

STATE OF NEW YORK

TEMPORARY COMMISSION ON REVISION

of the

PENAL LAW AND CRIMINAL CODE

155 LEONARD STREET

NEW YORK, NEW YORK 10013

held at

BUFFALO, NEW YORK

on

NOVEMBER 20, 1964

**GORDON H. KUNKEL**

OFFICIAL SUPREME COURT REPORTER

1754 STATLER HILTON BUILDING

BUFFALO 2, N. Y.

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COMMITTEE MEMBERS PRESENT:

- Assemblyman Richard J. Bartlett, Chairman
- Commissioner Timothy N. Pfeiffer, Esq.,  
Vice Chairman
- Judge John J. Conway, Commissioner
- Commissioner Julius Volker
- Commissioner William B. Mahoney, Esq.
- Richard G. Denzer, Esq., Chief Counsel
- Peter J. McQuillan, Esq., Chief Assistant Counsel
- Peter Preiser, Esq., Associate Counsel
- Stanley J. Reiben, Esq.
- Robert Bentley, Esq.

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THE CHAIRMAN:

I am Richard J. Bartlett, Chairman of the Temporary Commission on Revision of the Penal Law and Criminal Code. We are in the process of recording a series of hearings throughout the state on the proposed revised Penal Law

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which we submitted to the 1964  
Legislature for study purposes  
which was printed and distributed  
by Thompson and Company during  
the summer of this year, and which  
we expect to submit to the 1964  
Legislature for passage. We will,  
of course, at the conclusion of our  
hearings in New York next week get  
together and discuss the points  
raised at the hearings and make such  
changes in our proposal as seem  
appropriate. We do expect the  
1965 session to push vigorously  
for passage of the proposal. We  
are asking, however, for a deferred  
effective date to afford an oppor-  
tunity to get any other wrinkles  
out which may appear, and also to  
give us an opportunity to propose  
a revised Code of Criminal Pro-  
cedure which in our judgment  
should have a coinciding effective

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date with that of the Penal Law.

Without further ado we will call first on Mr. John Gridley representing the Planned Parenthood Group.

A SPECTATOR:

Mr. Gridley is not here yet.

THE CHAIRMAN:

Mr. Grobe?

MR. SULLIVAN:

Mr. Grobe has been delayed but he will be here very shortly.

THE CHAIRMAN:

Are there any others who are going to speak for the Humane Society?

MR. SULLIVAN:

No, sir.

THE CHAIRMAN:

Mr. Brown?

MR. FRANKLIN BROWN:

Thank you very much, but I am just here to observe.

THE CHAIRMAN:

You, sir, are representing the Auto Rental Group?

MR. BROWN:

No. I am representing no one here. I am just listening. Thank you very much.

THE CHAIRMAN:

And the Bar Association group will be back with us in a few

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MR. FINKELSTEIN:

minutes. Perhaps we will have to suspend. Mr. Finkelstein, would you like to be heard now? May I be heard a little later this morning, Mr. Bartlett?

THE CHAIRMAN:

I think we may be in a position to hear you or no one right now. Is there anyone else here who wishes to be heard? (no response) We will be glad to hear from you now.

MR. LEONARD FINKELSTEIN:

Mr. Chairman, members of the Commission, I want to be certain that what I say I say accurately so I made some notes on my subject and so with your permission I should like to read a good deal of the matter that I have composed on the subject. And I would like to address my remarks and my comment only with regard to the highest grade of crime, murder, and the most severe punishment

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upon conviction, either the death penalty or life imprisonment found in existing law and under the proposed Penal Law, and I know this is an old saw. I know of no subject in criminal law which has been argued and discussed at greater length and with more vigor perhaps than the question of abolition of the death penalty. And about forty years ago at elementary and high schools I debated the subject of whether capital punishment should be abolished, and whether it was effective to deter crime, and that was one of the subjects of debate, just as who was greater, Washington or Lincoln, and so forth.

And then, even as now, the question of whether the death penalty is a true deterrent was always the pure component of the

1 heated controversy. Now, in  
2 later years as an Assistant District  
3 Attorney of this County for almost  
4 fourteen years I have read and  
5 argued numerous appeals in the  
6 Appellate Division and in the  
7 Court of Appeals where either the  
8 death penalty had been imposed in  
9 premeditated murder, murder in  
10 the first degree, or life imprison-  
11 ment in the case of felony murder.  
12 And although I sought in the per-  
13 formance of duty to uphold the  
14 judgment of conviction, my view  
15 then as it is now was that the  
16 death penalty, whatever the circum-  
17 stances, was a barbaric form of  
18 punishment unworthy of a civilized  
19 society, and having characteristics  
20 more persuasive of vengeance, wrath  
21 and revenge, rather than a true  
22 measure of justice. And I so  
23 stated as a prosecutor and as a

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private citizen on many occasions.

My criticism today is not directed at the new definition of murder as contained in Section 130.25 of the Proposed Penal Law, or kidnapping, as defined in Section 140.15, but because, under certain circumstances the death penalty may result.

Now, I am mindful, Mr. Chairman that this Commission submitted recommendations which is 1963 bore fruit when legislation was enacted which provided for life imprisonment upon a plea of guilty to murder in the first degree, formerly prohibited. And enacted was now the familiarly known two stage procedure of jury trials to determine first whether guilt existed of murder in the first degree, and if so, the same jury or another jury was impanelled to

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determine the form of punishment;  
whether the death penalty should  
be imposed. And I hailed it then  
as a step; in fact, I thought it  
was a giant step in the direction  
of eventual abolition of the death  
penalty.

Since the enactment of that  
legislation I don't believe that  
in Erie County there has been a  
conviction of murder in the first  
degree, so that procedure was  
availed of but in total. I have  
heard of several instances in the  
counties in the metropolitan area  
of New York City where the two stage  
procedure was invoked in murder  
in the first degree convictions,  
and that in those instances I was  
amazed and perhaps even chagrined  
to learn that the death penalty  
had been advised by the second  
trial jury.

1                    Now, with this possibility of  
2                    even a second trial jury upon a  
3                    conviction of murder to determine  
4                    the death penalty that I oppose.  
5                    If it was the hope that the two  
6                    stage procedure and the other  
7                    revisions would make possible for  
8                    the first time in the history of  
9                    this state greater opportunity  
10                    at greater levels for the imposition  
11                    of life imprisonment, rather than  
12                    the death penalty, it would appear  
13                    that such must still remain only  
14                    a hope, and it is still dependent  
15                    in instances upon the passion  
16                    and feeling of a group of people  
17                    to determine life or death, either  
18                    motivated by sympathy or com-  
19                    passion on the one hand, and merci-  
20                    less retribution on the other hand.

21                    I would urge that the uncer-  
22                    tainty, or even the possibility of  
23                    the death penalty be removed, and

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thereby erase for all time, in my judgment and my hope, a stain and blot upon the conscience of our citizenry.

THE CHAIRMAN:

Mr. Finkelstein, is what you are seeking is simply about the death penalty?

MR. FINKELSTEIN:

Exactly. And I see now that the penalties assume a lot more even in view of the revision.

THE CHAIRMAN:

I don't quite follow you.

MR. FINKELSTEIN:

Because now the new definition of murder is a degreeless crime. Former murder was divided into two degrees; murder in the first degree, and murder in the second degree, and the other form of homicide was manslaughter in the first degree and the second degree. There are no degrees in murder.

The whole basic theory now as proposed is that murder is an intentional killing, so the exist-

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ing law which contains as an essential ingredient of murder in the first degree is premeditation and deliberation, distinguishing between the degrees of murder. In murder in the second degree premeditation and deliberation is not required. It is in murder in the first degree. So if the basic crime is an intentional killing, and as the staff notes of this Commission suggest, that the elements of premeditation and deliberation has been eliminated because it caused confusion even in the minds of able and experienced attorneys. It produced too broad a judicial construction of the word, "premeditation", since premeditation, it has been held in case law, could be formed even a fleeting instant before the homicidal act. I agree with

1 this reasoning, but it also per-  
2 mits the possibility that one  
3 may kill after planning and prep-  
4 aration over a considerable period  
5 of time, and no matter how savage,  
6 calculated and heinous his act,  
7 he may not only escape death, but  
8 even life imprisonment.. And one  
9 who has truly conceived the intent  
10 to commit the crime only the fleet-  
11 ing moment before the homicidal  
12 act may suffer the death penalty.  
13 And I say that in that instance  
14 perhaps the cure is worse than  
15 the ailment, and that contingency  
16 as well as the two stage procedure  
17 could be avoided by the abolition  
18 of the death penalty entirely.

