Do you know what the word wilfully means in the present Penal Law, Mr. Kennedy?

MR. KENNEDY : I think I could probably quickly find you a judicial meaning.

MR. DENZER : You could find a statement on the Court of appeals and the United States Supreme Court that it has so many different meanings that it has to be redefined with respect of virtually every statute it is used in.

MR. KENNEDY : We have no difficulty in doing it.

MR. DENZER : I have had a lot of difficulty .

JUDGE CONWAY : I can tell you in making up a charge you have difficulty in doing it.

MR. KENNEDY : But your charges always sound so well, Judge.

As I say, to me it is one of the biggest vices. You are asking the people of the State who are presumed to know the law, and who obviously don't, but you are asking the Bench and the Bar to start out with a brand new trial of defining these words of culpability, and also - -

MR. BARTLETT : What other words are you referring to words of

culpability.

MR. KENNEDY : Knowingly, wilfully, corruptly, all of the words of culpability that we now use - -

MR. BARTLETT : You are suggesting that the prior case law will be of no assistance to the courts or the Bar if this is adopted?

MR. KENNEDY : Yes, because you don't use those words. You don't use those words at all. You have set up new standards of culpability.

JUDGE CONWAY : What one specifically? Do you have any particular one in mind?

MR. BARTLETT : We want to address ourselves to the same example of your seeking, Mr. Kennedy, but in the crimes against and involving property, in theft, for instance, I fail to see that 160.05 contains a definition of larceny that is shockingly different from what we have used in this State for a long long time. I think that we can find a common denominator of crime. Larceny may not be a bad one to use.

MR. KENNEDY : I don't - -

MR. BARTLETT : I don't see in 160,05 in defining larceny that we use language remarkably different from what

we employ now in the statute, wrongfully takes, obtains, or withholds.

MR. KENNEDY : That is all right. That is about the same as it is now.

Intentionally, knowingly, those words are all thrown out of this law, and I don't want to pick on words here, but I had planned to, rather than go through word by word, I have about five examples of what I would like to center my fire on.

MR. BARTLETT : All right.

MR. KENNEDY : As Judge Conway says I am a prosecutor and I am prosecution oriented.

We all agree we are not playing a game with the Penal Law, but you seek now, under 75.05 to bring in the defence of entrapment, which is not now in the law of the State of New York.

MR. BARTLETT : You know it is the only state in the Union that doesn't have it.

MR. KENNEDY : That couldn't concern me less.

MR. BARTLETT : Evidently not.

MR. KENNEDY : I see no reason for it. We are not playing a game.

MR. BARTLETT : Right.

MR. KENNEDY : If a man is going to commit a crime, he will commit it. If he is not going to commit it you can seek to entrap a law, you can't, and he would not commit the crime.

MR. BARTLETT : I appreciate your loyalty to the State of New York, Mr. Kennedy, but - -

MR. KENNEDY : Well, the Empire State, sir. We should lead, not follow.

MR. REIBEN : It appears to me that what essentially Mr. Kennedy is stating is not so much that we are blazing such a new trail, but the present judiciary will not be able to understand the language we have written, and I am not too sure that he might be right in that, but I don't think that it is a valid objection.

MR. BARTLETT : Well, I guess maybe we better let you go ahead.

JUDGE CONWAY : I don't quite know what you said, but I think we better take an exception to it in behalf of all the judicial.

MR. BARTLETT : Go ahead, Mr. Kennedy.

MR. KENNEDY : Defense of justification, that bothers me. Again, getting to words, we are - -

MR. BARTLETT : That bothers us too, Mr. Kennedy.

MR. KENNEDY : Certain amounts of force, physical force are authorized under certain circumstances, different circumstances, deadly physical force is used, is authorized. I don't know what it means. I don't know where physical force stops and deadly physical force commences.

MR. DENZER : We define them in Section 10 of definitions.

MR. KENNEDY : Well, Mr. Denzer, will all respect to your definitions, I still don't know where physical force ceases and deadly physical force commences.

MR. DENZER : Well, precision may not be entirely possible, but there is a guidepost there at any rate.

MR. KENNEDY : I think that under certain circumstances you define deadly physical force as meaning physical force capable of producing death or serious physical injury. Under certain circumstances any blow can come under that.

MR. DENZER : That may be a good criticism. Maybe the definition should be changed a little.

Somebody suggested the use of such words such as under normal circumstances, which will, under normal circumstances is likely to produce death,

or physical serious injury. Maybe that can be improved.

MR. BARTLETT : Mr. Kennedy, I am not sure I understand your point here. Are you concerned with the inadequacy, or at least the vagueness of our definition of justification, or are you suggesting we shouldn't deal with it.

mr. kennedy ; No, we must have a justification section, but I am concerned with the definition or the authorization for justification under the proposed law.

I am, along, I assume, with the entire District Attorn@s Association, I am against the defensive mental disease, or defect as set out in the proposed law 60.05. I would favor the retention of the McNaghten Rule with the addition of the statement that appears - - as it appears on page B7 of the Appendix B.

MR. BARTLETT : Of what?

MR. BARATTA : B. Retain the McNaghten Rule?

MR. KENNEDY : Retain the McNaghten Rule. Broaden it with the addition of the section on page B7.

MR. BARTLETT : Are you aware that the proposal made by the

the District Attorneys Association, Mr. Kennedy, that we adopt the standard proposed in our revision, absent the second clause, Clause B?

MR. KENNEDY : Well, the last I heard of it, sir, that this whole insanity defense was to be reconsidered and the new study made on it.

MR. BARTLETT : Well, this - -

MR. KENNEDY : Both by the Commission and the District Attorneys Association.

MR. BARTLETT : We have been working with them during the past year. That proposal was made to us by the District Attorneys.

MR. KENNEDY : Well, as I say, the last I heard that this proposal was to be reconsidered, or the proposal in the proposed Penal Law under 60.05 was to be reconsidered and restudied by the Commission.

I am unalterably opposed to 45.10, making voluntary intoxication a defense to a criminal charge.

The law now is that intoxication can be taken into consideration in dealing with the question of intent.

MR. DENZER : Isn't the only difference between the present law and this law where the emphasis lies?

Voluntary intoxication, the proposed law says, is a defense to a criminal charge for an offense if it negatives the culpable mental state. The present law says it is not a defense, unless it does negative the culpability.

MR. KENNEDY: It says it may be taken into consideration solely with the intention of the crime charged.

MR. BARTLETT : That's what we are saying here.

MR. KENNEDY : I don't read it that way. I read it as a blanket defense to the charge.

MR. DENZER : Well, today if intoxication negates the intent required for the commission of a crime, it is a defense. That's the present law.

MR. KENNEDY : Right. Then your jury can come down and consider all other degrees of crime. Possibly, in a murder 1st charge, if it were to negate the premeditation, the jury could fall down and see if it is murder 2nd.

MR. DENZER : The same would be true. Isn't it a matter of semantics?

MR. KENNEDY : Possibly. But as I read it, it is just a blanket defense to a crime.

MR. BARTLETT : It doesn't say that. It says it is only an

offense where it negatives the specific intent required for the crime.

MR. KENNEDY : Right. As I say, I read that as a defense, and it comes under your section on defenses.

