

MINUTES OF A PUBLIC HEARING
HELD BY THE TEMPORARY COMMISSION
ON REVISION OF THE PENAL LAW
AND CRIMINAL CODE.

Erie County Legislative Chambers
Erie County Hall
25 Delaware Avenue
Buffalo, New York

February 1, 1968
9:30 A. M.

PRESIDING:

HON. RICHARD J. BARTLETT, Chairman

PRESENT:

HON. BENJAMIN ALTMAN, Member of the Commission

HON. JOHN R. DUNNE, Member of the Commission

HON. ARCHIBALD R. MURRAY, Member of the Commission

HON. EDWARD A. PANZARELLA, Member of the Commission

HON. ROBERT BENTLEY, appearing in behalf of the
Chairman of the Senate Finance Committee

STAFF:

PETER J. McQUILLAN, ESQ., Counsel to the Commission

HELEN E. GORDON, Executive Secretary to the Commission

MR. BARTLETT: Ladies and gentlemen,
I will begin the hearing now.

I'm Richard Bartlett, Chairman of the
Temporary Commission on the Revision of the Penal
Law and Criminal Code. The Commission is holding
a hearing here in Buffalo this morning on the pro-
posed Criminal Procedure Law.

Here with me are members of the Commis-
sion and I'll introduce them: On my right, Senator
John Dunne; if I can find him for a minute, on my
far right, Assemblyman Benjamin Altman; Edward
Panzarella, Assistant District Attorney of Kings
County, member of the Commission; Archibald Murray,
Counsel to the Crime Council, who is also a member
of the Commission; Robert Bentley, representing
Senator Anderson, Chairman of Senate Finance; and
introducing my staff, Peter McQuillan, Counsel to
the Commission, and Mrs. Gordon, Executive Secretary
to the Commission.

Our purpose here this morning is to so-
licit comment on the proposed Criminal Procedure
Law which the Commission has tentatively promulgated.
We completed work on our first draft which, during

the summer of 1967, was then circulated throughout the State, was printed for us by McKinney, the Thompson Company, and some 20,000-odd copies have been distributed throughout the State.

We've had a number of requests directly to the Commission for copies of the proposal and we've endeavored, of course, to provide them when asked for.

It's important, if the Commission is to succeed in its task of providing a modern procedural statute for the processes of criminal justice in New York State, that we have the comments, critical or otherwise, of the bench, the bar, law enforcement agencies, private citizens, as to whether or not this proposed code provides an efficient and, more important of course, fair procedure for the handling of criminal charges from arrest through trial and appeal and post-appeal remedies.

We do not claim any special virtue as draftsmen. We think -- we know we have an excellent staff. We know we've tried hard to produce a code which is an improvement over the present.

May I suggest to you before I call on

the first witness that the report of the Field Commission a hundred years ago when it submitted its code to the Legislature contains a sentence which I think is most appropriate to the work of our Commission and the point at which we are today. The Field Commission said:

"In submitting the result of their labors to the Legislature, the Commissioners will not pretend to assert that it is free from omissions and defects, for no human work can be without them. They have spared no effort to render it perfect and, in return, they ask for it the candid consideration of the Legislature and the people."

That's precisely our appeal.

We propose, after concluding our hearings this winter -- and as a matter of fact, we will conclude them on the 17th of February because we'll be holding them a couple a week from now to then -- the Commission will again consider the proposal, make such changes as appear to be appropriate following receipt of comments at the hearings. We will then submit the proposal to the Legislature as a study bill for 1968. Hearings will be held again next

Fall on the study bill and before the beginning or at the beginning of the 1969 session of the Legislature, we will submit and recommend for passage a new Criminal Procedure Law for the State of New York.

We would hope, through that process of writing and rewriting, soliciting opinion, considering opinion, considering change in view of recommendations, to have a distillation of the best thought available and, in turn, we hope produce the best possible procedural statute for New York.

We will now call on our first witness, representing the New York Civil Liberties Union, a longtime colleague and an old friend, Professor Herman Schwartz from the Buffalo Law School. *than p. 36*

PROFESSOR HERMAN SCHWARTZ: Thank you, Mr. Bartlett. Since you identified me, I'm Professor of Criminal Law here at the law school at the State University Law School, and I appear here today on behalf of the New York Civil Liberties Union.

This procedural law, obviously, has a very large number of extremely important, extremely interesting proposals. Because of the time problems that some of us have had in connection with when we

got it and how the comprehensiveness in scope of this procedural law applies, which really seems which is really an attempt to create an entire procedural system for what is the most advanced state in the union, most advanced industrially and every other way, this kind of effort will obviously take time and requires a lot of study and in my prepared statement, I said I hope that the Commission and the Legislature would take due time, sufficient time, to consider it and I was very pleased to hear about the procedure that you have outlined which, as with the Penal Law, should enable sufficient time to consider it, and I just want to depart a moment from my statement to commend the Commission on the Penal Law. I've just spent a semester teaching it at the law school and I must say that we found in analyzing it in very, very close detail, putting it through the crucible of cross-examination between student and teacher, that it holds up quite well, holds up very well indeed, and so I would commend the Commission on the Penal Law and I'm sure that as we live with it for a while, a lot of the complaints about it, a lot of the concern about it, which I notice some of my friends here

on my right have expressed from time to time, I'm sure that even without amendment, although I'm told there will be some, that it will be found to be baseless and so again, I would like to commend the Commission for that and I hope or I would hope that I would have a similar reaction to the procedural law when I've had a chance to go through it all.

My comments this morning, however, will not be entirely in that vein. The one area I have had a chance to study, and that's in part because of some background, is the area of Article 370-375 on wiretapping, on eavesdropping and on the motion to suppress, and, first of all, I'd like to reiterate again the total opposition of the Civil Liberties Union to virtually all forms of electronic eavesdropping, an opposition confirmed and made even stronger by the recent Supreme Court decisions in Katz and in Berger.

Both of these cases stressed the same great danger of such eavesdropping that the Union has pointed to from the start, its dragnet quality, as a result of which, as the court in Berger put it -- and I quote here, "The conversations of any and all

persons coming into the area will be seized indiscriminately and without regard to their connection to the crime under investigation."

And, as we pointed out at other times, the phone tap, for example, catches usually the normal conventional phone tap catches the calls of everyone who calls the phone tapped, every one who uses the phone to make a call, and that all the calls of the person whose phone is tapped and under suspicion, no matter how irrelevant those calls may be, and that eavesdropping -- the bug that's put into a room or an office -- is even more pernicious for that can reach not only phone conversations but all of the conversations in other instances in the most intimate parts of the home or business. And I would remind you of the bug in the Irvine case which was put in the bedroom of a married couple in order to catch a gambler and the numerous cases including some here in New York of bugs put in lawyers' offices and the like.

Recent hearings show that FBI agents, police officers, Internal Revenue officers and other agencies and some of the court cases show that the

New York police and others as well have not hesitated to try to overhear such conversations in every part of the home.

Now, in detail, our position has been set forth many times. There's not much need to set it out at length but what I'd really like to do here is rather than discuss it and put you to sleep at this early part of the morning more than you are likely to be after a trip from out of town, I'd just like to set it out in a series of propositions and if at any point or any one of these strikes you as particularly outrageous, well, I take it you'll sort of let me know about it.

The first of these propositions --

MR. BARTLETT: You won't accept a blanket demurrer at this point?

PROFESSOR SCHWARTZ: I have a feeling that that's what I'll get.

The first thing -- and I have here a series of about five or six propositions -- the first, and I'm not sure that this will be disputed; I doubt that it will, is that privacy is essential to liberty. A free society can't do without it and a totalitarian

state, a police state, cannot tolerate it.

Second, electronic eavesdropping, whether of the telephone or of the home or office poses one of the greatest of all threats to privacy and free thought. The mere awareness of the possibility that someone may be listening in on a conversation is enough, I think, to send shivers up the spine and to chill free discourse.

And three, with very rare exceptions as in the Katz case -- and I'll discuss that in a few minutes -- conventional electronic eavesdropping is inherently unlimitable and uncontrollable.

Four, on the basis of both experience and reason and logic, court ordered systems can't be relied upon.

Five, there is a great deal of disagreement among law enforcement officers and personnel on the value of electronic eavesdropping. In a free society, those who would invade and curtail freedom bear a heavy burden of justification. Since the harm to liberty posed by electronic eavesdropping is clear and the benefits are indispute among those ordinarily expected to favor it, that burden has not

been borne, and among those I would include, of course, the Attorney-General of the United States, Mr. Ramsey Clark; Mr. Thomas Minehart, former Attorney-General of Pennsylvania; Mr. Thomas Eagleton, former Attorney-General of Missouri; Stanley Mosk; former Attorney-General of California; the Chief States Attorney in Cook County, Illinois and a few others.

Now, this is not to say that these devices are valueless, as to which we make no supposition. Other practices, however, in violation of the Fourth and Fifth Amendments are probably useful also. Our point is rather a more limited one. The case for the great need of electronic eavesdropping is so much in dispute that the choice between liberty and effective law enforcement is not as acutely difficult as some have made out. That's the general background on the basis of which we make our specific comments. Those are my background remarks.

Now, in terms of the specific proposals in the Criminal Procedure Law -- and I would say, by the way, that the staff from what I can tell has done a very, very good job of drafting; it's as good

a job of drafting a wiretapping law or eavesdropping law, barring for the moment the policy considerations as I have seen them, and I may say that I have looked at a lot of legislation for the last six or seven years both in Congress and in New York.

MR. BARTLETT: In fairness and candor, I think I should say that Assistant District Attorney Richard Uviller of Mr. Hogan's office, New York County District Attorney, played a major role in the drafting of this section.

PROFESSOR SCHWARTZ: Yes, I know that. I detected his fine hand.

MR. BARTLETT: He has intimate familiarity with Berger, as you know.

PROFESSOR SCHWARTZ: Yes, yes. For those who may not be familiar with it, he argued and lost Berger, to those people in the audience.

MR. BARTLETT: Yes.

PROFESSOR SCHWARTZ: Now, the bill purports to comply with and indeed to go beyond the court's requirements in Berger and I would assume Katz as well. It does not, and in several crucial respects it falls short.

First, the most significant aspect I think in question is specificity. The staff notes several times refer to the "particularity of description consonant with the Fourth Amendment demand". But although this bill is obviously preferable to its predecessor -- no question about that -- its provision allowing continuous eavesdropping on premises for 15 or more days -- and this can be 15, 30, 45, depending on the number of renewals -- this kind of eavesdropping allows precisely the kind of "indiscriminate seizure of the innocent conversations of numerous innocent people" that Berger condemned.