19 MR. DENZER:

The same is true today under the  
present murder formulations.

21 MR. FINKELSTEIN:

Now a defendant may plead guilty  
to murder in the first degree.

23 MR. DENZER:

No; but I mean you mentioned two

1 kinds of cases. One, the lengthy  
2 preparation or planning and so  
3 forth, and the other, a fleeting  
4 second, a moment before the killing.  
5 So even the more culpable killer  
6 won't they escape the death penalty  
7 and the one who offers the intent  
8 just before may incur the death  
9 penalty. That is also true today,  
10 isn't it?

11 MR. FINKELSTEIN:

It is true today, but I say because  
12 of that fact ---

13 THE CHAIRMAN:

If the jury finds premeditation.

14 MR. FINKELSTEIN:

15 Yes. Because of that fact it  
16 causes confusion in the minds of  
17 the jury. Frequently it is a  
18 murder in the second degree verdict  
19 instead of murder in the first  
20 degree because it reaches a compro-  
21 mise, and all the jury in deliberation  
22 has to determine is to  
23 avoid the element of premeditation  
and deliberation and find that the

1 killing is intentional, and can  
2 not properly bring in a verdict of  
3 murder in the second degree. I  
4 say this would accomplish a better  
5 enforcement of the section.

6 Now, today a plea of guilty  
7 of murder in the first degree  
8 can be accepted as long as it is  
9 permitted with the consent of the  
10 District Attorney.

11 I say that if we abolish the  
12 death penalty the consent of the  
13 District Attorney then becomes  
14 academic and unnecessary, and a  
15 plea could then be entered upon  
16 the will only of the defendant.  
17 I say that if we take this first  
18 step forward, and if we believe  
19 that this two stage procedure  
20 really means the virtual end of  
21 the death penalty, and that the  
22 death penalty can be seen as on  
23 its way out then why not take the

1 complete final solid step. You  
2 are now revising this Penal Law  
3 for the first time in almost  
4 eighty-three years or more, so  
5 why not do it in one fell swoop  
6 and have this remnant of the past,  
7 this ugly remnant of the past over  
8 with entirely. There is no sense  
9 to state my opinion.

10 MR. VOLKER:

11 There are a lot of other areas  
12 in this where we might take that  
13 same proof, and why not now that  
14 we are revising, and we don't  
15 think it is exactly the thing  
16 to do without the Legislature  
17 to consider what is feasible in  
18 New York.

18 MR. FINKELSTEIN:

19 I appreciate that, sir, but I  
20 would like to see this Commission  
21 recommend, whether the Legislature  
22 will approve your recommendation  
23 or not; as a matter of fact, all  
of this is a recommendation to be

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enacted or not enacted by the  
Legislature. I should like to see  
a forthright stand by this  
Commission on the total abolition  
of the Penal Law, and you are  
simplifying by that means, it  
seems to me, a lot of the proced-  
ural difficulties that are being  
caused by the two stage procedure.

Now, I haven't seen it in an  
operation yet, but I can vision  
that if there was a trial before  
a second jury on the question of  
the determination of whether a  
death penalty or life imprisonment  
could be imposed, a number of  
irrelevant factors could be entered.  
As a matter of fact, the rules  
provide that the strict rules of  
evidence be not regarded and a  
host of immaterial and perhaps  
prejudicial matter may be intro-  
duced. So this avoids that, and

1 simplifies the procedure, and I  
2 think what it does do is set the  
3 record straight once and for all.

4 It seems to me that a nation  
5 like ours composed of fifty states,  
6 a nation that can aspire to the  
7 moon could eliminate a horrible,  
8 vengeful form of punishment like  
9 the death penalty. Thank you  
10 very much.

11 THE CHAIRMAN:

12 Thank you, Mr. Finkelstein. May  
13 I ask one question, please? As  
14 you may or may not know, the  
15 Commission has taken the position  
16 on capital punishment that we are  
17 not yet prepared to make a  
18 recommendation on the final ques-  
19 tion of abolition of intention.  
20 Assuming that the Commission  
21 maintains that position throughout  
22 the five sessions of the Legi-  
23 slature and we make no recommen-  
dation, in your judgment would

the degreeless murder provision still be an advance over the present law, recognizing that we must still come to grips with the ultimate question?

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6 MR. FINKELSTEIN:

Well, I think it is an advance, Mr. Bartlett. I think it is an advance because it ends the confusion between premeditation and deliberation. I think it is an advance to that extent, and my purpose wasn't on that. Simply stated, my entire purpose to appear before this Commission was to end once and for all the myth of the death penalty and substitute true reality in its place.

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18 THE CHAIRMAN:

Thank you, Mr. Finkelstein.

19 I was remiss in the opening of the  
20 hearing in not introducing the  
21 other members of the Commission  
22 who are here with me this morning.  
23 On my left, Vice Chairman Mr.

1 Timothy N. Pfeiffer of New York;  
2 and John Conway of Monroe County;  
3 and on my right your very well known  
4 Erie County representative on the  
5 Commission, Assemblyman Julius  
6 Volker; and a distinguished member  
7 of the Erie County Bar, William  
8 Mahoney. And our Staff Chief  
9 Counsel, Richard G. Denzer, and  
10 the other members of the Staff  
11 with us are Mr. McQuillan and Mr.  
12 Preiser on the right, and we have  
13 ex-officio representative here,  
14 Mr. Robert Bentley, representing  
15 the Senate Finance Commission  
16 Chairman, and Mr. O'Brien and Mr.  
17 Strong seated with the audience.

18 Would the Erie County Bar  
19 Committee representative like to  
20 be heard now?

21 MR. WALENTYNOWICZ:

22 Leonard Walentynowicz; there are  
23 myself and Mr. Paul Birzon, and  
with the Chair's liberty I would

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THE CHAIRMAN:

MR. WALENTYNOWICZ:

like to address a few comments  
first before we conclude our remarks.

Fine.

Both myself, who is Leonard F.  
Walentynowicz, a practicing  
attorney in this area, and Mr.  
Paul Birzon, also a practicing  
attorney, appear on behalf of the  
Erie County Bar Association, and  
I would like to begin my comments  
with complimenting the Commission  
upon their approach to the revision  
of the Penal Law. We think,  
speaking for the Committee, that  
the revisions by the Commission  
were excellent, designed to look  
at the law entirely to get a new  
grasp of our present day needs,  
and to that extent we feel that  
the Commission should be compli-  
mented for it, and not only for  
those reasons, but also the manner  
in which the proposed Penal Law

has been organized with an idea of facilitating a proper administration of the Penal Law. However, as you probably will always gather, there is an area here which we would like to save judgment on because of the complicated nature of the proposed revision. There are a good many new concepts that are introduced in this Penal Law, and not only are there new concepts introduced, but there are some old, you might say, concepts of criminal responsibility eliminated. There are also upon my examination of such law the Commission has failed to recognize one new concept which we think perhaps should be in some way recognized in any up to date revision of the Penal Law. And for these reasons I would like to just make a few remarks.

1           The one thing that struck me  
2           upon examining this Penal Law  
3           is the fact that there is no  
4           corresponding new Code of Criminal  
5           Procedure. Now, I read the pref-  
6           atory remarks to the Penal Law as  
7           it was published by the Thompson  
8           Company, and I understand while  
9           it was originally the recommenda-  
10          tion of this Commission to submit  
11          both the Penal Law and the Code  
12          together, and for reasons appar-  
13          ently of administration only the  
14          Penal Law was submitted to the  
15          Legislature at this time.