MR. BARTLETT : Right where it belongs; surely not the section on intoxication.

MR. KENNEDY : I am not concerned with where it is in your Penal Law, but as I read it, they would completely wipe the slate clean.

MR. BARATTA : You think the older statute is a better one and should be retained so that when the judge charges the jury in the element of intoxication, it just affects the premeditation?

MR. KENNEDY : The intent or whatever the charge is.

MR. BARTLETT : Okay.

MR. KENNEDY : Manslaughter 1st, the wording on 130.20, which is also involved in murder, is now only in the one degree or no degree, just murder, 130.25, where extreme emotional disturbance is a defense to murder.

MR. BARTLETT : You prefer the common law language, heat of passion, and the present statutory language in New York?

MR. KENNEDY : Well, no. The present statutory language, yes, but I don't have any idea what extreme emotional

disturbance is, and then it goes farther and it says the reasonableness of such explanation of extreme emotional disturbance or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as the actor believes them to be.

MR. BARATTA : We are looking that over very carefully.

JUDGE CONWAY: I am sorry it is taking so long. This is in no reference to you, Mr. Kennedy. It just hasn't been called in the order I promised it would.

MR. BARATTA : You are not the first to establish dissatisfaction with manslaughter in the first degree.

MR. KENNEDY : I will leave that point.

The only thing in my next point in dealing with sentence, I have the expert in front of me. I will say in that, I don't agree with it. My only point concerns multiple felony offenders, that under the proposed law he cannot get increased punishment for a felony, unless you serve time for the previously committed felonies. Now, that, I don't agree with.

MR. BARTLETT : Of course, you know, Mr. Kennedy, it was our

plan that for someone who has been in trouble before, he could be taken care of within the elastic limits we are proposing for first offenders, and the maximum penalty possible for a stated crime would not be imposed ordinarily, unless there was something in the man's record to require a stiff sentence.

MR. KENNEDY : If you go through that and the man comes back again on a second felony, he cannot be sentenced as a second felony offender, because he didn't serve time on the first felony.

MR. BARTLETT : Well, I think you misunderstood that the habitual offender provision that we now have is to replace the old life sentence, and it can be imposed only after two previous convictions for which time was served in excess of a year on each of them.

As to a second felony conviction, we make no provision for any increased penalty, but we think the outside limits set for the penalty gives sufficient scope to a judge that he can rap him good.

MR. KENNEDY : He gets no more, and can get no more for a second felony than he can for a first felony.

MR. BARTLETT : That's right. You wouldn't ordinarily expect a judge to give him the full treatment on the

first one, would you?

MR. KENNEDY : No, but it gives the judge the leeway, if he wishes. Under our present law, as I understand it, it is only when you come to a fourth felony offender that there must be time served on a previous before he could be treated as a fourth felony offender. Third is treated the same as second.

MR. PREISER : Suspended sentence counts only for the second and it doesn't count for the third and fourth.

MR. KENNEDY : The third you treat the same as a second anyhow, for sentencing. Only the fourth felony would need prior time served.

Under the proposed law the judge would have no discretion on that.

My last point, and it is a short one, is to a specific offense, and that is sodomy, where you seek to leave sodomy between consenting adults out of the law. I disagree with that.

Under the Commission notes it said if it is done privately and discreetly it will not be a crime, and I submit if it is done privately and discreetly, they wouldn't be caught. I feel that the threat of prosecution is a deterrent. How much, I don't know.

I have had one personal experience where two men who were living together as a result of a lover's quarrel, spat, one of them knifed the other one - -

MR. BARTLETT : We are not exempting them from any liability for that.

MR. KENNEDY : I understand that.

JUDGE CONWAY : There are those who would have us do so.

MR. KENNEDY : But in our administration of justice in Ontario County, we gave him a choice of being charged with sodomy or assault in the second degree, and he chose assault in the second degree, and I say there is a deterrent factor in having that crime on the books.

JUDGE CONWAY : He might have been a little screwy. When you start talking about words and phrases, because I fancy two inmates of Attica meeting for the first time, and (A) says to B, what are you in for? and B says for criminal facilitation in the first degree, and what are you pulling time for, for custodial interference in the first degree. We do have trouble with words, but we have done what we think is the best under the circumstances.

MR. KENNEDY : Well - -

MR. BARTLETT : Did you find anything you liked, Mr. Kennedy?

MR. KENNEDY : Well, I liked all the work you men put on it. That's about the extent of my favoring the proposed law.

MR. BARTLETT: Let me ask you some questions.

What do you feel about our eliminating the necessity for proving a breaking in burglary?

MR. KENNEDY : That has been almost taken out of the law now in case law.

MR. BARTLETT : Not exactly.

MR. KENNEDY : All you got to do is walk through or open a door - -

MR. BARTLETT : We don't want to have to open the door. Do you approve of our taking it out?

MR. KENNEDY : It is all right. It has never bothered us in a prosecution, proving the break.

JUDGE CONWAY : Well, it would bother you if you had all the larceny that followed the riots, where nothing had to be broken in the second and third stages of them, with everybody walking in and out of smashed plate glass windows, and we are left no alternative except to charge the jury that unlawful entry is all they get.

MR. KENNEDY : There was one thing I did hear, it was the suggestion that there would be a presumption of guilt introduced. I would be in favor of the presumption of guilt.

MR. BARTLETT : I could almost believe that.

MR. KENNEDY : I am locally known as the hangman.

MR. BARTLETT : Thank you for coming.

MR. KENNEDY : Thank you, gentlemen.

MR. BARTLETT : Mr. Cohen?

MAX COHEN : Mr. Chairman, gentlemen, members of the Commission:

My name is Max Cohen and I am engaged in the practice of law in Canandaigua. I have been engaged in the practice of law for approximately twenty years, and during all that time I have been engaged in the practice of criminal law. I have been a City Judge in the City of Canandaigua since 1948, and I am very disturbed about your proposed Penal Law here, and I am very disturbed about its wording.

The problem with wording and the problem of semantics is the problem of what does the officer do, the defense attorney, the magistrate, the

The district attorney, the trial jury, the grand jury and so on, these words are put to each of these people.

I would rather like to confine myself to specifics rather than generalities, because I am sure generalities will not help very much in approaching the problem.

One, let's take a definition in Section 10 of serious physical injury, for instance, or physical injury, 10 sub 3 and 4. Now, sub 4 says serious physical injury if it creates a substantial risk of death or serious and protracted disfigurement or protracted impairment of health, and so forth. Now, I have no idea what this means, and I am wondering what a police officer would think of it.

Let me give you a specific example. Let's say that first of all we have a situation where a fellow is out on the street and he has a fight and pokes another fellow in the kidneys, and they take the fellow to the hospital and he is in the hospital and the doctor takes a look at him and he is bruised in the abdomen and he figures, well, maybe he better stay in there for a couple of days and take x-rays,

which he does. He goes home and stays three or four days and he is in considerable pain for a few days and so forth.

Now, we have the problem is the man charged here guilty of assault in the 3rd degree under your proposed sections 125.00; and assault 2nd degree 125.05 says that it is assault in the 2nd degree when there is an attempt to cause serious physical injury.