Under this provision, a district attorney can obtain authority to place a bug in a private home and to leave it continuously in operation 24 hours a day for 15 days, catching the conversations of every occupant or visitor who's there, including lawyers and others. If necessary, the order may be renewed. There is no limitation on the number of renewals and each renewal is for 15 days. Although the application is required to designate the relevant hours of the day or night, this appears in subsection (e) of 370.15, there is no provision for

any limitation of the tap to such times in 370.35 which sets out the warrant and the order.

Now, although the particular conversations sought to be overheard may not be legally privileged -- and by that, this isn't, I just realized that this isn't that artfully drafted a sentence -- by that I mean that in asking for the application, in applying for the order, the district attorney has to say that "I'm not asking for any legally privileged conversations". Although that's true, how can one filter these out? Although the provision may eliminate the deliberate breach of lawyer-client confidentiality that was involved in Berger -- and I will remind you that a bug was put in Berger for four months in a lawyer's office -- what of the Morhouse case recently decided by the Court of Appeals where the bug on Morhouse's office caught lawyer-client conferences. The district attorney blithely told the court that, "The police officers monitoring this conversation were instructed not to and did not listen to or record attorney-client conversations". Rather a plausible assertion, to put it mildly, since in the very same investigation police

deliberately put a bug in Lawyer Nyer's office for four months. I guess that kind of argument calls for what we lawyers call a legal fiction, something that we know isn't so but which we act upon as if it were.

Now, this kind of very limited eavesdrop that is acceptable can be seen from Katz where the Court approved a bug on the public phone booth and in Berger where the Court carefully described the limited kinds of eavesdropping it permitted, putting particular stress on the Osborn case where, as you probably know, James Hoffa's lawyer was convicted of attempted jury tampering. In each of these, the eavesdropping was limited in time, place and, more importantly -- most importantly perhaps -- in people.

In Katz, FBI agents had reasonable cause to believe that Katz would use certain phones at certain times. This was in connection with gambling. A bug was placed on the booth activated only when Katz arrived to use it and turned off when he left. In apparently approving this kind of eavesdropping, because it's not entirely clear because the Court did this in passing, the Court emphasized that no one else's conversation was overheard. It noted,

and I quote here, "On the single occasion where the statements of another person were inadvertently intercepted, the agents refrained from listening to them", and this I think is highly plausible in this context since there is no reason to think that the agents in this case were particularly interested in that other person's conversation.

Although holding that the failure to obtain prior judicial approval made this eavesdropping illegal -- and I quote -- "Accepting this account of the government's actions as accurate" -- and that's what I've just described -- "it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate clearly apprised of the precise intrusion could constitutionally have authorized with appropriate safeguards the very limited search and seizure that the government asserts, in fact, took place".

Katz thus permits eavesdropping in one of the rare situations where it can be limited: A bug on one side of conversations which take place in a sporadically used place that cannot be easily be used by more than one person and where the bug is

limited to the occasions that the suspect actually uses the bugged premises.

ASSEMBLYMAN ALTMAN: Do you approve that limitation, Professor?

PROFESSOR SCHWARTZ: Yeah, yes. As a matter of fact, just by coincidence, I was in Michigan in September at an AACU Convention and a member came up to me and he was with the State's Attorney-General in Michigan and after telling me how much he disagreed with what I had to say in general, he said, "What would you think of this kind of situation?" -- and this is just sheer coincidence -- and it was almost exactly the same as Katz. He said they knew because of an informer that somebody was going to use -- the suspect was going to use a pay phone at a certain time to make an appointment to meet somebody else and they said could we, do you think we could put a bug on that phone for that one conversation and then remove it and I said yes and, oddly enough, this was exactly the same as Katz and this was before Katz and after Berger.

ASSEMBLYMAN ALTMAN: How do you line that up with the Union position that it's against all

eavesdropping and wiretapping?

PROFESSOR SCHWARTZ: Well, essentially it's because I think we haven't thought of this case. What we were thinking of primarily was the case of the conventional bug and tap which I'm talking about, the kind that this statute would authorize. I may say I don't know whether the Board would entirely -- I assume they would go along with what I have said -- the Board of the Union would. We haven't had the time, and this is part of the time pressure, but certainly insofar as I have been their spokesman on several occasions, this strikes me as the kind of situation which just, I would endorse, I would allow.

Now, as I have said too, I think to Assemblyman Altman I think, is it?

ASSEMBLYMAN ALTMAN: Yes.

PROFESSOR SCHWARTZ: Approval of that type of situation does not imply approval of a continuing 15-or 30-day bug on a house or an office where people congregate to talk of many things. It may not even authorize bugging of a home or office for sporadic periods because of the large number of innocent people in conversations which may take place

then as well. A telephone booth, because of its small and limited size is, therefore, a rather special situation and in this respect Katz is quite consistent with the language and thrust of Berger which condemned the indiscriminate seizure of the conversations of innocent persons when "a bug" -- and I quote here -- "is in operation in an area during such a long and continuous (24 hours a day)* * *"

Indeed, in both situations the Court pointed to other types of electronic eavesdropping which it approved, almost all of which involved very narrow circumstances where only one suspect pretty much could be overheard. Osborn, I've mentioned. That was a case where an FBI informer went in to Osborn who was suspected of attempted jury tampering with a recorder on him and he recorded just that conversation.

The other three cases are, interestingly enough, the same kind of thing. Lopez is the same thing, where an internal revenue agent went in with a recorder, just the one conversation. In a third case only, the authority which may be kind of shaky for other reasons, an informer went in with a radio trans-

mitter but again one conversation one suspect, and even in the Olmstead case which I don't know why the Court cited it, it may have cited it because of the lack of trespass at that point but in checking the record in Olmstead, I found out that there too all of the conversations which were overheard -- there were four of them -- involved an informer who told the FBI that he was going to talk with people who were trying to perpetrate a bankruptcy fraud and the only conversations that were overheard were those that the FBI told this fellow to set up and which they went to overhear.

MR. BARTLETT: Traditionally, that's never been viewed as eavesdropping really, has it?

PROFESSOR SCHWARTZ: That's right, that's right.

MR. BARTLETT: Because one of the participants in the conversations understands --

PROFESSOR SCHWARTZ: That's right, that's right.

MR. BARTLETT: -- that a record is being made.

PROFESSOR SCHWARTZ: That's right. Yet

these are the cases which the Court said are appropriate and --

MR. BARTLETT: Until Katz.

PROFESSOR SCHWARTZ: And in Osborn -- Oh, no, no. In Osborn, the Court -- in Katz, the Court quoted from Osborn saying this is the kind of thing we approve.

MR. BARTLETT: I understand, but Katz, if you take that to be approval --

PROFESSOR SCHWARTZ: Oh, yes.

MR. BARTLETT: -- of the tap --

PROFESSOR SCHWARTZ: Would allow one additional situation.

MR. BARTLETT: -- involves --

PROFESSOR SCHWARTZ: With non-participant eavesdropping.

MR. BARTLETT: Right.

PROFESSOR SCHWARTZ: That's right.

Now, as I said, in contrast with this and Berger, the Court repeatedly condemned continuous surveillance over a prolonged and extended period in Berger, the very kind of surveillance I think that Article 370 would permit.

Now, the second part -- again, these I think are fundamental policy issues rather than questions of drafting -- notice and suppression. The heart of any court order system is and it must be in the notice to suppress, in the motion to suppress and the requisite notice. In the first place -- and this may be just a minor thing and I don't want to make much of this -- I found no exclusionary rule expressly set forth. Section 375.20, subparagraph 2, excludes evidence obtained by unlawful eavesdropping "obtained under circumstances precluding admissibility". But these circumstances are not set forth. If Article 370 does indeed go beyond federal requirements as it's claimed and the violation is solely of these extra requirements --

MR. BARTLETT: May I interrupt?

PROFESSOR SCHWARTZ: Yeah.

MR. BARTLETT: We do propose, and it's not in here, an amendment to C.P.L.R. --

PROFESSOR SCHWARTZ: I see.

MR. BARTLETT: -- which is where it belongs.

PROFESSOR SCHWARTZ: I see.

MR. BARTLETT: Because we intend to apply it to civil or criminal matters.

PROFESSOR SCHWARTZ: General evidence.

MR. BARTLETT: In the general evidence rules of C.P.L.R., to have a section dealing precisely with that problem.

PROFESSOR SCHWARTZ: Yes, fine. Well, that takes care of the problem then.

ASSEMBLYMAN ALTMAN: 4506.

MR. BARTLETT: In the 4500's.

PROFESSOR SCHWARTZ: That's where some of it is now, I know.

MR. BARTLETT: Right. We intend an amendment of the present 4506 simply to conform.

PROFESSOR SCHWARTZ: I take it that the Criminal Procedure Law would have a reference -- a cross-reference to something about under circumstances as set forth in Section 4506.

MR. BARTLETT: Permanent or otherwise.

PROFESSOR SCHWARTZ: Otherwise, it's kind of hard to think that you should check the civil rules for that kind of thing in a criminal case.

MR. BARTLETT: Agreed. If we are to

have a Criminal Procedure Law which should handle all aspects of criminal procedure it should be cross-referenced.

PROFESSOR SCHWARTZ: Now, secondly, why is it enough if notice is given to "the owner, occupant or lessee of the premises or the subscriber to the telephone"; why should not it also be given to -- and here I'm not mentioning the time but the person -- why should not it also be given to the person whose calls are intercepted. There seems to be no reason why the person whose conversations are the target should not be notified for he's the one who will often have the most interest in challenging the eavesdropping. Such notice is particularly important when we turn to 375.30, paragraph 1 -- subparagraph 1 -- which is the motion to suppress. Who makes the judgment as indicated in the procedural law whether the evidence from the eavesdrop is being used as part of the prosecution? The statute says, I think, only that whenever it will be used as part of the prosecution either directly or indirectly, the defendant must be notified. Who makes that judgment? Federal prosecutors, for a long time, had an invariable

answer whenever the claim of wiretapping or eavesdropping was made. None of the evidence to be used against the defendant came from the tap. This served effectively to block any inquiry to the existence of such wiretapping or eavesdropping. Just this week, I think, the federal prosecutors will not be able to do that any more because there will be a Supreme Court decision or there was a Supreme Court decision on Monday which said that if there is wiretapping it's assumed, I think, unless shown otherwise or something -- and I don't know the exact details because I haven't read the decision, but this won't be possible any more on the federal level. It might be not possible, I don't know, by constitutional carry-over.

MR. BARTLETT: Well, the requirement of the statute is clear enough, is it not, that it must give notice if he intends to use wiretap or evidence derived from wiretap?

PROFESSOR SCHWARTZ: That's right, but there is a question of challenging his judgment because the whole question of the fruit of the poisonous tree is itself a very complicated legal question which the Supreme Court hasn't done much to clear up

outside of immediately just sort of setting out in the Robinson case the guidelines.