16          THE CHAIRMAN:

17          Mr. Walentynowicz, I should repeat  
18          what I said while you were probably  
19          out of the room, that it is the  
20          intention of the Commission that  
21          we submit for passage in the 1965  
22          session the revised Penal Law,  
23          but that its effective date be  
            deferred so that it might coincide

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MR. WALENTYNOWICZ:

with a revised Code which we will submit at a subsequent session of the Legislature. We just feel that both together might be too much to digest in one session. This is fine, because we feel that an extended dialogue between the Commission and the public is necessary for a proper and effective revision of this Code, and I say this because, for example, while we are in agreement with the Commission that there should be a new concept of criminal responsibility insofar as mental defects are concerned the text that the Commission suggests which is contained in 6005 of the Penal Law is such, that maybe without the proper Code of Criminal Procedure or provisions in the Code of Criminal Procedure would be most difficult to enforce.

1 THE CHAIRMAN:

Is that the psychiatrist's testimony?

3 MR. WALENTYNOWICZ:

Yes. But let me illustrate a point I observed.

5 THE CHAIRMAN:

Okay.

6 MR. WALENTYNOWICZ:

7 This goes not for the test of  
8 mental disease or defect, but  
9 also for identification and in  
10 other areas because I find that  
11 in most instances what has happened  
12 here is the approach of this  
13 Commission to formulate this Penal  
14 Law, and it is a closed statement  
15 of what is or is not to be con-  
16 sidered criminal responsibility,  
17 and to this broad statements are  
18 several exceptions. Yet at Section  
19 55.00 the Penal Law recites  
20 provisions establishing that an  
21 affirmative defense is one which  
22 must be raised by the defendant,  
23 by either "A" "by the presentation  
of evidence during trial, unless

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the people's evidence itself raises the issue involved." In most instances able criminal attorneys will be able by means of effective cross examination introduce reasonable doubt during the course of trial as to many exceptions now under our present system of obtaining evidence. And remembering this whole Penal Law was based upon truth the criminal responsibility as you must conclude is beyond a reasonable doubt, but in our present day enlightened concept of obtaining evidence to determine truth this may provide a very difficult problem. We go and look through this law and we find a good many exceptions to criminal responsibility are contained based upon the alleged proof of the actor's belief. How are we to find out this person's belief

1 if we cannot question him, or  
2 in the alternative if there isn't  
3 any questioning as such, where he  
4 can be questioned under proper  
5 safeguards. This has to do with  
6 procedure, and I understand this  
7 law is not designed to take care  
8 of procedure, but whether or not  
9 we except to this depends on a  
10 large part on whether we can use  
11 this demonstration, and that does  
12 depend upon us, so I am not suggest-  
13 ing here that we should necessarily  
14 devise a covering indices, but  
15 I am only raising the problem so  
16 it can be carefully considered  
17 before we decide if these are  
18 rules we want to live by.

19 MR. PFEIFFER:

Why has this caused you difficulty?

20 MR. WALENTYNOWICZ:

21 For this reason, sir, in a prac-  
22 tical way you start a lawsuit,  
23 you present your case, there is  
effective cross examination by

1 defense counsel ---

2 MR. PFEIFFER: Wait a minute: You say you start

3 a lawsuit? You mean, the prose-

4 cution?

5 MR. WALENTYNOWICZ: Yes.

6 MR. PFEIFFER: (continuing) Presents the evi-

7 dence?

8 MR. WALENTYNOWICZ: Right. Presents the evidence,

9 the defense attorney; it is effec-

10 tive and the prosecution cross

11 examines as to the validity of the

12 evidence. For example, that

13 criminal responsibility as a result

14 of mental defects. the second

15 section says this: "The terms

16 mental disease or defect do not

17 include an abnormality manifested

18 only by repeated criminal or other-

19 wise anti-social conduct". Our

20 present rules provide that in the

21 people's case could produce any

22 proof of the defendant's anti-

23 social conduct. If the attorney

1 is expertus enough he can produce  
2 a reasonable doubt in the people's  
3 affirmative case so as to create  
4 that reasonable doubt through facts  
5 paramount to get to the question  
6 whether this is something repeatedly  
7 done by an individual, you never  
8 would get to it. The defendant  
9 could say, "I will take my chance  
10 on the people's case". To take  
11 the position where you could get  
12 to it if you wanted to, and the  
13 people may never be able to get  
14 to it because of the fact that  
15 you will never have an opportunity  
16 to prove repeated criminal or  
17 anti-social conduct. For example,  
18 under our present system ---

19 MR. PFEIFFER:

Excuse me; you are saying you have  
20 such an opportunity? It is an  
21 affirmative defense and the de-  
22 fendant can raise it?

23 MR. WALENTYNOWICZ:

Yes, but your language at 55.00

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MR. PFEIFFER:

THE CHAIRMAN:

MR. WALENTYNOWICZ:

THE CHAIRMAN:

MR. WALENTYNOWICZ:

MR. DENZER:

says this: "An affirmative defense is one which must be raised by the defendant in the presentation of evidence." That is fine, but normally the people's evidence itself raises the issue involved. That doesn't mean that he can't present it, unless the people have. The prosecution's right. On question of seniority the law now is you must give notice. Notice and other information. And it is noted that 55.00 takes that into account. It is raised by "b", on a notice. How about this language, "unless the people's evidence itself raises the issue involved". I think there may be a little confusion on that. What we intended to say is if the people's evidence apparently raises the issue, let's say, self-defense.

1 If that inference is inherent in  
2 the people's proof, then the de-  
3 fendant shall be deemed to have  
4 raised it, and he doesn't have to  
5 affirmatively raise it in order to  
6 get it before the jury. The  
7 people's case may bring up an issue  
8 as to whether a killing or assault  
9 was committed in self-defense, or  
10 otherwise.

11 MR. WALENTYNOWICZ:

12 That is precisely the point, but  
13 in our machinery, suppose that  
14 killing to seek out the truth, if  
15 this is an issue that may be  
16 permitted to be raised either by  
17 notice in advance of trial, or  
18 by the very fact, by the means  
19 which the people obtained evidence  
20 then I think it is critical to  
21 give the prosecution ample means  
22 to secure that evidence so that  
23 when a person is asked to make a  
determination under these rules

1 they have all the pertinent  
2 evidence before it, and not just  
3 simply inferences. That is pre-  
4 cisely my point. When you say,  
5 "unless the people's evidence it-  
6 self raises the issue involved",  
7 this can be done in many phases.  
8 We must always understand that  
9 the sole, not only the primary,  
10 but the sole duty of the prose-  
11 cution is to seek justice, and not  
12 to color the evidence, as such.  
13 Now, if that be so, then I think  
14 it is quite proper that we permit  
15 the defendant to raise this as  
16 part of the people's case, and I  
17 also think that a correlary to  
18 that, we ought to permit the  
19 people to present their case, to  
20 seek out all the evidence and to  
21 submit it.

22 MR. DENZER:

23 In a situation where there is  
some defensive defense contention

1 inherent in the people's evidence  
2 yet the defense never raises it  
3 affirmatively, and therefore,  
4 there is a doubt as to whether the  
5 defendant is going to rely on it,  
6 and the people does not bring in  
7 all their evidence on the issue.

8 MR. WALENTYNOWICZ:

9 No. If the question is addressed  
10 to whether or not I am concerned  
11 that the prosecution after they  
12 have found an indictment has  
13 given notice of, no. My pri-  
14 mary concern is after I have al-  
15 ready given proof raise the point  
16 which does, they have tools by  
17 which to give their evidence and  
18 to obviously decide whether or  
19 not these exceptions to the Penal  
20 Law in criminal responsibility  
21 really should be applied in the  
22 particular instance?

23 THE CHAIRMAN:

You understand the purpose of  
exceptions. It is really a quali-



1 defect he lacks substantial  
2 capacity: (a) To know or to  
3 appreciate the wrongfulness of his  
4 conduct." "2. As used in this  
5 Section the terms "mental disease  
6 or defect" does not include  
7 abnormality manifested only by  
8 repeated criminal or otherwise  
9 anti-social conduct."