Now, I poke a man in the kidneys and send him to the hospital, and he is there for a few days. Now, mind you, you gentlemen may know what this means, but take me, I am a police officer and I have been on the job for six months.

MR. BARTLETT : Is that any more difficult to define than grievous bodily harm?

MR. COHEN : Yes. Well, grievous bodily harm as it has been presently defined is that there is a breaking of skin, the spilling of blood, and that sort of thing make your grievous bodily harm, and makes your change from 3rd to 2nd degree. I am not arguing that that is a good standard.

MR. DENZER : I never saw a definition of grievous bodily harm in the cases. Certainly there is nothing in the

Penal Law that defines it.

MR. COHEN : Oh, yes. The case of - - there is a definition in grievous bodily harm. There are several cases that define - -

MR. DENZER : In the individual cases, this may apply to the individual cases, but I don't know if they have an overall definition.

MR. COHEN : I am not interested in overall definitions. I am a police officer that has been on the job six months, and I want to know what to arrest this man for. That's what I want to know right now. Is he guilty of third or second?

MR. BARTLETT : What do you tell the cop now?

MR. COHEN : I am going along further. So let's say that I decide that anybody who hits a fellow in that particular area of the body and puts him in the hospital and lays him up for a number of days, that's a serious injury under this section. So I, as the officer, arrest the man for assault in the 2nd degree.

Now, you bring in the district attorney, and the district attorney says, well, I don't think that is a serious injury. There has been no breaking of skin, no blood, he is only in the hospital a

couple of days, this and that and so forth, or he could take the other view, it is serious.

Now, I appear as the attorney for the defendant. He calls me up and I go down the jail and he tells me what he did. Now, he says, Mr. Cohen, you tell me, have I committed assault in the 3rd degree, or have I committed assault in the 2nd degree? I say well, I haven't the slightest idea, and I haven't the slightest idea what the courts will do with this word serious. I don't know what protracted me. I have no standard to go by whatever. Now the grand jury might take one view or the other. The trial jury might take one view or the other.

The idea - - if we are going to change our wording and have a better wording than grievous bodily harm which we have now, and as I understand it, we generally solve the problem in Ontario County - - if the man spills blood, or he breaks the skin, that is grievous bodily harm.

MR. BARTLETT : Has the Appellate Division ever agreed with you, Mr. Cohen?

MR. COHEN : Yes, I believe so. I think there are cases that indicated to this effect. The breaking of

skin - -

MR. DENZER : Down in New York it is completely different.

You need a great deal more than that in New York City.

JUDGE CONWAY : You get that getting on the subway.

MR. COHEN : Yes, but the idea is this. What are we going to need here? I haven't the slightest idea how we are going to determine what we need.

At least we got something. It may not be good, it may not be the best, but if we are going to change the law, let's change it to something somebody is going to understand.

Now, we have enough difficulty, as you gentlemen know, with our appellate courts now where they have to decide definitions and what words mean, and you get three judges deciding it means this, and two judges deciding it means that, and all the way up to the United States Supreme Court.

MR. BARTLETT : We will agree with you, Mr. Cohen, but you are not going to be able to improve on that situation.

MR. COHEN : I am not trying to improve. But if we are going to make legislation, let's try to be more specific. Let's not try to be more general.

I appreciate that it sounds very nice to change these and make beautiful codifications, and I am all in favor of it, and I am sure everybody else is, but when you have to practice this every day and when you have a fellow asking you what crime he has committed and giving you some idea and you haven't the slightest idea what to do or tell him, then there is going to be some problems, and I feel that there is here.

Now, going on further, I can apply similar and give you actual cases that I have had on almost every section in here, where we take the justification section, moving on. I will skip the mental disease and defects, because that is a separate thing in itself.

Justification is not criminal when "Such conduct is necessary to avoid a public or private injury or evil greater than that sought to be prevented by the law defining the offense charged."

Now, I have got, when I am having a fight or doing something, or committing something which may be illegal or legal, I have got to stop and think whether the evil I am committing is greater than the

one I am trying to prevent, and I have got to sit down and think about this.

Now, supposing I have got a fellow that comes up and he is going to commit larceny, and I walk in and hit him over the head? Am I committing an evil greater by hitting him over the head than he is committing by committing the larceny?

MR. BARTLETT : If the present law is so clear to you in contrast to this, can you tell me - -

MR. COHEN : I am not saying the present law is clear whatsoever. I am not maintaining that. The present law is not clear, but if the present law is cloudy, I would say this, this law is completely black. There isn't any way of seeing through it or determining these things. There is no standard whatsoever.

And then, according to the ordinary standards of intelligence or morality, whatever that may be, my standards of intelligence and morality may be considerably lower than you gentlemen. Who is going to pass on what my standards of intelligent morality are? Everybody can have a different idea, and I could have five juries and one can say this is my standard of morality, and the other one can say

that is not, I should have a higher standard, and I am not saying we don't have these vaguenesses and difficulties in interpretation, and so on in our present law. We certainly do. We have got a lot of them, but I can't see a codification for the purpose of making it worse rather than for the purpose of making it better.

MR. BARATTA : Don't you think we ought to leave something for the jurors to decide?

MR. COHEN : Yes. There will be plenty for the jurors to decide if you have any kind of a definition, no matter how perfect it is, you are still going to leave plenty for the jury to decide, but now the one word that is used in all the way through these sections, I find that the word that seems to appeal the greatest to the drafters is the word substantially.

Now, almost, there again, almost every section contains the word substantially in it, as I run through this thing. Now, I have no idea what a substantial injury is, what a substantial distance is - -

MR. BARTLETT : Mr. Cohen, sure you do. You know what substantial is.

MR. COHEN : No.

MR. REIBEN : You know what a substantial fee is, don't you?

MR. COHEN : No, I don't. Because what my client considers substantial, I certainly don't, and there could be a lot of differences of opinion.

Now, I would like to just take one or two more specific situations to give you the idea of my feeling about it. I could go through every section and discuss it, but I am sure you gentlemen would not want to take the time at this time.

For instance, in 65.05, justification of physical force, "May not use a degree of physical force which is calculated to cause, or which creates a substantial risk of causing death", again, "serious physical injury or extreme pain."

Now, when you get over to 65.10. Justified physical force it says that you can use physical force upon another to the extent that he reasonably believes necessary to defend himself against such imminent use of unlawful physical force, and so forth, and kidnapping, robbery, forcible rape and sodomy, and well that you have to retreat, except

that you are not required to retreat in a dwelling and where you are not the initial aggressor. Now, this brings up several possible situations.

Now, let's say I am in my place of business. I am not in a dwelling, and I have got a fellow breaking the window, as you had here in Rochester apparently a little while ago, just this week, that apparently killed this man. He has got a mask on his face and he has got a gun in his hand. He breaks the window and he is climbing into my shop. Now, I can't be the initial aggressor. I have got to wait until he takes the first shot at me, apparently, and he hasn't pointed the gun at me. He is just coming through the window. Now, I don't want to be the initial aggressor because that will not be justification on my part for hitting this guy over the head and possibly killing him. You gentlemen say my interpretation is wrong?

JUDGE CONWAY : No, I think, in fact, the Chairman thinks you are right.