MR. BARTLETT: In terms of statute though, what more can you do than say the prosecutor must give notice under these circumstances?

PROFESSOR SCHWARTZ: Oh, the prosecutor must give notice whenever a wiretap was involved in the investigation.

MR. BARTLETT: I see what you mean.

PROFESSOR SCHWARTZ: Yes, rather than regard to whether it produced anything that is used.

ASSEMBLYMAN ALTMAN: Irrespective of whether he intends to submit this as evidence.

PROFESSOR SCHWARTZ: That's right, that's right. That way you can check on whether or not it did, in fact, come. The interesting thing, by the way, is that a lot of the revelations recently of eavesdropping on the federal level by internal revenue and FBI agents has been that very often the United States Attorney purportedly, I take it bona fide, has had no idea of whether or not the evidence he used came from wiretapping or eavesdropping. It turned out that a lot of it did. The FBI just didn't tell

him. He said, here is our information and he just sort of, I guess hear no evil, see no evil and that was it, and so it seems to me that that, you can't rely solely on the prosecutor's statement either wittingly or unwittingly. He may not be accurate in that statement and it appears that the rule should be, as I mentioned here and Judge Learned Hand set it down in the Goldstein case, that where the existence of electronic eavesdropping is shown -- and here is where your notice comes in -- the prosecution must show that its evidence was not derived therefrom.

Now, finally, and this is a more controversial matter, why the automatic exclusion of "secret recording of conversations with the consent of one of the parties"? The staff notes say that this is not eavesdropping, the point that Chairman Bartlett mentioned a minute ago. The Court, however, in both Katz and Osborn, pointed up -- Katz and Berger rather -- pointed to the judicial authorization in Osborn which involved precisely such a recording, as vital to its legality and I give this citation to Katz there and to Berger so I think, to be on the safe side, even where consent is involved there ought

to be judicial approval.

Three, wiretapping: I have left for last the most troublesome aspect of this proposal, an aspect which continues the tradition of lawlessness that New York has followed at least since Benanti in 1957 and earlier since Schwartz, I think, in Texas in 1952.

MR. BARTLETT: I take it this is the matter about which you and I talked at greatest length this summer?

PROFESSOR SCHWARTZ: Yes, yes.

MR. BARTLETT: And without trying to cut you short, do you feel that the Katz case fortifies your point of view on emergency tap?

PROFESSOR SCHWARTZ: Wiretap? I don't think Katz really affects that at all.

MR. BARTLETT: On the question of emergency eavesdropping?

PROFESSOR SCHWARTZ: Yeah. Oh, on emergency eavesdropping, I actually -- that's one thing I'm not taking a position here at all.

MR. BARTLETT: O.K.

PROFESSOR SCHWARTZ: I'm kind of

troubled about that but since I haven't had a chance really to think about that problem and since there will be more time, this is sort of what I meant at the beginning about the need for more time, I'd like to think more about that.

MR. BARTLETT: But in fairness, I think that you should know and everyone here who's interested should know that the administration plans to submit a wiretap proposal to the Legislature this year apart from the enactment of the Code, the Criminal Procedure Law, and so as to this portion of our proposal, it may well be that it is dealt with by the Legislature some time prior to dealing with the whole criminal procedure.

PROFESSOR SCHWARTZ: Well, my position, as I said, is that regardless of Katz and Berger which deal only with constitutional limitations, Section 605 effectively blocks New York State from authorizing any kind of wiretapping and this is wiretapping, not electronic eavesdropping.

This statute and any legislation that is proposed along the same lines -- and I take it it would be along the same lines -- deliberately violates

Section 605 of the Federal Communications Act, which bans the interception and divulgence of wiretapping conversations or any use of these conversations. Katz and Berger do not in any way relax the force of Section 605. They merely add a constitutional ban on non-trespass or on eavesdropping and impliedly bring wiretapping under the Fourth Amendment.

In 1961, District Attorney Hogan admitted that divulgence of wiretap evidence in Court was a criminal act. This admission was made in direct response to exactly the same conclusion by United States Circuit Court Judge Sperry Waterman concurring in the Pugach case and judges in New York who have refused to issue wiretap orders have concurred and, of course, the Supreme Court made the same decision in many applications --

MR. BENTLEY: Which Pugach case?

PROFESSOR SCHWARTZ: In the Second Circuit Court, Pugach against Dollinger.

MR. BENTLEY: There are a million Pugach cases.

PROFESSOR SCHWARTZ: I'm aware of that. Now, there can be no doubt, I think, that this

article expressly prohibits the use of wiretap, divulgence in Court, and surely contemplates that such conduct is purely a violation of federal law.

MR. BARTLETT: Of course, if we are wrong, then so are six out of seven members of the Court of Appeals, don't you agree?

PROFESSOR SCHWARTZ: Exactly.

MR. BARTLETT: Kaiser decision?

PROFESSOR SCHWARTZ: Exactly. I quite agree, and I think this is part of New York's decision.

MR. BARTLETT: We prefer to think that we and the six members of the Court of Appeals are right.

PROFESSOR SCHWARTZ: Well, wait a minute, let me backtrack just a minute. I'm not sure that the six members of the Court of Appeals deny that this was a federal crime. What they said was that they would not exclude wiretap evidence. I think that's all the issue is.

MR. BARTLETT: Didn't they say in effect that in their view it didn't apply to State law enforcement?

PROFESSOR SCHWARTZ: If they did, then they were very wrong because it was flatly said in Benanti, which created the great outcry in 1957, that it did and it was sort of intimated in 1952 as such in Schwartz against Texas that it did. I don't think there's much doubt about that.

The fact, as I said, this conduct is as criminal as any other violation of federal law and the fact that it's done for a public purpose or benefit makes no difference, as Brandeis reminded us in his dissent in Olmstead. If this is enacted and wire-tap evidence is introduced in court or otherwise used and perhaps if merely an interception takes place, although this is up in the air, but certainly if it's introduced in court, everyone involved in preparing and promoting such enabling legislation is guilty of aiding and abetting a federal crime. Obviously, no prosecution will take place despite Judge Waterman's demand for those prosecutions seven years ago. The United States Department of Justice will not prosecute a New York law enforcement official, I think less likely a New York State assemblyman, and very unlikely Governor Rockefeller, although that depends

on political considerations in the future.

MR. BARTLETT: Not Mr. Morgenthau
anyway.

PROFESSOR SCHWARTZ: Not Mr. Morgen-
thau.

MR. BARTLETT: I say that seriously.

PROFESSOR SCHWARTZ: I know, I know.
Especially since the FBI has been caught itself in
so much illegal eavesdropping with no prosecution so
far, but the act is no less criminal.

As Chief Judge Fuld said in a differ-
ent context just a few weeks ago, courts do not
preserve justice by allowing further criminal acti-
vity to take place. New York has flouted federal law
for a long time now, and this is another reason for
our opposition to the wiretapping aspects of this
Article. As Brandeis said, the government is the
omnipresent teacher and this matter in New York
despite its good intentions is teaching lawless law
enforcement.

Thank you.

MR. BARTLETT: I have one -- yes?

ASSEMBLYMAN ALTMAN: I would just like

to re-emphasize Chairman Bartlett's comment that we will be having legislation this year that the Governor's office is going to sponsor and if you have any other comments, you can be ready for him.

PROFESSOR SCHWARTZ: Well --

MR. BARTLETT: I think you can probably -- I don't know how soon the bill will be introduced but within a month some time.

PROFESSOR SCHWARTZ: Yeah. Well, the Union, of course, has the legislative representative up there, Neil Fabricant, and I take it he will see it as soon as most people will.

MR. BARTLETT: One point I'd like to make: You did note, of course, that our proposed statute does preclude the eavesdropping, eavesdropping upon privileged conversations.

PROFESSOR SCHWARTZ: The deliberate eavesdropping on privileged conversations.

MR. BARTLETT: Right.

PROFESSOR SCHWARTZ: Yes, yes, and I made that point.

MR. BARTLETT: So I think it's fair to say that an application which was based on an eaves-

drop of a lawyer-client conversation ought to be denied at the outset under the statute.

PROFESSOR SCHWARTZ: That's right, that's right, and which was based on an attempt to eavesdrop.

MR. BARTLETT: On an attempt.

PROFESSOR SCHWARTZ: That's correct, and I'm sure I've been struck and I'm sure there has been by normal methods, sociological methodology, one can draw from this the fact, I'm sure, that a huge number or a huge proportion of the cases that reach the Court involve client-lawyer eavesdropping. I'm shocked at this, by the way. It's just come to my mind recently but if you look at the New York cases, if you look at the federal cases, the cases that the Supreme Court has been throwing out recently over and over again, they involve taps on lawyers or on lawyer-client conversations, the Katz case, the Berger case, the Morhouse case. I'm not familiar with Nyer, Kaiser, the Roberts case a few weeks ago where the Courts threw something out, the Coplon case in 1951-- I mean over and over again, you know, and it strikes me that this must be more than accident but, on the

other hand, that's not a situation, one doesn't know how representative a sample that is, but I'm really amazed and surprised by this. I'm sorry to have taken so much time. I didn't realize it would take that long.

MR. BARTLETT: Any other questions?

(No response.)

We will now hear from Sheriff John Tutuska, Sheriff of Erie County. You can speak from there if you would like or use the mike over here I think.

MR. JOHN TUTUSKA: I'm sure everyone can hear.

Mr. Chairman, members of the Commission: The problems which face each and every law enforcement officer today are manifold and complex. The instances of crime in our nation are becoming more numerous each day. It is, therefore, incumbent upon all persons connected with law enforcement to use every effort to streamline enforcement procedures and make them practical and efficient.

When the revised Penal Law took effect, there were many who felt and still feel that mistakes

were made. This has led to considerable confusion among law enforcement personnel as well as legislators who are now beset with the complicated task of sifting out and attempting to reconcile these alleged mistakes.

Now, we are faced with a revised Criminal Procedure Law. We want no mistakes to plague and cripple law enforcement this time. It is, therefore, incumbent upon all of us to see that this law when it is enacted is effective and in decreasing the rate of crime and thereby protecting the honest citizen in his home and on the street as well as the law enforcement officer in his duties.

To this end, my staff and I have been and still are conducting a thorough study of the proposed revisions of the new law and will be making specific suggestions for changes in various areas. A comprehensive list of proposed changes and the reasons therefor is being prepared right now and will be submitted to the Commission within the next two weeks.

It is my fervent hope that these suggestions will be thoroughly digested by this Com-

mission and that the people of this State and particularly the people in Erie County will derive comfort and peace of mind when this new law takes effect.

I do want to point out that the Commission has performed an outstanding job in revising this Code, simplifying it and making it more practical and workable for all of those that are involved in the criminal justice process. We think that you did a real fine job on revising it but we do find areas where we are not in agreement with it, but it's such a big job and you spent a considerable amount of time on it, that the few short weeks we've been working on it we find we can't come here to you today and give you not only the changes that we request but the reasons for it. We want to be absolutely sure of our ground and we will present it to you in written form so that you may have an opportunity to digest as well.