10 Now, in other words, as part  
11 of this term "mental disease or  
12 defect", we would have, the people,  
13 it would seem to me, based upon  
14 55, the language of 55, to show  
15 that once this element of mental  
16 disease or defect is introduced  
17 to the court by any defense counsel,  
18 properly so, in cross examination  
19 by notice or by any means, he may  
20 even demonstrate it to the court  
21 by stating in the opening just  
22 with respect to how the defendant  
23 acted. The people have to read

1 55.00, it is my feeling here,  
2 because in 55.00 it also negates  
3 the second section; in other words,  
4 negate that. Maybe that is not  
5 so; maybe that was not intended  
6 to be the case, but this is the  
7 problem we are concerned about.  
8 May I ask a question? As a  
9 practice, in your opinion, as an  
10 attorney, anytime remarks of the  
11 defense counsel maintains to  
12 ellicit through cross examination  
13 doesn't the District Attorney  
14 always take that witness back over  
15 redirect examination and rehabili-  
16 tate the original version, and  
17 if through cross examination in  
18 this case the defense counsel  
19 attempted to ellicit through a  
20 lay witness the fact that the de-  
21 fendant had abnormal character-  
22 istics, couldn't the prosecutor  
23 take that witness back to the

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MR. WALENTYNOWICZ:

redirect examination, and so that even if there were abnormal characteristics those characteristics should essentially be characterized as anti-social? That is the point. I think our considered law now is that it is part of the people's case that they can't go into the defendant's character, anti-social, criminal or otherwise.

MR. DENZER:

But you pointed out he can't do that until he raises the issue himself, but you pointed out that it is proper. It is done every day. It is done by mostly everybody at trial. You find that the defense counsel opens the door by his cross examination, and in opening the door, of course, the prosecution has the right to redirect examination on any subject on which the defense counsel has

1 opened that door, and this is  
2 what happens all the time.  
3 MR. WALENTYNOWICZ: I have argued that position most  
4 strongly several times, and I am  
5 afraid I didn't do it very  
6 successfully because the other  
7 side objected. They said that  
8 even though this opened the door  
9 for him even to an extent by  
10 evidence existing to the extent  
11 that it brings in the defendant's  
12 past record and criminal activi-  
13 ties, this won't be tolerated.  
14 MR. DENZER: That is not what we are speaking  
15 of here.  
16 THE CHAIRMAN: Let's see how we get into this  
17 question. Under the present  
18 law notice must be given to the  
19 defense of insanity, right?  
20 Then as part of the people's case  
21 we assume they are going to put  
22 on a psychiatrist. Is that what  
23 we are getting to?

1 MR. WALENTYNOWICZ:

As part of the people's case. I don't think then the people -- When you say the "people", in rebuttal.

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5 THE CHAIRMAN:

That is the answer exactly to my question. How do you propose this issue will come up during the direct portion of the people's case?

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10 MR. WALENTYNOWICZ:

Well, this is the part that I am concerned about when you had this language in 55.00. It is not going to come up in the people's case, then I ask why, sir, does 55 raise the language unless the people's evidence itself raises the issue involved?

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18 MR. DENZER:

Because there may be a situation where it does come up in the people's case.

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21 MR. WALENTYNOWICZ:

Exactly.

22 MR. DENZER:

But not in this situation.

23 MR. WALENTYNOWICZ:

You don't make any exceptions.

1 You offer this affirmative defense  
2 to mental disease or defect.

3 MR. DENZER: Yes.

4 THE CHAIRMAN: But as a practical matter can you  
5 suggest to us just how in the  
6 course of trial this sort of  
7 testimony would come up relating  
8 now to the sanity test in the  
9 direct portion of the people's  
10 case?

11 MR. WALENTYNOWICZ: The defense counsel can examine  
12 the witness as to, how did the  
13 defendant behave before he was  
14 arrested, or at the time he  
15 allegedly committed the crime.

16 MR. DENZER: That would be raised by the de-  
17 fendant at the time of cross  
18 examination.

19 MR. WALENTYNOWICZ: Yes.

20 MR. DENZER: In this case the way it would  
21 possibly in the insanity defense.  
22 Either source raised in that  
23 fashion or some other fashion you

1 might have evidence in the record  
2 of prior anti-social conduct on  
3 the part of the defendant. Now,  
4 in summation the defendant's  
5 attorney would argue that this  
6 and other evidence made out the  
7 defense of insanity. In the  
8 court's charge he would say that  
9 that alone was not sufficient;  
10 that they must have other evidence  
11 in addition to this prior anti-  
12 social conduct and so forth,  
13 and that would go to the jury  
14 in that form. I don't see any  
15 difficulty there.

16 MR. WALENTYNOWICZ:

17 That is, if it is handled that  
18 way. My point is can it be  
19 handled in a definite fashion?  
20 In other words, you may never get  
21 to a psychiatrist and you start  
22 asking him about anti-social forms  
23 of conduct. It may never get to  
that.

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MR. DENZER:

You are misinterpreting that whole Section. On the anti-social it is absolutely inadmissible on either side. There are those that feel in psychiatry that this is evidence of insanity, and if this occurs from conversations they can't be guilty of any of it, but this Section is in there for the sole purpose of prohibiting the defense from bringing in proof that the defendant in the past has been so anti-social that he must be insane.

MR. WALENTYNOWICZ:

In other words ---

MR. DENZER:

You are misinterpreting that whole subdivision.

MR. WALENTYNOWICZ:

Perhaps I am. But it is an honest interpretation based upon the language that is used. In other words, this is the thing I am concerned about -- we are concerned about.

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THE CHAIRMAN:

Let's direct our attention for a minute to 60.06, the standard of insanity. At the moment this Commission is engaged in discussion with the District Attorneys Association as to this Section, and the District Attorneys have proposed that we eliminate "(b)" and it is our position if we eliminate "(b)" "2" is no longer needed, because that only qualifies "(b)".

MR. WALENTYNOWICZ:

That would be correct.

THE CHAIRMAN:

What would you think, Mr. Walentynowicz, of the standard that ended, "the wrongfulness of his conduct", period?

MR. WALENTYNOWICZ:

Let me say this. My personal feeling in here is that this perhaps could be an acceptable standard.

THE CHAIRMAN:

If you gentlemen did not enforce --

MR. WALENTYNOWICZ:

Well, our Committee itself hasn't made a public statement what we

1 feel it ought to be. We have  
2 had that communication to the  
3 Commission a couple of years ago.  
4 We didn't have the second sub-  
5 division. Our Committee never had  
6 the second sub-division.

7 THE CHAIRMAN:

8 I think you will find they did,  
9 sir. This is almost at precisely  
10 the ALI standard, and that was  
11 the question. In fact, we held  
12 the hearings.

13 MR. WALENTYNOWICZ:

14 We did not recommend the AIL  
15 standard. Our Committee did not  
16 include the second sub-division,  
17 because of this. I think this  
18 is a personal problem of the  
19 proof. Perhaps, the important  
20 thing is now we are off the  
21 diagramatics, which we think is  
22 important from our point of view.

23 About the provisions of these  
laws, so there can be a complete  
understanding of them, but not to

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take up the Commission's further time let me pass along to a few other notes that I have. And that this is of sentences, we find that in those sections there is no reference to the youthful offender statutes.

THE CHAIRMAN:

Let me quickly take up youthful offenders. Presently, of course it is spelled out in the Code, and it isn't our intention by mentioning and not mentioning them to pass on whether we were going to retain it.

MR. WALENTYNOWICZ:

Well, our thought was this: The new thought in your Code was to set up a certain kind of sentences changing the convictions for new concepts; release and suspended sentences with a judgment of conditional discharge, and absolute discharge, or judgment of probation and so forth.

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Well, it has been my understanding that a youthful offender statute has been thought to be in the form it was and I was wondering what phase this would have in your statutory scheme because this is similar to the next idea, because some of our Committee members have been talking about it that this is different. You have now changed from being mandatory to being permissible sentences, for what you call persons who are persistent felony offenders which we think is good, but however, does nothing in your opinions, in the sentence to allow for those people who perhaps were convicted many years ago and may not be youthful offenders, but may have lived exemplary lives for 25 or 30 years, or some such period of

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THE CHAIRMAN:

time, then perhaps they should be given consideration for living exemplary lives.

By some proceeding by which the judgment of conviction is wiped out?

MR. WALENTYNOWICZ:

That's right, exactly. We think that this ought to be considered. Now, there can be many ramifications of this. In other words it could be for such purposes the amnesty is given, and if there is some fear that some number of reputable criminals are -- the records are going to be wiped out, perhaps there should be some kind of a central filing place in some area to keep this record, but at least the public would know that this man has lived an exemplary life for a certain period of years and deserve the benefit of that type of treatment.