MR. REIBEN : It is incorrect on the common law; it is incorrect on the statute; it is incorrect under this statute. I think it is very clear that you don't

have to concern yourself with this fellow coming through your window with a mask and a gun. You do not have to consult counsel first.

MR. COHEN : The statute says if he is in his dwelling and was not the initial aggressor - -

MR. BARTLETT : Just a moment. I just want to make this observation. I think we made it in connection with one of the earlier witnesses. Perhaps it was Mr. Kennedy. I don't remember.

We are concerned with the language we have used in our 65 series on justification, and the staff is giving some attention to a tighter drafting of those sections. I don't mean to dismiss your criticisms with that, but I wanted you to know that we share some of your concern about the application of this language.

MR. COHEN : Now, also, I might mention that in 65.15 that mentions that he may use deadly force where he believes it to prevent such person from committing arson, and arson is the only crime mentioned.

MR. BARTLETT : In defense of property, yes.

MR. COHEN : Yes. I am speaking in defense of real property. Now, what if he is breaking into a dwelling

to commit burglary or larceny?

MR. BARTLETT : Then we are not in defense of real property.

MR. COHEN : But he is still breaking. 65 mentions breaking in to commit kidnapping, robbery, forcible rape and sodomy. Nothing is said about committing larceny within the dwelling. There are specific enumerated crimes in 65.10, 2, and yet the only one mentioned in 65.15 is arson.

MR. BARTLETT : We are talking about defense in real property.

MR. DENZER : Of course, there are other offenses that apply to the person; self-defense, whether or not equally applicable to the real property situation. We don't repeat them here, but if you are assaulted by a burglar, for example, obviously you have this justification, the justification to use deadly physical force.

Now, there is a robbery being committed on you. You don't look to this section 65.15. For that you look to the previous one, 65.10. 65.15, in other words, does not mean that the only time justification arises in defense of real property is when arson is involved. If there is an assault,

and so forth, then, you look to the other section.

MR. COHEN : Yes, but what concerns me, gentlemen, is going back to the overall problem I have to be very careful whether I kill this man for when he comes on to my property. I got to know that he is going to commit arson or robbery or rape or something of the kind.

MR. BARTLETT : You have got to be kind of careful, now, Mr. Cohen.

MR. COHEN : No, I don't. If a man is coming into my house at night and breaks my window, I can shoot him under the present law and I am perfectly justified in doing so, and I should be justified in doing so. I shouldn't have to play games with him and let him take the first shot at me and find out what he is doing in my home at two o'clock in the morning with a mask breaking into my home. It seems rather sporting to give this fellow the opportunity of not to get killed on my property, but it seems hardly the thing to do is give the fellow the first shot or let him commit the rape or try to, or commit the robbery before I do anything about it to make sure I am justified.

Now, I disagree also with Mr. Kennedy, as

far as the entrapment section is concerned. Where do you actively encourage and so forth, and where do you not.

A typical situation, a fellow going in and making a bet with a gambler in order to get him to find out whether he is in the business or not; is that actively encouraging the fellow to commit the crime of gambling?

MR. BARTLETT : There is no case law in New York, because we have never had the doctrine, but there is a lot of case law outside of New York, Mr. Cohen, including Federal case law. They don't have much difficulty in considering the customer situation which is what we want to include here with the entrapment provision.

MR. COHEN : I don't know whether there has been any problem with entrapment, particularly in this State without this section. It would seem to me it would give us defense lawyers an opportunity to raise some questions about entrapment in various situations such as extortion and gambling and things of that kind.

Now, again, in 75.10 the word substantial, "Substantially the same conduct", and down in 2B, "Substantially factual common factual denominator".

Now, in criminal solicitation I am wondering there if I am talking to some fellows at a bar and I have had a few drinks, and I say, well, let's go over and rob the bank tomorrow morning, and there is no overt act, of course, and they have been drinking a little bit, I am wondering if I am not guilty under that 100.00 because I am discussing the commission of a crime, encouraging it, suggesting it, and so forth.

MR. BARATTA : Did the crime take place?

MR. COHEN : No, the crime didn't take place. In fact, we really didn't do anything.

MR. BARTLETT: Did your intoxicated state negative the culpability required for this crime?

MR. COHEN : Let's assume we are sober.

MR. PFEIFFER : Wait a minute--

MR. BARTLETT : You assume you are sober. Let's assume for the moment. Do you think we ought to deal with that in criminal law?

MR. COHEN : No, I do not, unless there is some overt act, and then, of course, naturally.

MR. BARTLETT : This is an important point, because this is an extension of the present criminal law.

MR. COHEN : Now, I just would like to take one more.

As I say, we could go through them all.

Let me take Section 110.00, which is attempt. Now, the present statute says that the person is guilty of attempt or with intent to commit when he constitutes a substantial step, again, toward the commission of a crime

Now, our present law is that he would have committed the crime, except for some interference or some cause which prevents him from carrying on the crime that he would have if he normally would have gone along without this interference taking place.

MR. DENZER : The present law is tending to affect or failing, isn't it?

MR. COHEN : As a result of some intervening cause which prevents him from committing the crime which it did not occur, he would have proceeded and committed it.

MR. DENZER : It is statutory, and it doesn't say all that in the statute.

MR. COHEN : No, but there are case law. I just want to give you an example of a case I had last year.

You got a fellow drives into a place that sells

and used cars. He is going to steal a tire off one of the cars that is parked in the lot. So he drives his car up and he parks it and he gets out and he is walking over toward the car he is going to take the tire off. The owner of the place is hiding in a car between he and the car he is going for. The owner stops him and prevents him from committing the crime of stealing the tire.

Now, under our present section he would have committed the crime had not the owner interfered. This is our rule. It is very easy to see he was on his way to do it. He would have committed it. The owner prevented it. He, therefore, has committed an attempt.

Now, under our present section I would like to know when has he taken a substantial step. When he got out of the car? When he gets over to the car he is going to take the tire off? When he starts to take the wheel off? Where do we get substantial. I have no idea how we are going to apply that when we have got a fairly good rule now that everybody knows what it means, or at least has some idea.

MR. BARATTA : When can he stop him in the example?

MR. COHEN : Halfway between where he parked his car
and where the other car was.

MR. BARATTA : He never touched the other car?

MR. COHEN : Never touched the other car, and the cases say
attempt.

MR. BARTLETT : Do the?

MR. COHEN : Yes. He does not have to touch a car in an
attempt to take the tire off.

MR. BARATTA : Must have gotten a good confession.

MR. COHEN : Well, he confessed right then and there, and
he held him for the police, and the police came
and arrested the man.

You see, this is what disturbs me about
this is when I take each one of these sections and
take a case that I have had where we have used the
present law and I have checked the cases and had some
idea what it means, and then try to take this same
case in my own mind, as we just did here, and apply
these words, serious, substantial, and all these words,
we have no present definitions of as they apply to
specific instances in our State. It disturbs me
very deeply as to where we are going to be and
whether we are improving our situation, or whether we

are making it considerably worse than it is right now.

MR. BARATTA : But you will admit, Mr. Cohen, that these words will still require a refinement of definition in case law no matter how you draft the statutes.