Thank you very much.

MR. BARTLETT: Thank you very much, Sheriff. If we have these by the 19th of February, we'll have them together with the comments we're getting at the hearings and the Commission would be able to consider them when we go back over the pro-

posals. By the 19th would be right, wouldn't it?
Yes, by the 19th.

MR. TUTUSKA: Mr. Chairman, you'll
have it in your hands within two weeks.

MR. BARTLETT: Thank you very much.
Good to see you, John.

Next we have, speaking for the New
York State Magistrates' Association, Judge Eugene
Salsbury.

(No response.)

Apparently he is not here.

For the Buffalo Police Department,
Deputy Commissioner Thomas Blair.

MR. BLAIR: All right, Mr. Chairman.

MR. BARTLETT: Good morning, Mr. Blair.

MR. BLAIR: Good morning, Mr. Chairman.

MR. BARTLETT: Do you want to speak
right from there? I think if you want to tilt the
mike over, Mr. Altman is mastering the switchboard
over here and I think he's got it figured out.

MR. BLAIR: All right.

MR. BARTLETT: Fine.

MR. BLAIR: Mr. Chairman and members of

the Commission here present: The Buffalo Police Department thanks you for your courteous and gracious invitation for an appearance here.

In going through the proposed revision of the Criminal Code we had a little difficulty through a lack of a distribution or rather a derivation and distribution table so that if we omit some things that are obvious to others, we had no intention to do so.

In listening to Professor Schwartz, I know that I myself became somewhat more humble. I trust that the Commission will understand that policemen cannot make the erudite presentation that the Professor made and that perhaps --

ASSEMBLYMAN ALTMAN: You seem to have done very well at our last meeting in New York.

MR. BLAIR: Thank you, sir.

MR. BARTLETT: Sincerely.

MR. BLAIR: No, thank you. -- and that perhaps some of the suggestions that they make may seem ridiculous to you but I assure you that they are not so to policemen. We have just decided to begin at the first section and go through, in other

words, follow through in numerical order.

MR. BARTLETT: All right.

MR. BLAIR: The first section that we would like to make comment on is found in the definitions, Section 1.20, subdivision 15. It has to deal with the definition of a police officer and in your comments, it mentions that there are two advantages to the term "peace officer", these being that a peace officer may arrest on reasonable grounds and also that they have an exemption on the use of firearms, that is carrying of firearms under 265-21A of the Penal Law.

We feel that there is a very great advantage to the public safety, that the real advantage of Section 154 which defines -- of the current Code which defines peace officers is the statewide protection afforded the citizens of the sovereignty by well-trained and duly appointed policemen in our cities, towns and villages who, by virtue of said Section 154 are also peace officers of the State of New York and we feel it would be to the detriment of the safety of the citizens of the state if the proposed elimination of the term "peace officer" is

carried out.

As the comments indicate on Page 28, paragraph 1, the proposed change from the present law lies not so much in the new definition of the term "police officer" as in the elimination of the term "peace officer".

MR. BARTLETT: We intended, Commissioner, if we failed to do so -- I'm glad you made the point -- but we intended to give all the power to the defined category police officer under the proposed Code as is given the peace officer under the present Code.

MR. BLAIR: Well, I'll make some reference to where the term "peace officer" is used throughout the -- you mean through amendment or proposed amendment?

MR. BARTLETT: No, we intend -- we intended here to use the term "police officer" to connote, one, the same function and, two, the same power that the peace officer now has under the present law plus -- plus -- the powers given the police officer as he's defined in 154-a of the present Code.

MR. BLAIR: Well, I know that in its comments, the Commission seemed disturbed by the fact that so many public personnel were included within the definition of "peace officers" under 153.

MR. BARTLETT: That is true.

MR. BLAIR: Or 154. And we feel that the solution is not to delete that section but rather to scan closely those persons therein who are included within the definition of peace officer and then to amend the section to include in the subject definition only those public servants performing police officer functions.

MR. BARTLETT: That's precisely what we intended to do, precisely.

MR. BLAIR: All right. Now, many of the statutes, the sections in the recently enacted and effective Penal Law are couched in the term "peace officer".

MR. BARTLETT: And we require an amendment throughout the Penal Law to conform to the terminology of this.

MR. BLAIR: All right, O.K. Then in that respect that this amendment following so soon on

its enactment, it does give the impression of what the Commission has referred to as a patchwork approach to us.

MR. BARTLETT: Well, you'll agree that the use of the word "peace officer" in the present Penal Law has to be geared to the present Code?

MR. BLAIR: Indeed, indeed.

MR. BARTLETT: And if we have a new Code, we'll have to mesh those together as we have the present Penal Law and the present Code, and we will.

MR. BLAIR: And these are some of the difficulties that we're in because apparently the Commission was unable to carry through with the Legislature's original Commission and that was to have both the Code and the Penal Law presented together.

MR. BARTLETT: Right, that's right.

MR. BLAIR: By what was it, February 1st, 1963?

MR. BARTLETT: Well, don't -- I assure you that nobody expected that we would finish this by February 1st, 1963, that I ever met.

MR. BLAIR: I'm merely quoting, I

think it was Chapter 361 of the Session Laws of 1961.

MR. BARTLETT: Yes. If you're familiar with commissions, Commissioner, they all have a terminal date within a year or two of their enactment and then they're extended year by year.

MR. BLAIR: And for the record, this Commission had a most difficult task and in good faith has done, generally speaking, on the overall picture a good job, very good.

MR. BARTLETT: Thank you.

MR. BLAIR: Now, in Section 30.80, you get into the definition of what a statement involuntarily made is. We feel that subdivision 2 of that section could be eliminated.

ASSEMBLYMAN ALTMAN: Please, Section 38?

MR. BLAIR: 30.80, subdivision 2. It has about six examples of presentations of what is meant by an involuntary statement. We feel that the courts are well able to detect and decide whether or not a statement is voluntarily made and that there is enough case law on the subject to adequately cover it.

MR. BARTLETT: You would prefer that it

not be a defined term then?

MR. BLAIR: We would prefer that it not be defined.

MR. BARTLETT: And how would you -- how would you express the constitutionality question which is contained in Subdivision (f) of that definition? Would you leave that unstated too? That's a catch-all admittedly.

MR. BLAIR: Well, it is not stated in the current Code of Criminal Procedure.

MR. BARTLETT: No.

MR. BLAIR: And yet policemen know that when you have a, let's call it a custodial suspect that you had better give the advices set forth by the United States Supreme Court in Miranda or anything that the subject may say goes out the window. O.K.?

MR. BARTLETT: You don't have any quarrel with the definition; you just think it would be better left unsaid, is that it?

MR. BLAIR: I think it would be better left unsaid because when you say it, it may open up the avenue to further restrictions and I feel myself

that a confession is good evidence.

MR. BARTLETT: We do too. Our purpose in defining it was just the opposite, as a matter of fact. It was to be hoped that in defining it statutorily, we might put an end to new kinds of involuntariness which has been the unhappy trend of the courts.

MR. BLAIR: Now, Section 60.20, Subdivision 2, says or it deals with warrants of arrest and says, "Even though an information * * * is sufficient on its face, the court may refuse to issue a warrant of arrest * * * until it has further satisfied itself, by inquiry or examination of witnesses, that there is reasonable cause to believe that the defendant committed the crime charged." And we have no quarrel with that but we do feel that as Article 35 of the Penal Law is presently worded that a magistrate has or a court cannot, when a prisoner makes an allegation of a wrongful use of force on the part of a police officer, that the magistrate doesn't have the discretion to examine into whether or not a summons or warrant of arrest should be issued, that prima facie when the prisoner makes the allegation of

a wrongful use of force the magistrate must issue at least a summons and, for that reason, we believe that now we're getting into the force provisions of the revised Penal Law.

ASSEMBLYMAN ALTMAN: He's talking about 60.

MR. McQUILLAN: Commissioner, would you mandate the issuance of a warrant or summons if the information is sufficient on its face?

MR. BLAIR: Not necessarily, no, I wouldn't, no. But what I mean or what I am trying to convey is that policemen feel that Section 35.00 in connection with 35.30 mandates a justice to issue a warrant for the arrest of a police officer or a summons for him, that's all, that what Section 35.00 says -- look at it, the whole article -- in relation to a police officer using force, it says that you can only raise this as a defense to a charge, let's say, of assault levied against you by the prisoner whom you feel you found it necessary to use force in order to apprehend.

MR. BARTLETT: Well, but Commissioner--

MR. BLAIR: Yes.

MR. BARTLETT: The vast majority, the overwhelming majority, of warrants of arrest are issued upon charges made by police officers.

MR. BLAIR: Indeed.

MR. BARTLETT: And don't you want the Court to be responsive to a valid information filed with that Court?

MR. BLAIR: Indeed I do.

MR. BARTLETT: That's valid on its face?

MR. BLAIR: Indeed I do.

MR. BARTLETT: Isn't that the area in which this question really arises most often?

MR. BLAIR: Certainly. But if, however, if the Court can avoid the use of a warrant by doing what this section indicates, that is, further examine witnesses, fine. Then the warrant shouldn't issue but what I am saying is that there is unequal treatment there as we view it, and an unequal standard as between the private person and the police officer.

MR. BARTLETT: Will you spell that out, please, because I missed that point entirely? What's the difference?

MR. BLAIR: All right. Under 246 of the expired Penal Law, the statute read that the use of force was not unlawful when committed by, I believe it said, a public officer in the performance of a legal duty. Accordingly, if a person went to get a warrant for a police officer, there was nothing wrong with the court examining whether or not the officer had exceeded, let's say, a rational or the rational bounds in the degree of force he used.

MR. BARTLETT: Well, if under the old law an information was filed with the Court charging the police officer with assault --

MR. BLAIR: Yes, sir.

MR. BARTLETT: -- with assault, and on its face it alleged a crime, a warrant would have to issue, wouldn't it?

MR. BLAIR: If, on its face, it alleged a crime but the officer, as I understand it-- and I may be wrong; I have been through a few -- the magistrate had the opportunity to call in a few persons, examine a few witnesses, somewhat like you might do on a summons, and then make a judgment as to whether or not the warrant should issue. We feel

he no longer has that discretion.

MR. BARTLETT: Will you look at 60.20, Subdivision 2, Commissioner?

MR. BLAIR: That's what I was reading.

MR. BARTLETT: May refuse to issue it unless he further satisfies himself by inquiry or examination of witnesses. That's exactly what you're asking for, isn't it?