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MR. VOLKER:

The only reason we bring this up is because you do bring up new concepts of criminal responsibility such as solicitation. Let me say that regularly every two years we have such a statute presented to us in the Codes Committee of the Committee of Legislation, and if this Commission doesn't do something about it, the Legislature will be faced with what I predicted last year again. There are many Legislators who feel as you do, apparently, that there should be some machinery for wiping out the records of a crime committed many years ago, possibly 20 years duration, where the convicted person has led an exemplary life.

THE CHAIRMAN:

We are giving it our attention.

MR. VOLKER:

I have in mind the holder of a Federal position who took some-

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MR. WALENTYNOWICZ:

thing and has been trying to live it down ever since. That is precisely the point. We are talking about perhaps there could be some allowance as to the kind of crime. Maybe the felony is not to be, but maybe misdemeanors or minor offenses, but we do think attention should be given to this area. As a correlary to this we think the attention should be given to arrest records being wiped out. In many instances individuals are arrested and they are later found to be innocent and acquitted and charges are dismissed. And I think that is constantly before us in various forms in public service life and there is always reference to the arrest records. I understand and the Committee understands that for police purposes there ought

1 to be some sort of record of this  
2 conviction, but should not be to  
3 the public extent that it is now,  
4 for almost any individual through  
5 some local police agency can pick  
6 up this arrest record, and we feel  
7 that this is something this  
8 Commission ought to direct its  
9 attention to.

10 Again as a correlary to the  
11 arrest problem, we find in the  
12 area of youthful offenders there  
13 are many instances even though  
14 a youth has been granted youth-  
15 ful offender status and supposedly  
16 doesn't have to report the exist-  
17 ence of such arrest. Unfortunately,  
18 under the present system of keeping  
19 records there is some record made  
20 of his arrest before he is granted  
21 that status and this presents  
22 from time to time difficulties  
23 of that particular damage.

1 THE CHAIRMAN:

You are talking about not only in  
2 the law, but wherein someone  
3 applied for a liquor license, you  
4 have to recite the fact of an  
5 arrest and what for --

6 MR. WALENTYNOWICZ:

Right. I think that should be  
7 taken care of. I am going to con-  
8 clude my remarks by just making  
9 these comments here as these  
10 thoughts I have expressed here,  
11 and Mr. Birzon will continue.

12 THE CHAIRMAN:

Thank you very much.

13 MR. BIRZON:

Mr. Chairman and gentlemen, I am  
14 a practicing attorney here in  
15 Buffalo, and I am a member of  
16 the Criminal Law Committee of the  
17 Erie County Bar Association. Per-  
18 haps, for a moment, I would like  
19 to change the current of the  
20 stream and indicate to the Comm-  
21 ission all we approve of in respect  
22 to the newly proposed Penal Law.

23 THE CHAIRMAN:

This is a happy thoughtful

1

occasion.

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MR. BIRZON:

Speaking quite generally we

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approve of the approach of the

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Commission insofar as it endeavors

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to revise the Penal Law as opposed

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to merely reciting the present

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statutes of the Penal Law with

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its judicial interpretations, and

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plugging gaps. We subscribe to

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that general approach.

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Furthermore, we approve and

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commend the Commission for the

13

structural approach which it has

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given to the newly proposed Penal

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Law insofar as it has eliminated

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an alphabetical group in favor

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of more sensible and more logical

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groupings. We approve of the fact

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that the newly proposed Penal Law

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does not purport to embrace a

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total compilation of all penal

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legislation, particularly in a

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regulatory field. We recognize

1 that there are literally thousands  
2 of violations rising with respect  
3 to which there are penal conse-  
4 quences in many areas of the law,  
5 and it would be, if not a near  
6 impossible chore, perhaps somewhat  
7 less of a sensible chore, to  
8 attempt to incorporate it in a  
9 single volume. But this approval  
10 is based primarily upon the fact  
11 that it intends, as I understand  
12 it, to incorporate within its  
13 index a reference to the many  
14 other penal statutes that we find  
15 in our book.

16 THE CHAIRMAN:

That is correct. We do plan an  
17 index of those statutes contain-  
18 ing penal sections.

19 MR. BIRZON:

That is the way I understood it,  
20 Mr. Chairman, and for that reason  
21 we approve of the approach of  
22 the Commission, and as Mr.  
23 Walentynowicz has indicated, we

1 generally would have preferred  
2 and possibly still do, but we  
3 appreciate the practical diffi-  
4 culties with respect to present-  
5 ing the Code - the newly pro-  
6 posed Code - presuming it is going  
7 to be a revision opposed to a re-  
8 statement, and if I am correct on  
9 that assumption we would have  
10 enjoyed seeing the totality of  
11 the new penal scheme as a whole,  
12 and I know that this was the  
13 position of the Commission in  
14 rather imperative terms at one  
15 time. I appreciate, as I say,  
16 and I am not insensitive to the  
17 practical difficulties, but I  
18 would daresay without detailing  
19 the matter that there were many  
20 areas where in order to properly  
21 analyze and evaluate given pro-  
22 visions of the Penal Law as a  
23 body of law attempting to regulate

1                   conduct, one could better evaluate  
2                   that if one knew of the procedural  
3                   implementing of legislation were  
4                   to come. Still you agree, do you  
5                   not, there are large areas of the  
6                   Penal Law with respect to respon-  
7                   sibility and justification and  
8                   all that sort of thing that do  
9                   not depend on any kind of Code of  
10                  Criminal Procedure and we have  
11                  come to a conclusion in considering  
12                  those things. I think it will  
13                  make many areas that may be iso-  
14                  lated for the purposes of examina-  
15                  tion, but I suggest to you that  
16                  there are certain areas, however,  
17                  that be elected eliminated that  
18                  may depend upon a proper intelli-  
19                  gible solution in their counter-  
20                  part, procedural limits.

21                  I would just like to remark  
22                  further in addition to Mr.  
23                  Walentynowicz' comments, that our

1 Committee is very pleased to  
2 subscribe their signature along  
3 with that of the Commission to the  
4 death rule. I think more than  
5 that at this point I need not say  
6 because I think Mr. Finkelstein  
7 has covered the Committee's  
8 position relative to the particular  
9 provisions.

10 Now, just one other area, if  
11 I may, and I might indicate to the  
12 Commission that we would very much  
13 like to, and I am sure you will  
14 accord us this privilege of re-  
15 serving our rights, as it were,  
16 to submit a memorandum relative  
17 to many of the areas which time  
18 does not permit our Committee to  
19 specifically examine. There is  
20 one area, however, we should like  
21 to raise and discuss very briefly  
22 if we may, and that is Section  
23 45.00 subdivision 7. With respect

1 to Section 45.00 generally, it  
2 is quite clear it seems to me that  
3 these sections were derived  
4 essentially from their counter-  
5 parts in the model Penal Code.  
6 We have no quarrel with the first  
7 three areas and words purporting  
8 to establish a standard of culp-  
9 ability. And incidentally, before  
10 I go on I would like to indicate  
11 that we do approve of the narrowing  
12 of terms with respect to culpa-  
13 bility, and I have read the Comm-  
14 ission's remarks relative to the  
15 abundance of terms that proliferated  
16 in this area, and we by all means  
17 feel that it is very worthwhile  
18 to reduce the number of terms, and  
19 we are faced basically with four  
20 standards in the concept of culpa-  
21 bility; inducement, knowingly,  
22 recklessly and criminal negligence.  
23 Now, with respect to the first

1 three, gentlemen, insofar as each  
2 of those concepts imports what  
3 has been traditionally considered  
4 a criminal intention. We have no  
5 quarrel with respect to the sub-  
6 division 7. However, it seems to  
7 me that this imports a rather new  
8 concept into our body of criminal  
9 jurisprudence. Now, it is true  
10 that there are certain isolated  
11 statutes presently in our Penal  
12 Law under Section 1052 which make  
13 criminal conduct which stems from  
14 ignorance but these I suggest to  
15 you are carried out to the areas  
16 where the public is obviously  
17 effected. 1054 is the manslaughter  
18 in the second degree section,  
19 and that under sub-section 3 they  
20 talk about, for example, over-  
21 loading a passenger vessel, and  
22 they set up a standard of neg-  
23 ligently -- using the word "negli-

1                   gently" with respect to persons  
2                   having charge of steamboats. We  
3                   talk about conduct which stems  
4                   from ignorance, recklessness or  
5                   gross negligence. With respect to  
6                   persons in charge of steam engines  
7                   we have language including the  
8                   word "ignorance or gross negligence".  
9                   Now, perhaps there is some justi-  
10                  fication in the area where the pro-  
11                  vision is not clearly effected, but  
12                  as in the operation of steamboats  
13                  and railroad cars and so forth  
14                  perhaps there is some justifica-  
15                  tion for this standard, but I  
16                  suggest to you that incorporating  
17                  the concept of criminal negligence  
18                  into our body of the law in an  
19                  area, and there are only two areas  
20                  of assault in the third degree.  
21                  And with respect to manslaughter ---  
22                  It is now criminally negligent  
23                  homicide, 1030.10.