MR. COHEN : May I discuss that very point which I was going to, and I am glad you reminded me.

Now, this becomes - - now, you say well, when you get a case, let's say we get a case where this fellow is going to take the tire off and he comes to me, I am his attorney, and I say to him, well, we have got nothing to say substantially. I don't think you moved substantially by going halfway to the car. Let's go to the United States Supreme Court with it and let them tell us what substantial is. It means we have got to go to the Appellate courts. We have got to . We have no idea what they are going to say with each individual situation, what substantial is.

Now, the fellow will say to me, now, Mr. Cohen, that costs money. I have not got any money to take an appeal to find out what substantial is. I have been paying you \$5.00 for this office call. I want you to tell me right now; I don't want to

ask Justice Warren and spend \$5,000.00 to find out what substantial is.

You take this instance. I was able to tell him under our present law whether he had committed an attempt or whether he had not committed an attempt.

MR. BARATTA : I don't know.

MR. COHEN : I cannot tell him under the present law whether he has taken a substantial step.

MR. BARTLETT : I am glad you were to be able to be so certain in advising him under the present law. I must confess, I couldn't be that certain.

MR. COHEN : There are some frightening cases under it. I would be glad to give you the citations.

MR. PFEIFFER : Do you mean to say that just because a man gets out of the car and walks towards another car and somebody else thinks he is going to steal?

MR. COHEN : No.

MR. PFEIFFER : That is the factual situation you have given.

MR. COHEN : I left one out. The intent to take the tire which the man admitted he was doing, and he has got a wrench in his hand - -

MR. PFEIFFER : Wait a minute. You have got a confession,

and definitions go out the window completely. That doesn't prove your point at all, Judge Cohen.

MR. DENZER : There wouldn't be any difficulty at all.

MR. COHEN : Let's assume it didn't happen. Where is the substantial. Let's assume he has got the intent. you got the confession, same thing. When is he taking the substantial step?

MR. DENZER : There wouldn't be any difficulty under this formulation, in my opinion. That would be an attempt under any formulation.

MR. COHEN : How would it be?

JUDGE CONWAY: He has trespassed on the victim's property.

MR. COHEN : There is no law against that under our present law. You say he took a substantial step - -

JUDGE CONWAY : I say he didn't take a substantial step until he got way over to the car.

JUDGE CONWAY : Obviously, a jury has to decide it. Is that so difficult?

MR. COHEN : Yes, it is more difficult than what we have got now. What we have got now is difficult enough, that something interferes to prevent him. This you could make some determination of when it becomes substantial.

MR. DENZER : You mean it is only when somebody interferes with you that you have an attempt under the present law? That is the definition, sir, of when he has to interfere or attempt.

MR. COHEN : No, not something. Somebody has to interfere.

MR. DENZER : Suppose he decides to abandon it. He gets to a certain point and he is ready to rob a store and he decided not to do it.

MR. COHEN : How far has he gone if he goes to a store and he is going to rob it, and then leaves. He hasn't committed any crime.

MR. DENZER : He is right up to the door and ready to go in.

MR. COHEN : He hasn't committed any crime if he leaves now.

MR. BARTLETT : Isn't the case, Judge Cohen, that he must have taken substantial steps towards the completion of the crime?

MR. COHEN : No, it is not, and there is some cases where they took no steps to the completion of the crime. They just got out of the car and was going to rob the payroll, and the police were right

there and they nabbed him.

MR. BARTLETT : Do you have any other points?

MR. COHEN : Well, if you gentlemen want me to keep
going, I could go through every section substantially -
and I use the word substantially not facetiously - -
We are talking about the same thing.

MR. PFEIFFER : I think we understand what you mean by
substantially.

MR. COHEN : I have looked in the dictionary under the
word substantially to try to determine what it
is, and I couldn't by reading the thing.

I might mention - - to get away from this
thing - - I might mention a couple of things that
might be of some help to the commission. One
is under B5.05, sex offenses. I do not notice any
subdivision under trickery, tricking a woman into
intercourse by pretending, or this or that, and then
having intercourse. I mean, she consents, but
the consent was obtained by trickery.

MR. BARTLETT : Where the woman's consent is obtained by
trickery?

MR. DENZER : That could mean a great many things.

MR. COHEN : Then, again, 140.35, protracted custody and

control.

I am wondering, gentlemen, 140.35, whether or not some consideration should be given to referring that to the Family Court Act. Mr. Chairman, 140.35, a reference of that section out of the Penal Law to the Family Court Act.

MR. DENZER : Well, the purpose of this was to take that kind of case out of the kidnapping category.

MR. COHEN : Well, the Family Court Act would take it out. We have quite a problem with these custody fights where they are stealing children from each other, and definitely, it should be out of the kidnapping, but I wonder if it should be here, because this section could be used as a claw by the wife against the husband; the husband against the wife.

MR. BARTLETT : What you are really saying, you think this ought to be dealt with by the Family Court. That doesn't mean that perhaps we still need a definition of this.

MR. BARATTA : You have a jurisdictional problem, then, in the Family Court. You have no right of extradition.

MR. BARTLETT : Perhaps this ought to be added to the list of the crimes.

MR. COHEN : Of course, they have the Uniform Support Act, and those things where that might be included in that to take care of the interstate. I was just noting that comment.

On the kidnapping situation, one thing occurred to me, 140.15, what about the situation we read in the papers once in a while where a woman steals a baby just because she wants a baby. She has no thought of harming the baby, she has no thought of ransom, and takes the baby home and keeps it. I could not find where I felt, of course, that was covered under 140.15. Now, it may be covered. She may be charged with some other crime, but I am wondering if that should not be some degree of kidnapping.

MR. DENZER : Yes, we have been considering the kidnapping area, and the cases like that specifically. This staff has, and will probably make some suggestions to the Commission on it.

MR. COHEN : Yes; and I might also mention in passing under 140.15, under B, "Removes him a substantial distance from the vicinity" for a substantial period. I don't know why we couldn't say removes from the

home where he is or the building or something of that kind, and try to make some more definite standard.

MR. BARTLETT : What is the law now, Mr. Cohen?

MR. COHEN : I can't tell you what the exact is.

MR. DENZER : Well, the reason the word substantial is put in there is to avoid cases like the Chessman case, for example, where the victim was moved about seven feet over, or something of that nature, from one car to another. It was really a robbery and a rape. Unless you have some standard there as to removal a substantial distance, why, you are going to include robberies and - -

MR. COHEN : Then let's say five hundred feet, or let's say a thousand feet, or let's say a mile, or let's have some standard by which you are going to make it a crime. Let's not make it different, for instance, you could have five hundred kidnappings all the same distance, and one would be convicted and the others not convicted, or any indefinite amount.

MR. BARTLETT : Okay.

MR. COHEN : I was wondering 175.00, and the other sections why the word signature was not in the

definitions. It is, in the present definition under the old Penal Law Section 3.

MR. BARTLETT : In the forgery section?

MR. COHEN : Yes. I did not find a definition for the word signature. There may be one in it, but I didn't notice it going through.

MR. BARTLETT : Well, we didn't surely want to limit forgery to the case of a false signature, but it is included in here.