MR. BLAIR: Yes, but when you get over into Article 35 of the Penal Law, the Section 35.00 says that we raise justification as a defense in a criminal proceeding and I believe that, in effect, they are saying that when the person makes the allegation of an assault, let's say, the crime of assault against a police officer, the magistrate does not have the discretion under this 60.20.

MR. BARTLETT: Oh, well, we definitely disagree that that's the rule at all.

MR. BLAIR: I'm only presenting the policeman's view and, as I say, it may appear cumbersome and wholly unreasonable to yourself or the Commission. Please understand, as I say, that we are police officers and that we cannot make the type of

presentation that was made for the representative of the Civil Liberties Union.

MR. BENTLEY: Well, Tom, the point you're getting at is that you don't want the magistrate to be bound by having to issue a warrant just because somebody brings in an information. You want him to have the right to inquire.

MR. BLAIR: Information against a police officer, right.

MR. BENTLEY: Right.

MR. BLAIR: We would like that certainty.

MR. BENTLEY: I see your point.

MR. BLAIR: Any arrest that we make now we feel even though there was -- well, just take a fellow by the arm because he won't get in the wagon and move him into the wagon, we feel --

MR. BENTLEY: You appreciate a lot of these informations don't come from police officers, they come from supposedly aggrieved citizens.

MR. BLAIR: Oh, yes, I'm for this discretion. I am for Section 60.20.

MR. BARTLETT: Let me say that my

understanding of 60.20 is that an information filed with a magistrate, the lower criminal court judge as our nomenclature goes, which alleges the use of force against a private citizen by a policeman, where it appears on its face from the circumstances that clearly it was justified, he would be derelict if he issued a warrant -- not just wrong, he'd be derelict if he did.

MR. BLAIR: I hope that you're correct and I hope that the courts, Mr. Chairman, see it as such, you see. I read an article -- I don't know, I believe in regard to Rap Brown had a little difference with a police officer outside the United Nations Building and while the magistrate dismissed a summons, it was obtained. It was obtained, he indicated that the subject matter would be brought up at the trial as to whether or not the officer had engaged in a wrongful use of force.

Now, under Section 60.40, in the comments on Page 93, the second last paragraph, are we to imply from that that there are areas other than the arrest area where the term "peace officer" will be used? If so, and the term "peace officer" is to be

eliminated as we indicated before, where are we to look then for the definition of peace officer or is this one of those cases where you're going to change the word "peace officer" into "police officer"?

MR. BARTLETT: Let me just deal with that, try to sum up our position simply.

I gather from what you said that you're as unhappy as we are with the laundry list of people that are included in 154 now, and we thought that the word "police officer" was a more meaningful denomination for the group we think ought to have full arrest powers and all of the other authority we associate with the regular policeman than was the term "peace officer".

We could just as easily have defined the word "peace officer" in Article 10 and come up with exactly the same result. We did not intend any change in what the now peace officer may do by changing his name to police officer. We've already done that as to part of his authority as to 154 and, frankly, as you see our definition of police officer which is intended to replace peace officer is about that 154-a, approximately the same categories, and so

we simply intend by this that the category police officer under the new Code have exactly the same authority, no less than the peace officer now. We could have left it at peace officer just as well.

MR. BLAIR: You'll reassure an awful lot of policemen if you do. I mean it may be psychological, Mr. Chairman.

MR. BARTLETT: We got a psychological problem on the other side, all these people who are not policemen who are now peace officers, you see.

MR. BLAIR: Under 60.60, Subdivision 3, in order to effect the arrest, it says the police officer may use such physical force as is authorized by Subdivisions 1 and 2 of Section 35.30. We don't feel that Section 35.30 authorizes it.

MR. BARTLETT: Well, if we say so here, it will help, won't it?

MR. BLAIR: What?

MR. BARTLETT: If we say so here, that will help, won't it? Isn't that your complaint now?

MR. BLAIR: It would be better if you said so in Article 35, Mr. Chairman, for us and I am presenting, as I say, our views.

Under Section 60.70, it says that the defendant -- this has to deal with a warrant of arrest issued by a Court, served by a police officer outside either the county of issuance or an adjoining county.

It says that if the defendant refuses to endorse the warrant of arrest -- in other words, make an endorsement thereon that he wants to go back to the county, the Court of issuance -- it says the police officer must state the refusal as a request to be taken to the local court, the county of arrest.

Now, we can conceive that a defendant would want to be taken to a court in the county of issuance but for some reason refuses to so endorse the warrant stating that he wants to voluntarily return to the county of issuance, but he is not signing anything, and further that he will resist if effort is made to take him to the local court. Now, in such a case, would it not be more reasonable to take the defendant to the county of issuance and then if the issue is raised, take up the issue in court at that time as to whether or not he would want to return.

MR. BARTLETT: We thought we were doing

the policeman a favor here, frankly.

MR. BLAIR: We appreciate your good--

MR. BARTLETT: Because whenever this question is litigated it's a difficult one. What's the rule now, Commissioner?

MR. BLAIR: Pardon?

MR. BARTLETT: What is the rule now?

MR. BLAIR: I can't hear you.

MR. BARTLETT: What's the rule now?

MR. BLAIR: Unless he requests to be taken, I believe, to the county of arrest, let's say then you bring him back.

MR. BARTLETT: Right. We simply wanted to give the policeman protection here that if he really wants to be taken to the -- after all, let's assume an arrest made in my county, the extreme eastern end of the state from here --

MR. BLAIR: Yes, sir.

MR. BARTLETT: -- on an Erie County warrant. If the defendant, upon arrest, says, "No, take me right through to Buffalo, we might as well have the arraignment there", fine, just indicate on here, "I waive appearance before the local judge".

It seems to me that's a protection to the police officer so the question won't be litigated because if the fellow says, "No, I won't sign", it's no big deal to take him to the local judge, is it, while he's there?

MR. BLAIR: Oh, then you may get involved into having -- you may be compelled to use force to take him to a local court of arrest. Involuntarily, he wouldn't involuntarily go there because voluntarily he would return to Buffalo.

MR. BARTLETT: Isn't that pretty far-fetched, as a matter of fact, that he would physically resist going to the local court but would willingly go back 400 miles to another court?

MR. BLAIR: Mr. Chairman, you think of it and the policeman in the performance of the functions of his office runs into it and this is only a suggestion, giving you the benefit of what experience we have.

MR. BARTLETT: Well, we thought we were doing you a favor. If not, we'll probably take it out.

MR. BLAIR: At no time, Mr. Chairman,

have we ever questioned the good intent of this Commission and we know that you are trying to do and doing very well a most difficult job.

Now, under Section 60.70, Subdivision 4, it's a requirement to take the person or in other words, he must be fingerprinted and mugged. There are situations where the nearest mugging and printing facilities would be not in the local court but in the court in the territory embraced, let's say, in the court of issuance. In other words, you may only have to go 200 feet to cross a county line that would take you into the court of issuance but there you would be able to print and mug him, whereas if you were to stick resolutely to this provision of the section, you might have to drive 30 miles with him in order to get to facilities where he could be printed and mugged.

MR. BARTLETT: Isn't that the present practice to print him and mug him before arraignment?

MR. BLAIR: We print him and mug him before arraignment but under the present practice, the only time that you mug and print -- and we'll get into this area too -- you have opened up an

entire new area of printing and mugging here which we will have some comments on, you see. We do in felonies and in certain misdemeanors and offenses specified in, I think it was, 552 or thereabouts of the current Code.

MR. BARTLETT: That's the present law, is it not, the present practice, that you do fingerprint and mug before arraignment?

MR. BLAIR: Indeed.

MR. BARTLETT: And the purpose of Subdivision 4 was again for the benefit of the policeman that if that took a little time, it was not to be construed to be an unreasonable delay. That's the only reason that's in there.

MR. BLAIR: All right, fine, fine.

MR. BARTLETT: Yes.

MR. BLAIR: Under 65.10 relating to the issuance of summonses in lieu of a warrant, it seems to provide that if the Court is satisfied that the defendant will respond thereto, the Court must issue a summons instead of a warrant, since the summons may be served by a police officer, by the complainant or by any other person designated by the

Court. Now, if the offense charged is a misdemeanor, how does the person get fingerprinted and mugged pursuant to Section 80.10? Or are we not to mug and print them in cases of summonses? In other words, this is the next question. If a summons is served on the person, is that an arrest?

MR. BARTLETT: No, it's not.

MR. BLAIR: Then apparently we do not mug or print them in cases where summonses are issued.

MR. BARTLETT: You make a good point here, though.

MR. BLAIR: What?

MR. BARTLETT: You make a good point. If the purpose of 80.10 is to get more complete fingerprinting and mugging of those persons charged with misdemeanors or felonies and we at the same time want to encourage the use of summons where it's appropriate in lieu of arrest --

MR. BLAIR: We're all for the use of summons, use of the summons more.

MR. BARTLETT: I know you are and your point is well-taken. That probably isn't an intelligent method of sorting out those misdemeanor cases

that ought to be fingerprinted and mugged and those that ought not to be.

MR. BLAIR: In other words, the law frequently refers to arrest. Now, apparently you aren't going to include in this Code of Criminal Procedure a formal declaration of the definition of arrest as appears in the current Code. Or are we to here rely on case law, which is all right so long as we understand.

MR. BARTLETT: Your point is that you think that maybe 65.10 ought to say a summons is not an arrest but we have arrest as defined here too and it's clear we did not intend the issuance of a summons to be an arrest.

MR. BLAIR: All right, and if you don't, do you want such a person who receives a summons to be fingerprinted and mugged?

MR. BARTLETT: Commissioner, I think you've pointed to a gap here that has to be filled. I believe, and again I speak for myself, I believe it was our intention that all misdemeanors as set forth in 80.10, I guess it is, be fingerprinted and mugged and it's obvious from the language that we use in

80.10 that it would only, as it is now drafted, include those who have been arrested, right. It is a good point and, as a matter of fact, Mr. McQuillan has already said that he will draft something to cure that.

MR. BLAIR: Well, you say there is a gap and it has to be filled. We haven't said that it should be filled by fingerprinting persons who are summoned or perhaps given an appearance ticket.

MR. BARTLETT: Well, at least you have pointed out to us a gap in our scheme because I feel quite certain that the Commission intended that all misdemeanor charges, defendants, be mugged and fingerprinted. Thank you, Commissioner.

MR. BLAIR: Because an arrest is no more a conviction than the issuance of a warrant.

MR. BARTLETT: Of course not.

MR. BLAIR: All right.

Now, Section 70.20 dealing with arrests by private persons.

Now, a Buffalo police officer standing on the Buffalo side of a street co-terminous with a suburban community, hearing a gunshot, turns around

and sees a woman slump to the ground. A man is running from her presence and carries a woman's hand-bag in one hand and a revolver in the other. On-lookers point to the running man and shout, "Stop that man, he just shot and robbed that woman". The police officer realizes he cannot overtake the fleeing hold-up suspect so he fires his service revolver at the suspect wounding and stopping him and thereupon places him under arrest.