MR. CHAIRMAN:

1 MR. BIRZON:

I am sorry; that is correct.  
1030.10 and 125 subdivision 3 that  
this is a gross departure from  
what certainly has been the trend  
or notion of criminal responsi-  
bility, or a prerequisite of  
criminal responsibility and that  
is some type of comprehension of  
the section setting up a standard  
that includes unawareness, however  
gross, that unawareness may be  
the context of this statute. The  
definition of criminal negligence  
leaves out something quite impor-  
tant, and it seems to me that un-  
less there is some compelling  
reason should be included and  
that is a morale defect. I find  
that the defect, and of course,  
these matters are all value  
judgment, but I find it some-what  
difficult to agree that as a  
matter of value judgment that an

1 individual who may be insensitive  
2 to a particular risk give the fact  
3 that the insensitivity is perhaps  
4 somewhat more than ordinary neg-  
5 ligence; that this lacks the  
6 morale, or immoral quality that  
7 one generally looks to its statutes  
8 that seek to regulate conduct -  
9 social conduct.  
10 MR. PFEIFFER: Reckless?  
11 MR. BIRZON: No, I don't think so, sir. The  
12 reason being this: --  
13 MR. PFEIFFER: The immoral act tells the difference.  
14 MR. BIRZON: I think the reason it does not is  
15 this: because the only difference  
16 between, for example, intentional  
17 conduct and recklessness is defined  
18 by 45.00 is the fact that with  
19 respect to intentional conduct  
20 the actor knows for a certainty  
21 that the particular result will  
22 follow as a result of his conduct.  
23 With respect to reckless he knows

1 as a matter of probability but  
2 he knows nevertheless. There is  
3 a conscious disregard by your own  
4 definition. With regard, however,  
5 to criminal negligence, by  
6 hypothesis and because of your  
7 definition there is no awareness  
8 whatsoever.

9 THE CHAIRMAN:

No active will involved.

10 MR. BIRZON:

11 And more than that, there is no  
12 awareness. Without an active will  
13 I assume no conviction can be  
14 made under your new definition  
15 to which we agree, but more than  
16 that there is no awareness. The  
17 argument has been made by Professor  
18 Wexler basically as follows: that  
19 any knowledge that conviction and  
20 sentence may follow conduct that  
21 inadvertently creates improper  
22 risk does place men in some degree  
23 with an incentive to take care to  
use their faculties and draw on

1 their experience in gaging the  
2 potentialities of contemplated  
3 conduct. I think there is some-  
4 thing to be said for that, cer-  
5 tainly, but one wonders this.  
6 What is the situation with regard  
7 to a person of low intelligence,  
8 is heredity to be taken into con-  
9 sideration in this type with  
10 respect to this type of charge.  
11 Is temperament a material element;  
12 would this be admissible with  
13 respect to a prosecution under this  
14 charge. There has been some  
15 academic controversy launched and  
16 Professor Wexler has taken the  
17 one stand that I have just given  
18 you, and Professor Hall, an equally  
19 emminent scholar has taken a quite  
20 opposite position. His position  
21 basically is that conscious action  
22 is the scienter monomania of  
23 penal justice, and there is some-



1 the accident tells him that this  
2 individual's conduct, or carelessness  
3 was gross in his judgment,  
4 there can be an arrest. Interestingly  
5 the purport of 45.00 was to  
6 reduce the areas of culpability  
7 in the sense of using just a few  
8 words, as opposed to, as I indicated  
9 before proliferous of words  
10 that existed before, but we see  
11 here the word "gross". It is hard  
12 to determine whether we have in  
13 effect a gross negligence statute,  
14 or a gross ignorant statute. In  
15 either case I suggest to you that  
16 as a value judgment in which there  
17 is a legitimate area of dispute  
18 I grant that something less than  
19 conscious risk creation is not a  
20 proper subject for penal regulation.  
21

22 THE CHAIRMAN:

23 Wouldn't your standard apply to  
the fact of a thoroughly soused

1 driver?  
2 MR. BIRZON: Well, I think that as I understand  
3 it, there is a provision with  
4 regard to intoxication as not  
5 providing a defense, if I am not  
6 mistaken.  
7 THE CHAIRMAN: You are right.  
8 MR. BIRZON: And I think the same reasoning  
9 would hold; the justification.  
10 THE CHAIRMAN: Do you approve of that section?  
11 MR. BIRZON: Oh, yes. There is some conscious-  
12 ness involved. There is volition  
13 in getting into the car after  
14 one has been soused.  
15 MR. PFEIFFER: How about handling a gun?  
16 MR. BIRZON: Again in the intoxication area?  
17 MR. PFEIFFER: Yes.  
18 MR. BIRZON: Oh, yes. I have no quarrel with  
19 that. But what I am suggesting  
20 is that kind of consideration  
21 that complete unawareness alone  
22 is not a fit subject for penal  
23 regulation. In the hunting area

1 I note a case which refers to  
2 People v. Weiss, a case decided  
3 in Supreme Court, Warren County,  
4 which was a hunting case, and there  
5 are many of these.

6 THE CHAIRMAN: That is my County. That is the  
7 case where the man shot someone  
8 down out of a tree.

9 MR. BIRZON: I assume you are familiar with it  
10 then.

11 MR. VOLKER: I wondered what they thought he  
12 was up there for.

13 MR. BIRZON: Applying the guards to culpable  
14 negligence as interpreted by  
15 People v. Angelo, which is a lead-  
16 ing case, the Court says for  
17 example: "Mere indication of a  
18 person's stupidity and irresponsi-  
19 ble tolerance, that carelessness  
20 however serious the grounds may  
21 happen to be does not constitute  
22 culpable negligence." It was  
23 suggested in the area of hunting

1 that previous we endorsed, and  
2 perhaps the Legislature should  
3 consider an absolute liability  
4 statute that imposes absolute in  
5 the form of a fine for shooting  
6 at a human being by mistake.

7 Perhaps there is some area in the  
8 hunting field where absolute lia-  
9 bility is proper, at least inso-  
10 far as imposing a fine, but where  
11 we get into a broad area of  
12 assault in the third degree, I  
13 think we may have quite a serious  
14 problem, particularly in view  
15 of the abundance of automobile  
16 accidents we now see.

17 Thank you very much, gentlemen.

18 THE CHAIRMAN:

19 Thank you. I want to thank the  
20 Erie County Bar for their comments.  
21 It is your position that the  
22 standard we use in describing  
23 recklessness is the law of the  
state now?

1 MR. BIRZON:

Yes, it is. I would say so. In  
2 the People v. Angelo I think it  
3 ended at that point.

4 THE CHAIRMAN:

We would urge the Committee if  
5 you have a written submission to  
6 make, that you do it as quickly  
7 as possible. I know this puts  
8 a great deal of pressure on the  
9 members of the Committee, but we  
10 are under pressure at the present  
11 time.

12 MR. BIRZON:

Certainly.

13 THE CHAIRMAN:

As soon as we can have it we will  
14 appreciate it.

15

Mr. Gridley.