MR. COHEN : I have a thought about 190.15 where it is a defense that the employer orders the clerk or book-keeper to commit a crime.

I am wondering if an employer ordering an employee to commit a crime is a defense by the employee that he has committed the crime. I did not give it too much consideration. That just occurred to me in reading the section as to whether or not that should be the situation under those circumstances.

MR. DENZER : That is taken from the present law, of course.

MR. COHEN : There is a justification under the present law?

MR. DENZER : Yes.

MR. COHEN : I am not aware of that.

I am wondering under 185, commercial bribing, whether or not there should be some provision for corroboration, or whether there should be a conviction merely on the statement of the person accusing someone of the commercial bribe just on his say so, alone, where there might be some shenanigans going on and there might be some financial dealings going on between them.

MR. DENZER : You don't need it. That is a code of criminal procedure accomplice corroboration applying to all the bribery sections.

MR. COHEN : The question is, is he an accomplice?

MR. DENZER : That is case law that in all those correlative situations the bribe receiver and the bribe giver are accomplices for testimonial purposes. You don't need a special provision under each of them in the Penal Law.

MR. COHEN : You are saying under these sections you are making both guilty of commercial bribing?

MR. BARTLETT : The giver and the receiver.

MR. DENZER : Yes. Each is guilty and in a trial of the other, each is an accomplice.

MR. BARATTA : In other words, the rule is still applicable.

You can get the evidence against both of them.

MR. COHEN : I wasn't clear on whether you were creating a situation of making them both guilty, so they would be accomplices.

Now, on 185.45, rent gouging, under the lawful rental and lawful charges, now the thought occurs to me there is, of course, we have no rent control in this area. What is a lawful charge? Now, I can charge my tenant anything I want to. Suppose I charge him a hundred or two hundred and fifty dollars a week for a little shack and he comes in and says, well, I don't feel that is lawful. Are we going to mean lawful by that, or if it is just prevented by law?

MR. DENZER : This is one place where we have probably followed your suggestion. This is taken largely from the statute. The word lawful charges and so on were used because they do have meaning. This is a rather obscure crime. It is a strange crime anyway, but it has a case law backlog, and so we didn't change it.

MR. COHEN : How would that apply to a situation where you had no rent control?

MR. DENZER : Well, it has been held that the superintendent and lessor employees can be guilty of this crime. You don't need the landlord under a rent ceiling to have the offense. If a superintendent shows a prospective tenant an apartment and he says for fifty dollars I will see that you get it, that is construed as rent gouging.

MR. COHEN : I might suggest a consideration of combining sections 190.10 and 190.15 in one section. The wording is almost identical except for one or two words, and they are both Class A misdemeanors.

MR. BARTLETT : The chattel mortgage and conditional sales situation?

MR. COHEN : Yes; combining the two and saying chattel mortgage and rules shall apply.

Now, 195.15, issuing a bad check, I am wondering about the knowledge of a person that there is an insufficiency of funds as it applies to that section.

MR. DENZER : I don't quite understand that.

MR. COHEN : It says he is acting in his representative capacity and so forth.

MR. DENZER : Which section?

MR. BARTLETT : 195.15. The defense - -

MR. COHEN : Affirmative defense. What if it is done by the person, nevertheless knowing that there is an insufficiency of funds in the bank at the time he does it, even though in his representative capacity. You see, with full knowledge that the check is not going to be honored, he is nevertheless drawing it.

Falsifying, there again we have got that substantial segment of the public, and I am also wondering there about puffing, where are we going to reach - - draw the line as far as interpreting the criminal statute between what is puffing and sales talk, and what might be considered misleading. I think we have a very difficult line there between where one would stop and the other would begin.

MR. BARTLETT : You think we ought to leave this out altogether?

MR. COHEN : I don't know it has been any problem. It certainly hasn't been any problem in this area. I don't know what the problems are as far as - - I have never heard of a case of it in our area.

MR. BARTLETT : You must appreciate the circumstances in Canandaigua.

MR. COHEN : I understand that. I don't know what the situation is in the metropolitan area.

Well, it would seem to me if it is left in that perhaps a little more definition might draw the line between just puffing and sales talk. You might put in substantially misleading, and that would clear it up.

MR. BARTLETT : You want us to use substantial?

MR. COHEN: Yes. 195.25, I am wondering how that would effect impersonations on the stage. It says impersonating another.

MR. BARTLETT : It is with intent to gain benefit for himself and to injure others.

MR. COHEN : He is getting a salary to perform on the stage. It is certainly a benefit to himself.

If you read the plain wording of it, it would be a crime. I doubt that probably anybody would, but some one might use it.

I am wondering about refusing to aid a police officer under 200.10, where it is a crime to refuse to aid a police officer.

Now, supposing - - well, I may be confused there - - you see, you are changing the words on the

offense or violation. I wonder if you refuse to aid a police officer in a traffic infraction, for instance, whether that could become a Class B misdemeanor, or a crime, but I think you use the word offense, which in this case would be above violation.

MR. DENZER : No, offense includes every crime, every violation.

MR. COHEN : Yes, including violation. I am wondering if a police officer asked you to move this vehicle and you refused to do it, that then the person is guilty of a misdemeanor.

MR. PREISER : Offense doesn't include a traffic infraction. It includes everything else.

MR. BARTLETT : Well, traffic infractions aren't under this act.

MR. COHEN : Yes.

MR. PREISER : Traffic infraction is specifically included.

MR. COHEN : But the question is how far, whether you have to aid the officer or not aid him in order to be guilty of a crime. It seems to me you ought to cut it off.

MR. BARATTA : It ought to be commensurate with the crime.

MR. COHEN : To the crime you are trying to aid him with.

I am wondering, obstructing fires, the next section, whether it would be a crime under that section if a fireman asked you to move and you just refused to move.

MR. BARTLETT : Perhaps it might.

MR. COHEN : I was wondering if that would be too great a degree of violation for just doing that.

MR. BARTLETT : Might be the very thing required.

MR. COHEN : Yes, might be very serious if the fellow doesn't move, I appreciate that.

MR. BARTLETT : Mr. Cohen, I am going to have to ask if you - - we have taken a good deal of time, and I don't mean to suggest by asking you to conclude that we are not interested in what you have to say, because I want to thank you with the greatest care.

MR. COHEN : May I just say one or two words, just one sentence, and I am a little concerned about the order of the sections putting them into public administration.

I find that attorneys and police officers now generally are very favorable to having everything alphabetically, where if we want burglary, we just look under B, and we could find it very easily.

In fact, I remember some of the boys trying to find sodomy and have no idea. They are looking all over and can't find sodomy. Of course, they don't know crimes against nature.

JUDGE CONWAY : They have been spoiled.

MR. BARTLETT : Does it make good sense now, Mr. Cohen, speaking of sodomy when you have an infant case involved that you don't find it under sodomy at all? You don't find it under carnal abuse, you find it under children?

MR. COHEN : As I say, I am not in favor of that either. I think that everything, if you wanted the best, in my opinion for the attorney and the police officer, would be to have everything all alphabetical so that we could run through and know.

MR. BARTLETT : But again, we have the difficulty of knowing what title we will assign to it. Wouldn't that probably be taken care of if we are willing to provide a good index?