In this circumstance, the police officer has made an arrest as a police officer under Section 70.30. We are discussing Section 70.20. The use of his firearm is justifiable under Section 35.30 but, of course, he may have to raise that justification as a defense in a criminal proceeding against him.

MR. BARTLETT: Just the way he did under 1055.

MR. BLAIR: What was that, sir?

MR. BARTLETT: Just the way he did under 1055 of the old Code, of the old Penal Law.

MR. BLAIR: Oh, you have eliminated from the old -- it is not quite the same, Mr. Chair-

man.

MR. BARTLETT: No, no.

MR. BLAIR: Under the old one, you also had 1054 where we got into the area too of excusable homicide but that's a part we're discussing further here. The firearm was justifiable under 35.30. Now, the firearm use is justifiable because he is a peace officer and a peace officer may use deadly physical force under Subdivision 2 of Section 35.30 of the Penal Law. He is such a peace officer under 35.30 because he is a duly appointed policeman of the City of Buffalo and Section 154 of the Code as it presently reads defines such a duly appointed policeman of Buffalo to be a peace officer, but the proposed elimination of the definition of the term "peace officer" -- now, we're getting into this because you say you're going to change it -- but it may raise questions as to whether or not the officer's use of force would be justifiable under Section 35.30.

MR. BARTLETT: Well, obviously, Commissioner, we're going to have to use the same term in both cases.

MR. BLAIR: O.K. Fine, you've indi-

cated you're going to make the change there. Assume though the same fact situation with two exceptions. First, the incident occurs directly across the co-terminous street from where the Buffalo policeman is standing. That is, it occurs on the suburban community side of the street. The officer sees the man shoot the woman, sees him take a run away, sees him take her handbag and sees the man start to run. He starts across the street in pursuit of the offender. The instant he crosses the center line of the street, Section 70.20 operates to denude him of his status as a policeman and converts him immediately to a private person.

MR. BARTLETT: What is he now?

MR. BLAIR: What?

MR. BARTLETT: What is he under the present law?

MR. BLAIR: He is a peace officer of the state.

MR. BARTLETT: Well, what's his power of arrest outside of his bailiwick?

MR. BLAIR: Oh, peace officers can make an arrest outside their own bailiwick. Is it

your understanding -- it's our understanding that they can, you see.

MR. BARTLETT: Of course they can, so can a citizen too. Go ahead, make your point.

MR. BLAIR: All right, O.K. As a private person, he is still able to make a lawful arrest under Section 70.20 which says a private person can arrest for a felony anywhere in the state, but he cannot make the arrest as a police officer now under Section 70.30. The offender is out-distancing him. He could apprehend him with the aid of the firearm but the moment he crossed the center line of the street, the statute operated to make him impotent to use it as a police officer and if he tried to effect the arrest of the offender by using the firearm as a private person he would himself be guilty of a crime for there is no provision in Section 35.30 which makes use of the firearm justifiable by the private person even though it be the means to capture a brutal murderer. The murderer is free to act again.

Now, it's difficult for a policeman to comprehend the underlying philosophy here which

says to the police officer who is required by state law to have several weeks of training, including many hours of firearm training which he must successfully pass as a condition of becoming a policeman, that when you cross the center line of that street you were stripped of your firearm and all the training you have in its use and with that crossing also went your only chance to immediately apprehend that fleeing felon and to take him from among the company of law-abiding citizens.

Now, I have heard it explained --

MR. BARTLETT: Do you agree that the present law limits a Buffalo city policeman to the position of a peace officer in his bailiwick?

MR. BLAIR: No, I don't. No, I don't.

MR. BARTLETT: You think he's making a peace officer arrest outside of Buffalo anywhere in the state?

MR. BLAIR: Indeed I do. Section 177 authorizes the arrest by a peace officer for a crime. It does not limit it and proceeds to include within the definition by 154 duly appointed policemen of cities, towns and villages, deputy sheriffs. The

only ones that aren't in it, I believe, are state policemen and they're covered under the Executive Law.

MR. BARTLETT: Well, Commissioner, this is a problem with which the Commission is now interesting itself, but suffice it to say that it's been the subject of discussion by a committee including representatives of the State Chiefs, Office of Local Government, Professor Curtis at Cornell, for years, trying to resolve the bailiwick question.

The very reason they're in existence is because there's a very serious question as to what the power of a Buffalo city policeman is while he's in New York City, for example, you know. And we had a case just recently of the Troy policeman who got a lot of publicity which raised again the question of the authority.

MR. BLAIR: I don't know what the Michigan statutes are on the powers of policemen and police officers up there, but this apparently -- this to us means a new philosophy.

MR. BARTLETT: We didn't intend it -- but let me make -- may I just make this comment?

MR. BLAIR: Yes.

MR. BARTLETT: We are very much concerned ourselves about the question of bailiwick, i.e., what are the geographic limitations of a peace officer's authority, and I think you may well find a proposal coming before this session of the Legislature to enlarge what we believe -- you apparently don't -- are the present restrictions.

MR. BLAIR: Well, I -- they haven't been incorporated in your proposals here.

MR. BARTLETT: No, they have not, no, no.

MR. BLAIR: Your proposals here, the Commission's -- I don't mean yours but the Commission -- and I know you act in good faith.

MR. BARTLETT: We think we state the present law here as to bailiwick.

MR. BLAIR: All right.

Now, in this same case, if a peace officer from the suburban side of the center line were in the vicinity and directed the Buffalo police officer to assist him to effect the arrest and directed or authorized him to use the firearm, then his

use of the firearm to wound and apprehend the offender would be justifiable.

Now, we have a report here that on January 10th, 1968 -- and this account appeared in a local newspaper -- that Governor Rockefeller, speaking before the Women's Legislative Forum, conceded that the State is losing the war against crime. It is heartening to hear that the Governor in his budget is asking the addition of 50 Troopers to the complement of the State Division of Police. There have been statements to the effect also that perhaps as many as 5,000 more policemen are needed to be added to the New York City police force.

Now, policemen are trained, Mr. Bartlett, to protect life and property and statutes such as 70.30 which restrict their power to arrest only to those offenses committed or believed by them to have been committed within the geographical area of their employment, and accordingly their justification to use a firearm, only to offenses committed or believed committed within that area, we believe that deprives the law-abiding people of this State of the benefits of the training and the police officer's

experience.

MR. BENTLEY: Of course, Commissioner, you realize there's another field of this that involves municipal tort liability. The General Municipal Law, the authority or the extent of liability of the City of Buffalo for the acts of a policeman outside of the city is set out, and your Corporation Counsel has often taken the position that he doesn't want the liability of the city increased on this matter, so there are two sides to this.

MR. BLAIR: Well, yes, yes, there is two sides. There is two sides. We're only presenting our side.

MR. BENTLEY: We'd have to relieve ourselves of that position, which would be easier.

MR. BARTLETT: Let me say that the Combined Law Enforcement Council and the New York State Association of Chiefs have obviously believed as we do that there are geographic limitations now on peace officers in New York State because just the other day at their meeting in Albany, they voted to support legislation which would give them statewide bailiwick which they do not believe they now have.

MR. BLAIR: You mentioned the combined what, law enforcement agencies?

MR. BARTLETT: Yes, Combined Council of Law Enforcement Agencies.

MR. BLAIR: Yes. Is there any representation, Mr. Bartlett, on that group among the representatives of, let's say, the Policemen's Association of New York State?

MR. BARTLETT: Yes, Police Conference and PBA.

MR. BLAIR: Police Conference. Do they have representation on that council?

MR. BARTLETT: They sure do. They were there on Tuesday and had a great deal to say.

MR. BLAIR: Fine. Then, that news is heartening.

MR. BARTLETT: And the chiefs too, Commissioner.

MR. BLAIR: Yes, sir.

MR. BARTLETT: Chief Murphy, former chief of New York City, is the chairman of that group.

MR. BLAIR: And a most able person.

MR. BARTLETT: Yes.

MR. BLAIR: Yes, sir. Again and under Section 70.30, we get into the question of a definition of an arrest. Does it apply, does the same definition apply to warrants without arrests, arrests without warrants, summary arrests, issuance of summonses and issuance of appearance tickets? In other words, we are not able to, we cannot understand whether or not it does.

MR. BARTLETT: You mean you're not clear as to whether the term "arrest" includes the issuance of a summons or the issuance of an appearance ticket?

MR. BLAIR: We don't understand that, that's right. In other words, does the same definition apply to all four actions that are designed to bring a person before or within the jurisdiction of the Court?

MR. BARTLETT: Well, if it is not, we did intend it. If the statute is not clear, we'll take a look at it.

MR. BLAIR: All right. Now, under Section 70.70, Subdivision 1, that's the stop and frisk. It refers, as does Section 70.30 dealing with

the officer's arrest, that a public place located within the geographical area of such officer's employment.

Now, apparently then if this is enacted, if I am out in the suburban community of Amherst and I see a notorious burglar, safe man, in the vicinity of a building out there whom I also know to be one who usually carries a dangerous firearm, I cannot stop and frisk him.

MR. BARTLETT: We think that's the present law.

ASSEMBLYMAN ALTMAN: It is the present law.

MR. BARTLETT: Very clearly.

MR. BLAIR: Again it goes back to what a peace officer's powers are, Mr. Bartlett, you see, and that's where I think our difference is from the view of the Commission's, what the powers of a peace officer are, and your position may be the correct one.

MR. BARTLETT: We think the case law clearly limits. I personally have to tell you that I quarrel with the present law and I'm going to support

efforts to expand it at this present session of the Legislature. However, I think in all candor, I have to say that this draft we're discussing now does express the present law of New York State on bailiwick and may I suggest to your Counsel an excellent discussion of this is to be found in the Cornell Law Review, Fall of '64, in a lengthy article on the question of extra-territorial law enforcement in New York which analyzes the problem, analyzes the case law on it.

MR. BLAIR: That's the Fall of 1964?

MR. BARTLETT: Right. Professor David Curtis wrote it. He's also chairman of that committee I mentioned to you.

MR. BLAIR: Well, 70.70-2 has a slightly different definition of what articles that you could take and arrest for than does the current section involved here. It does appear to lessen the total number of contraband weapons that you could take from the person.

MR. BARTLETT: You think it limits it?

MR. BLAIR: Yes, we do, from the suspect. We believe it somewhat limits the current, the

present Section 180-a.

MR. BARTLETT: We hope after we hear from the Supreme Court, which we expect will be very shortly, that we have still got something to talk about, Mr. Commissioner. We don't know about that for sure.

MR. BLAIR: Well, I understand that problem.