16 MR. JOHN GRIDLEY:

Mr. Chairman, gentlemen, I am  
17 John Gridley. I am appearing  
18 before you as the counsel to the  
19 Planned Parenthood Center of  
20 Buffalo. My remarks are directed  
21 very specifically to Section 1142  
22 under the present Penal Law,  
23 and Section 1145, and 1142 is en-

1 titled, "Indecent Articles", as  
2 you may recall, and Section 1145  
3 has to do with "Physicians' Instru-  
4 ments", which allows certain excep-  
5 tions to the application of 1142.  
6 I think you gentlemen, although  
7 I am no student of the Penal Law,  
8 did a very fine job in handling  
9 a difficult matter in the matter  
10 of the Obscenity section, and I  
11 compliment you and your staff  
12 with the new Penal Law, Sections  
13 1142 and 1145. However, as I  
14 understand it, there is a recommen-  
15 dation that this will be trans-  
16 mitted into the Public Health Law,  
17 and we submit to you that this  
18 is an inappropriate statute to  
19 be on the books in any section  
20 whatsoever.

21 These sections as you gentlemen  
22 undoubtedly know were enacted a  
23 great many years ago; 1881, I

1 believe, and they are certainly  
2 in this day and age, and are an  
3 expression of, I think to some  
4 extent, minority feeling. That  
5 at any rate, the validity they  
6 may have had at that time I think  
7 is no longer applicable, and that  
8 these should not be found in our  
9 Public Health Law.

10 I have formed a very simple  
11 premise that these are not obscene  
12 and indecent articles, and we are  
13 speaking of contraceptive devices  
14 to which this section directs us  
15 to. The best available evidence  
16 we have is that about 90% of  
17 fertile American couples utilize  
18 in one way or another some form  
19 of limitation of family size.  
20 When giving this figure I am  
21 obviously including the Roman  
22 Catholics. There is no question  
23 that a great many of them are

1 responsible enough that they are  
2 seriously concerned about the size  
3 of their families and the welfare  
4 of their families, and wish to do  
5 something about it. But to per-  
6 petuate in our state laws a  
7 statute which labels the most  
8 effective means of contraception as  
9 indecent articles is to categorize  
10 in a most unfortunate manner prac-  
11 tices which have come to be adopted  
12 by the vast majority of our people.  
13 The various methods of birth con-  
14 trol developed in the last ten  
15 years even, if you will, have ex-  
16 panded greatly. There are many  
17 new methods which in this country  
18 we people can approve merely from  
19 a social point of view, and on  
20 a national scale they have become  
21 almost life and death to some of  
22 these foreign countries. And it  
23 is only through the activities of

1 doctors and medical groups in this  
2 country that these devices have  
3 been developed in the face of  
4 Section 1142. But we are a world  
5 leader and it is up to us to  
6 apparently to not only develop  
7 these things, but to help the world  
8 use them. So I submit to you  
9 gentlemen, that the prescription  
10 for a contraceptive device through  
11 a penal statute which in effect  
12 is not honored in any way, which  
13 of course, is no answer. But the  
14 law unavailed of is certainly no  
15 law at all. That this is not  
16 serving the benefit of the people  
17 of this state, and it does not  
18 seem appropriate that we need more  
19 legislation singling out contra-  
20 ceptive drugs, and these articles  
21 are generally used by the vast  
22 majority of people. We are all  
23 aware of it and there is no sense

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of hiding your lights under the bushel basket.

But we are all aware of the fact that there is a vast religious difference of the application of these articles. What the position is of the Catholic church or will be in the future is not for certainly me or any of us to say. But at the same time we are in a sense practicing a kind of discrimination when we say to a large percentage of our people, "you may not use these devices because a group of our population believes that it is improper to do so". And whether this situation is changed again I submit we cannot say, but I think there is a general recognition not only in this country, but on a world-wide basis that this is getting to be a problem beyond the point of

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religious beliefs and even beyond the point of social welfare. In this country it is getting to be a matter of human survival, and this may one day be our problem in the United States. We don't know this, but these statutes are particularly inappropriate in the context of today's great consensus among people in all walks of life, and among all religious groups on the rightness, and even the necessity, for responsible parenthood.

I assume you are familiar with the book of Doctor John Rock, a very learned and well thought of obstetrician and gynecologist, who is himself a Catholic and this has caused some controversy to the church, but he has quoted in his book the views of some theologians on the subject, in which we have

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one by Stanislaus de Lestapes,  
S. J., Professor of Family Socio-  
logy at the Institut Catholyne  
in Paris, who is the Holy Sees  
representative at the United  
Nations World Population Conference  
in Rome in 1954. I wanted to bring  
this out to you, and I have never  
heard of him frankly, but here is  
a man who does represent Catholic  
thinking. And as yet the Catholic  
Church teaches that there is a  
principal right of a party today  
to practice a form of birth limi-  
tation provided that this regu-  
lation is inspired solely by  
motivation of genuine belief, and  
that it represents the order of  
values in the sexual function.  
I will not labor further with  
the question of theology because  
I don't think it is completely  
appropriate, and I don't think

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it is appropriate in a determination that it should be a part of the Public Health Law.

I think the rules as they are now constituted are strictly restricted to an official question of the Public Department. An issue, I think, of whether or not on a private basis private physicians and hospitals have been using prescribed various birth control methods for a good many years, and this is done, I think, legally, under Section 1145, which is the exception for physicians.

At the same time you are also aware that some of those articles at least are available on general sale at drug stores. Whether this is good or bad from a moral point of view I am not prepared to say.

We have some problems in our

1 society that I am sure any society  
2 will expect never to solve, but at  
3 the same time the most effective  
4 methods of birth control are those  
5 that are available only through  
6 physicians and are practiced by  
7 married couples who have had  
8 competent advice in this area. But  
9 I think the net result is to dis-  
10 criminate severely against lower-  
11 income families who depend on  
12 public agencies for medical ser-  
13 vices, and who do not have the  
14 money available to avail themselves  
15 of the private physician.

16 And it is for these reasons we  
17 support the position which was  
18 taken by the American Law Insti-  
19 tute when they drafted the Model  
20 Penal Code that the provision  
21 of "indecent articles" as applied  
22 to contraceptive devices should  
23 be dropped from their consideration.

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Again I say I realize it is not in the new Penal Law, but it is supposed to be in the Public Health Law, and I put it to you, if there is legislation made in the Public Health Law, which I don't think you gentlemen are concerning yourselves with, but it should not be couched in the present terminology of Sections 1142 and 1145. Thank you.

THE CHAIRMAN:

Thank you, Mr. Gridley. The Commission will consider it is desirous to relocate that section. Or drop it.

MR. GRIDLEY:

THE CHAIRMAN:

It will be reconsidered; its present decision to relocate it.

MR. GRIDLEY:

Thank you very much.

MR. GEORGE GROBE:

I am George Grobe, Jr., an attorney, and I represent the Erie County Society for the Prevention of Cruelty to Animals. This society is the second oldest humane society

1 in the United States which was  
2 founded in 1867, and since its  
3 founding it has been taking as  
4 parts of its duty the promotion  
5 of humane treatment of animals in  
6 many areas; education to the pub-  
7 lic, and working with the legi-  
8 slators in enacting legislation  
9 and promoting such humane treat-  
10 ment of animals. There was nothing  
11 done until President Millard Fill-  
12 more when he was a State Senator  
13 of New York State, and in 1873  
14 urged the passage of an anti-humanity  
15 law in the Legislature.

16 The Society firmly believes  
17 that the present animal laws under  
18 Article 16 of the Penal Law are  
19 doing a terrific job for promotion  
20 of humane treatment of animals,  
21 and feels that they are simple in  
22 statement, the public understands  
23 them, that the law enforcement

1 enforcement agencies have been  
2 working with them for a great many  
3 years, and that they are success-  
4 fully doing the job that they were  
5 intended to do. The Society feels  
6 that this Section should remain in  
7 toto in the new Code under the  
8 present revision of your Criminal  
9 Code.

10 Specifically, it is the Society's  
11 position that the wording of the  
12 proposed amendment would cause many  
13 difficulties with the enforcement  
14 of the anti-humanity laws in this  
15 state.

16 THE CHAIRMAN:

17 Do I understand you, Mr. Grobe,  
18 in saying that you think we should  
19 leave it as it is in toto in the  
20 Penal Law?