MR. COHEN : Yes, but as I say, it is easier to do it. You don't have to look in the index anyway.

Number two, I just wanted to mention this business of using the words violation and offense and

so on differently than they are now. I can't possibly conceive how that is going to help us in the administration of law. We now have a crime or offense, and I have known of no area where there has been any difficulty in the use of those words why we now have to suddenly change so that police officers who have been in years now have to learn new terminology.

I can't see where it gains anything.

MR. DENZER : Do you know what an offense is, and when it is a misdemeanor under the present law?

MR. COHEN : Yes.

MR. DENZER : You are very astute then. Most people can't find it. It requires quite a bit of research.

MR. COHEN : It would seem to me that the answer is not to change the wording, but just to define better what a misdemeanor is and what an offense is. Thank you.

MR. BARTLETT : I want to thank you for the great care with which you have gone through this, and if you want to make a written submission on any portion of your examination, we would like to have it.

Mr. Buetens.

MR. SULLIVAN : He has left. He had to leave.

MR. BARTLETT : We are very sorry we couldn't get to him.

Are there any others who wish to be heard?

JUDGE DAVIDSON: I would like to say a few words.

JUDGE CONWAY : I would like to introduce to the members of the Commission a distinguished member of the Bench of the City Court of Rochester, Sidney Z. Davidson.

MR. BARTLETT : Glad to have you, Judge Davidson.

JUDGE DAVIDSON: I recognize the fact that there was a commission which investigated the changes of the Civil Practice Act, and also a commission that reorganized the courts. That Commission created a City Court Civil Branch, and City Court Criminal Branch, and I think it was ninety-five judges appointed to the Civil and ninety-five to the Criminal getting more money than we do here in our Court, and one of those judges was immediately sent up within a month or so up in the Supreme Court because the Judicial Conference has a right to place you there if they want to, and immediately attacked the validity of the Mexican Divorces.

I can't for the life of me ever see why a Commission of very intelligent men have to take a book called the Penal Law, as they did the Civil Practice

Act and throw it out and substitute for that book or those books a lot of new items, changing the complexion of the whole thing causing us a lot of concern because we have to go back to school. After having tried a great number of cases in my career, some 286 homicides included, I wonder why men have to do that. I assume a goodly sum of money is provided and they have to show some results.

I have just given a cursory examination to this thing because I was down in court. I would like to study it thoroughly, but there are a couple of items that come to my attention.

I had quite a concern when I came on the bench in '61, appointed there. I felt that I lost the challenges which I had in trial work which the learned John J. Conway knows, but I found some challenges in this Court, and one was the alcoholic. And gentlemen, we had in our court last year some 5500 hundred cases of intoxication, and I know that's only a scratch in the surface of cronic alcoholics in the United States. They run into millions. As a matter of fact, I think there is about six or seven thousand in New York State. And I for one on

the bench feel very strongly that putting a man in the penitentiary for ten days or fifteen days is foolish. I think I observed that the maximum is fifteen days, and now, under our rules I find that the short-termers, fifteen days means ten days.

Now, fellows, if you sit in my court - - and when I was a kid I lived down on Front Street, which is skid row - - I have a very strong feeling for these fellows, and you see this snow outside today - - and in Rochester if you don't know it, we have three and four and five feet of that stuff - - and when you see some fellows, unfortunates who are called drunks, derelicts, no home, come in on the first day of December with about two feet of snow on the outside, no place to stay, and society failing them completely without an answer, and you give them fifteen days in the Pen, and he is out in ten days right in the snow again, he is going to bum some money coming out of the Penitentiary and he is back in there the next day. It is just going around in a circle. They call it a revolving door.

There was a law on our books, an excellent law and I went into it. I took it up with the Ford

Foundation and the Carnegie Foundation, and they washed their hands of it. They didn't want to get into intoxication work. They had an excellent setup and I think it is in the Municipal Law for the establishment inebriety board with the full details, and the court, if a fellow came in two or more times into the police court or magistrate's court for intoxication, could be committed for not more than three years, not in the penitentiary, under the direction of the inebriety board, it was between the State Hospital and the Penitentiary. It was not the stigma of a penitentiary or a state hospital. And he remained there, and they used every type of therapeutic treatment they could, including trades, to get him into some shape, and then the board, he would go before the board and they would find him some job he would like in his trade and send him out. If he came back the second time, give him another chance; if he came back the third time, back into the court from which he came, and he would be committed to the penitentiary for not more than three years.

I find that the short term, the thirty days which has been given for a long good many years, is

faulty. They are not tried out, and the long term is important because, then, you can do something with them.

MR. BARTLETT : Do you think six months, Judge, would serve any purpose?

JUDGE DAVIDSON: I prefer that you put in there not more than three years. Of course, you can't in our state law, because when it is beyond the year penitentiary term he has to go to the State Prison. There should be some provision made so you can operate.

MR. BARTLETT : What is being done in your penitentiary for them, Judge?

JUDGE DAVIDSON: Nothing substantially. They are in there only four months when they get six, so they call those four months - - sometimes they send them out on the farm to do some work there. But it isn't long enough. You got to work with these men to the point where you get them to understand where they have got something in life. A short term doesn't work.

MR. BARTLETT : Is anyone working with them under the present system? Are they being worked with?

JUDGE DAVIDSON: We have a couple of psychiatrists there. They are beginning to understand the problem. They

are beginning to work.

But they are not in there long enough, and certainly, your ten or fifteen day order, we are going to have fifteen thousand drunks in our court if you put this into effect. Make it longer, substantially longer.

MR. BARATTA : We have been giving that very serious consideration.

JUDGE DAVIDSON: I will write in something to you. Maybe I can give you something.

MR. BARTLETT : How about a civil committment for a longer period? We agree that a penitentiary is not the proper institution.

JUDGE DAVIDSON: That was set up under civil law, but it was criminal in nature, that is, that it came into our court. It is like they have done with the Civil Practice Act. They have put it into several other places, but criminal law, you have one place, not in a dozen, so the man looks it up. He can find it in one place.

MR. BARTLETT : Isn't the man we are talking about a sick person rather than a criminal?

JUDGE DAVIDSON: True, I am going to say that. I am going to say he is sick.

MR. BARTLETT : Then ought not we to have an institution and a program appropriate to his condition?

JUDGE DAVIDSON: I am suggesting that the introduction, again of those provision, that one whole article with relation to the inebriety board. Shake it, and you will find it is a perfect thing, but it was thrown out by the legislature a few years ago.

MR. BARTLETT : From disuse, never employed.

JUDGE DAVIDSON: It was thrown out from disuse because there were cities who wouldn't envoke it. They wouldn't pay the money, yet, they might give five million dollars over to disabled cats in some foreign land. I will write you about it. I will do that, and give you my complete thought on it because I am interested. It is a challenge. It is a failure on the part of society.