Under Section 75.20 on the appearance ticket, the first question we had -- and it's just a repeat -- is, is this an arrest?

MR. BARTLETT: We say not.

MR. BLAIR: All right. Is not the purpose of the appearance ticket defeated by the requirement of mugging and printing for misdemeanors?

MR. BARTLETT: Well, you've raised this point.

MR. BLAIR: Surely.

MR. BARTLETT: And it has to go one way or the other. It's my personal view that we intended to enlarge the area of mugging and printing. We think it's sound public policy. There are others who disagree, of course.

MR. BLAIR: Well, we have a further question. It is on close pursuit, after close and continuous pursuit, where the officer pursues an offender into another county and gives him an appearance ticket there, does he not have to return him to his own jurisdiction anyway for printing and mugging? And we don't know, we cannot tell.

MR. BENTLEY: Tom, what do you think of the whole concept of this appearance ticket?

MR. BLAIR: The concept -- let me read you from the note. That's Section 75.20. It's a new idea. It looks good to us. Any time when you can get a person who is alleged to have violated the law before the court without resort to an arrest is to us a much better way of doing it than by resorting to the arrest process.

Now, under Section 80.10 dealing with the fingerprinting, it says the arresting officer must have the fingerprint -- must have the fingerprints and the photograph of the defendant following an arrest "for a misdemeanor defined in the Penal Law".

MR. BARTLETT: Yes, right.

MR. BLAIR: You have that?

MR. BARTLETT: Yes, Sub.(b). That greatly enlarges the list of crimes that's now in 552, I think.

MR. BLAIR: Right. Now, we were wondering if you had some comments on the plan of the appearance ticket which said, in effect, that its use will eliminate use of the oftentimes humiliating and frequently expensive arrest procedures. Now, a most humiliating experience for any person is to be involuntarily printed and mugged. For example --

MR. BARTLETT: I don't think my point of view is a very popular one but I resolve this by requiring that everybody be mugged and fingerprinted for identification purposes, everybody.

You would agree that it would greatly facilitate not just police work but a great many other legitimate pursuits of society.

MR. BLAIR: Well, I certainly hope -- I certainly hope -- if your view on it ever becomes law that you put it perhaps in the Civil Service Department or some place to keep it out of the police department. For example, here are some of the

misdemeanors, off-street --

MR. BARTLETT: Well, let me just ask this, Commissioner -- we are running short on time -- because I want to get a couple others in. May I just ask this point on fingerprinting, as a matter of policy, are you opposed to our enlarging the area of printable and muggable crimes?

MR. BLAIR: Not per se.

MR. BARTLETT: O.K.

MR. BLAIR: I believe that the State Temporary Commission of Investigation, I believe it was in its sixth or eighth interim report -- I'm not quite sure -- said that for purposes of pure identification, for example, we get an individual whom we know has only committed a misdemeanor and we feel that he may be mixed up, let's say, with the rackets and we are unable to ascertain his identity even though we have only arrested him for a misdemeanor and we see wisdom to mugging and printing him in order to learn his identity. We don't see the wisdom, let's say, in mugging or printing a 16-year old for the possession of a sparkler on the 4th of July which could happen under this particular section.

MR. BARTLETT: O.K.

MR. BLAIR: Fine.

Now, Mr. Schwartz in his presentation said that privacy is essential to freedom. Nobody can argue it. However, laws are essential to freedom too.

And as regards the proposal for wire-tap, we feel that the Miranda majority of the United States Supreme Court certainly isn't going to let any law enforcement officer go beyond Berger and Katz and I believe that this proposal further restricts somewhat Berger and Katz.

MR. BARTLETT: You do?

MR. BLAIR: As in your comments, you indicate that you must make every other effort to get the evidence. There's no other -- well, no other means to get the particular evidence that you're looking for or words to that effect.

MR. BARTLETT: Yes.

MR. BLAIR: All right. Now --

MR. BARTLETT: We think that's implicit in Berger.

MR. BLAIR: Fine.

MR. BARTLETT: As a matter of fact, I think there's some language in Katz which suggests that too.

MR. BLAIR: Incidentally, we believe that the Governor has taken a forthright position in the area and it may not be too popular with some people but we believe in his position that wiretap, some form of wiretap, should be available to law enforcement officers and is in the best interests of the safety and protection of the community.

Now, under your proposal -- this is my last item and I'm sorry I've spoken as long as I have.

MR. BARTLETT: It's all right.

MR. BLAIR: Under your proposal, we see no reference made to current Section 117-a of the Code of Criminal Procedure.

Now, this section mandates police officers to take enforcement action and bring before a court or magistrate having jurisdiction, any person offending against any of the provisions of Articles 26 of the Agriculture and Markets Law. Now, Article 26 proscribes cruelty to animals.

MR. BARTLETT: We intend -- we intend

to transfer that.

MR. BLAIR: You do intend?

MR. BARTLETT: Yes.

MR. BLAIR: Because we not only must have concern for human beings but for animals.

MR. BARTLETT: We intend to transfer that. You probably know that all the penal provisions relating to cruelty have been transferred to the Agriculture and Markets Law. This will be appropriately there too.

MR. BLAIR: May I just ask this one last one?

MR. BARTLETT: Sure.

MR. BLAIR: Under Section 13, 315.20, Subdivision 1 --

MR. BARTLETT: Yes?

MR. BLAIR: -- reference is made -- and this is the third line of Subdivision 1 -- as authorized by Paragraph (c) of Subdivision 2 of Section 60.50". We can't find it.

MR. BARTLETT: It's a typo. It's a typo and thank you for catching it. We had caught it.

MR. BLAIR: Well, thank you.

VOICE: What should it have been?

MR. McQUILLAN: I don't have the marked copy here but it will be changed somewhat.

MR. BARTLETT: The reference is wrong, no question about it. There is none.

MR. BLAIR: Mr. Chairman, again I want to thank the Commission for its graciousness in inviting policemen and for taking the time to be present here and listen to what we have to say on this proposal.

MR. BARTLETT: Well, we're very grateful for your comments. I am particularly appreciative of your pointing out the present gap on the question of appearance tickets and mugging and fingerprinting. There's a serious policy question there as to which direction the state ought to go in but we do appreciate your pointing that out in particular.

We will now take a short break for about five minutes. We'll then resume and may I ask any of you who have not given your names who wish to speak during the recess, to speak with Mrs. Gordon over here so that we may call you in some kind of order.

The next speaker after our short intermission will be Judge Marshall and we will resume in just a couple of minutes.

(Whereupon, a short recess was taken.)

MR. BARTLETT: Ladies and gentlemen, may we come to order again please?

The next speaker will be a very distinguished Judge and an old friend, Judge Fred Marshall, Erie County Judge.

HON. FREDERICK M. MARSHALL: Thank you, Mr. Bartlett.

May I take this opportunity to welcome you and the members of your Commission to the City of--

MR. BARTLETT: Our technician is doing pretty well here.

JUDGE MARSHALL: Probably wasn't paid.

I want to welcome you to the City of Good Neighbors, and we appreciate the time that you're taking to afford us the opportunity to present some views.

This may be a disjointed presentation because I've attempted to read your work during the course of some criminal trials and have stuffed notes

here and there and underlined certain passages and I hope you'll forgive me for that.

MR. BARTLETT: Happy to have your comments, Judge.

JUDGE MARSHALL: I want to endorse, first of all, the very fine work of your committee and to reiterate that I feel that not only the revised Penal Law but also your new procedure law are significant advances in the field of criminal law and criminal justice. Certainly we all recognize that changes are needed in some areas on both of these works, but on the whole I think that they meet the needs of our times and meet the needs of the people.

I think all of us will agree -- and by the way, I want to emphasize that I speak as a trial judges -- trial judges do not legislate. Trial judges do not fix the philosophy or the social structure of the law and our function and purpose is to place ourselves in a position where we can protect and enforce the rights of both sides to a controversy.

It's an oversimplification to say that there is no simple solution nor answer to this problem of the proper administration of justice, and I

know that you seek and we all seek a system which affords the accused a speedy trial, a fair trial, of the issues and at the same time protects the rights of the community and those who victims of criminal acts.

I've heard it said and you have, of course, that a trial is no longer a search for the truth, but rather an expedition to uncover misstatements, errors in police procedures, to uncover minor technical loopholes, and some have said that delay in reaching the trial stage of a case seems to be more important than a search for justice.

I want to endorse the simplification of the criminal procedures which you have incorporated in your new work. I've got some suggestions to make and I recognize that some of these are already incorporated, in some measure, in your work but I make them because I want to re-emphasize the importance of them.

I recognize also that the first thought would require a constitutional amendment or constitutional implementation but it would seem to me that we ought to be thinking in the area of eliminating

the necessity of presenting every case to a grand jury. I know you've thought about it and I know it's been part of your discussion. We might well think of the possibility of securing some sort of a waiver from a defendant. We might be thinking of the area of presenting a certified copy of a transcript in those cases where we have had a preliminary hearing before a magistrate and we have had the witnesses paraded in before a magistrate. It seems to me that if we could work in that area that we could save a great deal of time not only for prosecutors but for police officials, we could save countless police hours and we could save and conserve the time of the citizens who are the victims of crime.

MR. BARTLETT: Judge Marshall, I just spoke with Mr. Altman, inquiring whether such a constitutional amendment had been introduced at this session. He's not sure whether it has been or not but I have the feeling it may well be. It was part, as you know, of the proposed new constitution which, for other reasons, did not succeed, but I do feel quite strongly that that's one possible amendment that was included in the proposed new constitution

that the Legislature might rather readily adopt. There was no expressed opposition to that proposal that I know about in connection with the new constitution by defense people, prosecutors, judges, ACLU, I know of no opposition including the Grand Jury Association. They were all for it.

JUDGE MARSHALL: I have read with approval your provisions with respect to discovery. I think that these have been sorely needed. I would, however, hope that the discovery authorized to the people might be broadened in some measure. How that might be done, I'm not prepared to say, but it would seem to me that if a trial is truly a search for the truth that discovery of tangible personal items in the hands of defense counsel ought to be made available in some measure to a prosecutor.

Along the same lines, we're aware of the Rosario decision and this I'm sure is going to upset some people but we're aware of the Rosario decision which requires that the prosecutor turn over to defense counsel statements in his hands, grand jury testimony which may have been made by the witness who is then testifying, and I'm wondering, this may

present constitutional questions but I'm wondering why we cannot, if again we're looking for the truth, why we cannot require defense counsel to turn over to the prosecutor the sworn statements of any witness that he might have called to testify on behalf of the defendant.

Now, of course, I realize that the sworn statements of a defendant given to his counsel cannot be turned over to the prosecution, but my thought is that we might require and authorize the prosecution to have the sworn statements of any witness which might be in the hands of defense counsel and these might be turned over to the prosecutor for the purposes of cross-examination. That's a reverse of the Rosario rule.