21 MR. GROBE:

22 Yes. Mr. Chairman, in connec-  
23 tion with this particular section  
Mr. Sullivan mentioned to me by  
way preparing the Code that he

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THE CHAIRMAN:

thought by that section that this  
is a serious ---

I am not suggesting that it isn't  
a good -- an appropriate proposal,  
but they do suggest that sort of  
thing belongs in the Penal Law.

MR. GROBE:

This is also our thought in connec-  
tion with this section is that we  
are now urging to make one law a  
legal judgment agency of the Dis-  
trict Attorney in connection with  
this section. We have eliminated  
a number of people to work with  
and when we are faced with the  
possibility of a multiplicity of  
enforcement agencies to deal with  
this complicates our task tremend-  
ously. We feel that these sections  
are good and that the ease of  
enforcing them will be maintained  
if they remain right where they  
are. And we are dealing with  
no increased enforcement agencies

1 on our part. We would like to  
2 see them stay right where they are.

3 In Section 250.35, I am not a  
4 scholar of the Penal Law, but the  
5 word "intentional" raises some-  
6 thing on our part. It appears to  
7 us that this might require proof  
8 of these cases. In other words,  
9 having as we do a well defined  
10 act ---

11 THE CHAIRMAN: Don't you have to prove intention  
12 now?

13 MR. GROBE: Well, it is my understanding/<sup>of</sup>the  
14 law now that these acts are well  
15 defined acts of cruelty without  
16 any law to back them up, and ---

17 THE CHAIRMAN: The Jury or Judge hearing a case  
18 has to find intentional conduct,  
19 does he not? You surely aren't  
20 suggesting that death or injury  
21 to an animal cured by inadvertance  
22 is sufficient?

23 MR. GROBE: No, I am not indicating anything

1 in that regard, but I think by  
2 accenting the use of this word  
3 and term and using it in the  
4 Statute may very well afford vio-  
5 lators of these acts an opportunity  
6 to escape their just punishment.  
7 THE CHAIRMAN: May I ask a question? Would your  
8 people prefer to the use of "in-  
9 tentionally" by itself, language  
10 like this; unjustifiable, inten-  
11 tionally or recklessly?  
12 MR. GROBE: As I understand, this has been  
13 proposed as an amendment?  
14 THE CHAIRMAN: That is correct.  
15 MR. GROBE: To the Code?  
16 THE CHAIRMAN: How does that suit your people?  
17 MR. GROBE: My people's position is that we  
18 want the Code, the new Code, to  
19 retain these provisions of the  
20 Animal Law.  
21 THE CHAIRMAN: I understood that, but ---  
22 MR. GROBE: That is all they want, and that is  
23 what they are striving for. They

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JUDGE CONWAY:

MR. GROBE:

JUDGE CONWAY:

do not want these changes. They say these laws are effective and just, and are fair, and they want to retain them.

Mr. Grobe, I take it your organization does not prosecute charges under these sections in Erie County. Only through the office of the District Attorney.

In Monroe County our Humane Society does the prosecuting itself, and we heard yesterday from the attorney who has actually been the District Attorney as far as these cases are concerned for the past thirty years. He felt he not only would object to the present Code in our proposal, but that if it were amended to include the phrasing that the Chairman referred to, that this would be an extension over the beneficial results of the law, this would be even better

1 than it is now. And this man has for  
2 thirty years done all the prosecut-  
3 ing in Monroe County.

4 MR. GROBE:

5 Mr. Sullivan has been with us at  
6 least as long as that, and he has  
7 been with the District Attorney in  
8 prosecuting these laws, and he  
9 has been well qualified with the  
10 District Attorney in connection  
11 with it, and he has raised no  
12 complaint the way the present laws  
13 are.

14 THE CHAIRMAN:

15 One of our difficulties is this:  
16 We feel one of the mandates that  
17 we have is to have the Statute  
18 cite as precise under all the  
19 circumstances what is prohibited  
20 and what is required for conviction  
21 under that Statute. We are trying  
22 to fill the gap that over the years  
23 the courts have had to fill by  
that law, and one of these is,  
for example, what we are talking

1 now. We think the Statute ought  
2 to say if the courts require the  
3 proof of intentional conduct.  
4 The Statute ought to say, and  
5 that is why we are hoping that  
6 perhaps we would be assisting  
7 those that protect the animals,  
8 and I assure you we know that, by  
9 adding "intentionally or recklessly!"  
10 It is our judgment that reckless  
11 conduct might be covered by the  
12 present Statute.

13 MR. GROBE:

All I can say to you gentlemen for  
14 the Society's benefit is that these  
15 laws, they want them maintained in  
16 their present condition.

17 MR. DENZER:

18 May I ask one question? We are  
19 confronted with a great number of  
20 humane societies including SPCA  
21 and a group of others, and they  
22 tell us continuously how difficult  
23 it is for them to get convictions  
in the field of cruelty to animals;

1 how hard it is to prosecute a case.  
2 And in the same breath they speak  
3 of laws, or for laws and so forth  
4 that would help them. It seems to  
5 me something inconsistent of the  
6 position of the collective societies  
7 when they say on the one hand how  
8 difficult it is to prosecute, and  
9 how on the other hand they want to  
10 retain the present legislation  
11 without a change of a comma. Per-  
12 haps some of the difficulty that  
13 the humane society has over the  
14 years is perhaps the legislation  
15 on the books is inadequate, and  
16 we are trying to make it all more  
17 inclusive. We are just trying  
18 to point out to you there is an  
19 inherent contradiction in these  
20 statements that have been made,  
21 apparently, or just here in the  
22 Society here in this County.

23 MR. GROBE:

As far as the Erie County Society

1 is concerned is that we are satis-  
2 fied with the Statutes of the  
3 present law. We are satisfied  
4 with the implements of the enforce-  
5 ment of the present section and we  
6 want them retained.

7 THE CHAIRMAN:

8 One last question; Mr. Grobe, do  
9 you know what the position of the  
10 Buffalo Society would be if it  
11 were faced with this choice,  
12 either ---

13 MR. GROBE:

14 Just a minute, Mr. Chairman, I  
15 think maybe Mr. Sullivan could  
16 answer this.

17 THE CHAIRMAN:

18 This is very simple. Would the  
19 Society, if this were the choice  
20 you have, would the Society favor  
21 the language in the Code by adding  
22 "unjustifiable, intentionally or  
23 recklessly", and leaving it in  
the Penal Law, or would they favor  
a transfer of all the present  
sections to the Code without change?

1 MR. SULLIVAN:

I truly believe that the Code would be acceptable if one condition would be left in the Penal Law.

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5 THE CHAIRMAN:

Thank you. This was noticed by the Commission as we heard representatives across the state, and we wanted to know what your view was.

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10 MR. VOLKER:

The other organizations have taken the same attitude.

11  
12 THE CHAIRMAN:

There is a little difference in opinion. Are you people members of the State Humane Society?

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14  
15 MR. GROBE:

Mr. Sullivan is the former president of the Society.

16  
17 THE CHAIRMAN:

We had a little difficulty sorting out the SPCA and the ASPCA.

18  
19

Thank you very much.

20

MR. GROBE:

Gentlemen, Mr. Sullivan has received correspondence which are letters in which are directed that these letters be submitted to you.

21

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23

1 THE CHAIRMAN:

All right, fine.

2

Mrs. Cielen, do you wish to be

3

heard?

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MRS. LOUISA CIELEN:

I am Mrs. Louisa Cielen and I

5

represent the Western New York

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Chapter, National Association of

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Social Workers, and I would like

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to make a statement of position.

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The Western New York Chapter

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of the National Association of

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Social Workers directs its remarks

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and concern to that portion of

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the Commission's 1964 Study Bill

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which deals with the insanity

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definition. We wish to confirm

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the stand of NASW as supporting

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the bills which have been intro-

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duced to make these changes. It

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is our opinion that portions of

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the present laws dealing with the

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insanity defense are outdated, and

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that it is in the interest of

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the people of the State of New York

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to bring these laws up to date as has been proposed by the current bills being considered.

We believe that this is necessary to conform to the present knowledge in the field of psychiatry and human behavior.

THE CHAIRMAN:

Thank you very much. We appreciate that. Is there anyone else here who wishes to be heard? (no reponse) We declare the hearing closed.

\* \* \* \* \*