There is one other thing. I do speak maybe three times a week for groups of people, and I have talked about morality in this country, and I have said that the country is rotten, and I imagine that as learned men you know it is, and I know that immorality and immoral conduct has even been told that it has reached the White House. But nevertheless,

when you are going to follow England with their Beatles, and when you are going to say morality doesn't mean anything in America, and you are going to eliminate sodomy as a crime, and we got them sitting over here in cars at night across our river on the bridge, and they are invading our parks and you are going to permit me to say to you fellows sitting upon that bench, "I will meet you tonight at eight regardless of what my wife says," when you are going to debase the moral standards of the country and continue to do it, and ^{know} you are attacking it by throwing out this very important matter. If morality means nothing we are going the way of all the great nations and empires of the world.

Gentlemen, this must not be taken out. It must be the law. We must plead with the people to maintain moral standards. You take this out - - adultery, of course, I know I had many divorce cases - -

MR. BARTLETT : Were there any criminal prosecutions following them?

JUDGE DAVIDSON: I had one adultery case that I defended, and that woman was a tough looking gal, and she stole all the money from this fellow, and she was convicted.

That is about thirty years ago.

MR. BARTLETT : What was she convicted for, the adultery or the money.

JUDGE DAVIDSON: She was convicted of the adultery.

JUDGE CONWAY : I take it there was difficulty in proving the grand larceny.

JUDGE DAVIDSON: There is difficulty to prove adultery when it is established in the divorce cases. Maybe those who are against divorce might have prosecuted a few of those that were in there for adultery. Maybe the divorce laws would have been changed. I know that seven hundred thousand or seven hundred fifty thousand divorces were in there in the United States last year which strikes at the basis of the family and which is breaking down the moral law, and you are helping now to strike out the crimes.

MR. BARTLETT : Judge, may I ask a question?

JUDGE DAVIDSON: I suggest that to you, that you do not take it out.

MR. BARTLETT : May I ask a question, please? Now, do you believe that every part of a penal law of the society ought to be equally and vigorously enforced if it is appropriately in the penal law?

JUDGE DAVIDSON: Yes, sure.

MR. BARTLETT : Is there any enforcement of this community of yours, which is one of the finest in the State, and the Nation, for that matter, is there any enforcement of this community of either the adultery or the sodomy sections we are talking about?

JUDGE DAVIDSON: The adultery law is not enforced, and has never been enforced, with the exception of one case in twenty-five years.

MR. BARTLETT : Then why should we make a fraud of the criminal law by including it in our books as a crime?

JUDGE DAVIDSON: Sodomy, I would say, I have never had a sodomy case. I think I would turn it down forthwith in my practice. But I believe sodomy cases have been brought in.

MR. BARTLETT : I assume the community of this size, as with the size of every community, there are men living with men and women living with women. Are there any prosecutions?

JUDGE DAVIDSON: No.

MR. BARTLETT : We are only dealing - -

JUDGE DAVIDSON : Will you let me give you the answer?

Because the American people have gotten down so slow

in their moral standards that they scoff at it, and they laugh at it. They scoff at it and they laugh at it. It is a joke.

MR. BARTLETT : We don't want any jokes in our criminal law, Judge Davidson.

JUDGE DAVIDSON: We don't want any law. I think it should be prosecuted. I think it should be brought in, but they just go by, of course gambling joints reign too, and they just go by too. We have babysitters - - they call them baby sitters, I think - - but those are things I think can be brought by education of people and bring them back to their senses. I think the moral laws of the Country are the ones being effected. And I think the reason why a lot of these things which are violations are not, because the American people have got so that they scoff at it. They don't pay any attention. They don't do what they should do.

JUDGE CONWAY : Judge Davidson, of course, you are aware that the Commission is not in any way indicating their approval of these acts, but merely is basing their act and suggesting the excise of it on the philosophy it is not enforce, it is not a public crime, it is not

an offense to all the people, but rather it is a private sin that's being committed.

I agree with you that it should not be taken out, but for the reason that I feel that all together too much is being heaped upon the Commission and on the proposed law, because of the fact that these are being removed.

People who are not aware of the fact that, for instance, adultery was never a crime in New York until 1909, people who were not aware of the fact that there has never been a prosecution for sodomy, the kind that is being excluded, and, of course, a lot of the public are unaware with that which has nothing to do with other consensual acts with adults in private. Of course, anything open and notorious is not.

JUDGE DAVIDSON: You have in here, I think I saw it, just think of that, you and I are in Court on pornography. Here is something that I can have these dirty, lewd pictures in my cellar, and I can show them to my neighbors and my friends and I can invite them in the cellar, according to your - - I think according to your statute that you are setting up here now, and it

is perfectly all right, so long as I don't sell them.

Now, on the next night I can invite the people on the street, across the street up there. The next night around the back of me on the other street, according to that.

Judge, I think you feel as I feel about pornography, and when you have stuff like Fanny Hill, which is perfectly all right, one of the worse books that was ever written and now they are flooding newsstands in New York State, Fanny Hill, the activities of one of the worse prostitutes who ever lived. Of course, one prostitute is probably as good as the other, except she doesn't have as much business.

Those are the things you are doing here. By these things I mean, whether it is personal with me or not, I feel there is some concealment of morality, and even though you say that they do not prosecute for sodomy - -

MR. BARTLETT : Or adultery.

JUDGE DAVIDSON: These fellows who are permitted to commit sodomy because of adults in their own private boudoirs, these fellows are merely heaping more

on their fires so that you think they are going to ignore the youngsters who they can pervert, if you say it is all right for me to flirt with you and take you home. I am going to want some young stuff too. That's what you are doing. You are opening the doors more wider and wider to the point where everyone in the country will be effected by it, and our country will be so degenerate and demoralized that we lose everything we got.

MR. BARTLETT : I don't share your dire predictions to the effect of this exclusion, Judge, but I do suggest to you that there is a moral issue involved in a criminal code or penal law, if you will, part of which we respect law enforcement too vigorously in force and the rest of which we unanimously say winning at it. I think this is a very serious moral problem too that we are trying to deal with.

JUDGE DAVIDSON: Instead of them doing what you are doing, maybe it ought to be a good idea to create a commission that will begin to direct our attention to the morality of the people and the enforcement of law in the various communities. I think that might be a wise suggestion?

MR. BARATTA : Very good suggestion in a different sphere from a pulpit and educational programs, very good.

MR. BARTLETT : Thank you very much, Judge. If you have something to submit to us in writing, we will be happy to see it.

Is there anyone else who wishes to be heard?

MR. RAY : I am John N. Ray, and I am Treasurer of the Bowling Proprietors Association of American, and I am past treasurer of the New York State Bowling Proprietors Association.

I have six pages of comments that I would like to submit. Now, if you would prefer to have me read it, I can read it, and if not, I can just submit it and you can consider it.

MR. BARTLETT : We are familiar with your problem in general, Mr. Ray, and we are concerned about straightening out some difficulties we know exist in connection with the bowling lane operations, and if you have your statement with you, we prefer that you submit it, I think.

MR. RAY : I think all right. I will do as you prefer.

MR. BARTLETT: Is there anyone else who wishes to be heard?
Well, I want to thank all of you who came to

participate in these hearings, both by giving us the benefit of your views, and by listening.

We can be sure that the expressions we have had today will be carefully considered by the Commission in formulating our final recommendations to the Legislature, and we hope that our final product will be satisfactory to the majority of the people concerned which is everybody in New York.

Thank you.

(Whereupon the Hearing was concluded at 1:35 P.M.)