MR. PANZARELLA: Judge, would you limit that solely to sworn statements in the hands of the defense or any statements that the prosecution must turn over?

JUDGE MARSHALL: The prosecution must turn over reports, yes. Well, I haven't given that any thought but right now, I would limit it to affidavits, sworn statements in the hands of defense

counsel.

MR. PANZARELLA: Thank you.

JUDGE MARSHALL: We have got a case, a Court of Appeals case, which now is the law in the State of New York which says that a prior plea of a defendant in a criminal case to a charge in satisfaction of an indictment that may have been brought against him, that that prior plea once withdrawn can no longer be used against him as an admission.

I disagree with the majority. There was a dissent in that case, of course. I disagree with the majority and I'm wondering whether or not the Commission has given any thought to legislation which would permit the people to introduce in evidence a prior plea of guilty given in open court with counsel present, voluntarily and knowingly, by a defendant as an admission against interest in the prosecution of a case.

I would endorse such legislation.

ASSEMBLYMAN ALTMAN: You'd have a rough time passing it.

JUDGE MARSHALL: I know it.

We have had a number of cases in Erie

County where the defense was a plea of not guilty by reason of insanity. It seems to me that asking 12 lay people to sit and to make a determination after hearing all of the testimony, the highly technical psychiatric proof, asking these people to make a determination of guilty or not guilty by reason of insanity is a burdensome and an unwarranted responsibility.

I don't know whether you've thought in this area or not but it would seem to me that this decision in some way, in some manner, ought to be left to the trial judge or to a panel of psychiatrists.

ASSEMBLYMAN ALTMAN: Well, wouldn't the trial judge be a lay person in this respect too, Judge?

JUDGE MARSHALL: Yes, but I think he has more familiarity with the psychiatric proof, with the scientific proof that comes in. I think he's more knowledgeable in how this proof is presented, why it's presented, and I think that you would have a fair determination if it was left in the hands of the trial judge rather than 12 individuals.

MR. BARTLETT: Judge, would it make

any difference to you, assuming that the question of assigning responsibility to decide that question to the judge could not be resolved permanently, would it be helpful from your point of view if the Oregon rule were adopted here, requiring proof of insanity beyond a reasonable doubt by the defendant?

JUDGE MARSHALL: I think that would be a step in the right direction.

I welcome and endorse the changes in the number of peremptory challenges. I think that this is going to speed up the disposition of cases. It seems to me, however, that we have not properly spelled out in Section 140.30 the power of the substitution of alternate jurors. I know you discussed this question and we have a very serious question as to whether or not a judge may substitute an alternate juror for one of the regular panel who has become disabled during the course of deliberations, and I would hope that in some measure this might be more clearly spelled out.

I turn to Section 130.20 in which you have again incorporated the notice of alibi but, in my experience, the sanctions imposed are meaningless.

Many times these alibi witnesses come in at the last minute and the most severe sanction is a delay in the trial and again we're right back to this question of moving along promptly and speedily in the administration of justice. I don't know what sanctions could be imposed but I would think that we might be able to find a more suitable sanction for a delay in the proper notification of alibi witnesses to the prosecution.

ASSEMBLYMAN ALTMAN: Well, the court, of course -- this section or proposed section says that the court may exclude the testimony. What could be a greater sanction than that, Judge?

JUDGE MARSHALL: I'd like to see the case that was affirmed on appeal where the trial judge excluded the testimony, sir. You'd be reversed as quick as you could turn your head.

Article 60, I note that it reads that a warrant of arrest is a written order issued and subscribed by a local criminal court. Does this mean that Supreme Court can no longer issue a warrant of arrest?

MR. BARTLETT: A Supreme Court judge

or a County Judge may, sitting as a local criminal court. There are a number of areas, are there not, where they can sit as a local criminal court just as now a Supreme Court judge does not issue a warrant as a Supreme Court judge but he does it as an extra magistrate, does he not?

JUDGE MARSHALL: Yes.

MR. BARTLETT: The same way.

JUDGE MARSHALL: There is no question in the Commissioner's mind that if a police officer comes in to me with proof which indicates probable cause that I now have the authority, as I do, to issue a warrant of arrest. I'm wondering whether or not this provision here limited it to a local criminal court.

Coming back to 140.15, Subdivision 3, the last sentence, the juror whose name was first drawn and called must be designated by the court as the foreman which, I think, is well and no special oath need to be administered to him. Well, that isn't what I wanted to talk about. I wanted to get down to 4. No, that isn't what I want either.

MR. BARTLETT: This is in 140, is it?

JUDGE MARSHALL: Oh, yes, this is the area that I wanted to talk about, 140.15, Subdivision 3. It reads as follows: "The juror whose name was first drawn and called must be designated by the court as the foreman". Shouldn't the word "accepted" be in there?

ASSEMBLYMAN ALTMAN: You mean that the individuals accept the responsibility of --

MR. BARTLETT: I see.

ASSEMBLYMAN ALTMAN: -- as being the foreman?

VOICE: No, should be accepted as a juror.

MR. BARTLETT: I see the point.

JUDGE MARSHALL: Well, I leave it to you as something to consider.

MR. BARTLETT: I think it's this though. The line just above that says "* * * until 12 persons are selected and sworn* * *".

JUDGE MARSHALL: Yes, I know.

MR. BARTLETT: And it would be the first drawn among that 12.

JUDGE MARSHALL: All right.

MR. BARTLETT: I agree with you, however, that that might need to be clarified.

JUDGE MARSHALL: Now, what has happened to the wayward minor provisions of the Code of Criminal Procedure and what are we doing about it?

MR. BARTLETT: We were not --

JUDGE MARSHALL: They haven't been dealt with at all in the new proposed criminal law.

MR. BARTLETT: Right. We did not plan to deal with them in the new Code in the belief that the machinery provided here coupled with Family Court machinery was adequate. If there is strong feeling to the contrary, we certainly, you know, would consider continuing it.

JUDGE MARSHALL: Well, will there be a wayward minor proceeding?

MR. BARTLETT: No.

JUDGE MARSHALL: And where will it be held?

MR. BARTLETT: No.

JUDGE MARSHALL: There will not be?

MR. BARTLETT: No, it was our plan to eliminate it, Judge. If there is strong feeling that

that is imprudent, we would certainly reconsider it.

JUDGE MARSHALL: And lastly -- and I'm finished -- it would seem to me, and I endorse the proposals of Judge Conable, that it should be left in the discretion of a trial court to determine whether a child under the age of 12 should or should not be sworn.

Thank you, gentlemen.

MR. BARTLETT: Thank you very much, Judge. We appreciate it a lot.

Incidentally, on the question of the issuance of a warrant of arrest in 5.10, Definitions, local criminal court includes a Supreme Court Justice or a County Judge sitting as a local criminal court and I had to search for it myself, Judge. I didn't have it right at my fingertips either but we intended that you retain what you traditionally have had as magistrate's powers in connection with the issuance of warrants and that sort of thing.

Thank you very, very much, Judge Marshall. We appreciate your taking the time to come and speak to us.

We will now try to take one more wit-

ness before lunch and I am pleased to have with us the district attorney of this county, Michael Dillon, who was just elected last week as President of the District Attorneys' Association of New York State. Very pleased to have you with us this morning, Mr. Dillon.

HON. MICHAEL DILLON: Thank you, Dick.

Well, Mr. Bartlett and members of the Commission: I think that today I'm here more for the purpose of making a report to you than I am to engage at this moment in a critical analysis of the proposed Criminal Procedure Law.

I think as we all look back upon the history of the Penal Law and the criticisms that were heaped upon so many as a result of the pronouncements that ultimately were made by the Legislature, we in the District Attorneys' Association, as I'm sure other representatives of law enforcement, have learned a lesson and for that reason we do not want a repetition of that type of public reaction to the Criminal Procedure Law about which so much studious work and effort has been done by the members of this Commission to whom the public is deeply indebted for

your labors.

We in the District Attorneys' Association -- and I now speak primarily as president of that Association -- have, therefore, taken an approach with respect to the Criminal Procedure Law that we did not take with respect to the proposed Penal Law and assignments have been made to various district attorneys' offices throughout the State of New York breaking down the provisions of the Criminal Procedure Law and asking for a critical analysis from these various offices of these proposed provisions. We will meet next week in New York, the Executive and Legislative Committees of the Association, to bring together the fruits of our labors and we propose then at your hearing in New York City to appear as an Association to give to you our critical and we hope constructive analysis of the Criminal Procedure Law.

I'm sure from our preliminary studies that we will have many recommendations to make to you, some we believe of meaningful proportion and others that I suppose are comparatively insignificant but will aid us in the administration of criminal justice.

On a broad scale, if I may just make a few comments today, I think that the major problem confronting prosecutors, judges and, yes, members of the Bar in today's complexities, is the administration of criminal justice and how we can speed up the administration of criminal justice. The continuous delays, the multiplicity of proceedings in which we find ourselves involved, are having tremendous drastic effects upon prosecutors and courts. I think that the manner of procedure now in criminal justice -- and Judge Marshall touched upon it -- is causing us many problems, some of which are insurmountable and the major one of which, or which concerns me for a number of reasons, is the fact that we're obliged as a result of this to engage in plea bargaining to an unusual and it seems to me sometimes an unnecessary extent with the criminal element of our community. That's not necessarily an activity which I as prosecutor or anyother district attorney of the State of New York enjoys but we find ourselves as a matter of expediency being obliged to do it; otherwise, the entire system of criminal justice would bog down.

So on that broad basis, I think we have to look to the Criminal Procedure Law to change some of the problems with which we're presently beset. I spoke less than a week ago in New York City about one of the problems that Judge Marshall touched upon today and that's the obligation to present all felony cases to grand juries. Today, in trying a criminal case, we're confronted with so many prior statements of the people's witnesses.

MR. BARTLETT: This would be a constitutional change, incidentally, to which the Commission would give its full support.

MR. DILLON: Well, I think that it's an area of legitimate concern, Dick, for the Commission and, of course, for prosecutors and for the courts.

MR. BARTLETT: If there isn't a proposal already in, I suspect there will be very quickly.

MR. DILLON: Fine.

I then also just want to touch upon this problem. Today when we walk into a courtroom the defense lawyer sometimes has as many as three or

four or five transcripts of prior testimony of the people's witnesses. Over the course of the multiplicity of proceedings that a witness is engaged in, he testifies about hundreds of facts over and over again. Because of the continuous harassment of witnesses in this connection, witnesses' words become confused, their memories are jumbled and I think their faith in the administration of criminal justice is destroyed, and I would like to see the good minds of this Commission devise a plan whereby the multiplicity of hearings could be consolidated into one prior to trial, where we could decide the questions of the admissibility of evidence, the question of the admissibility of the confession or admission, and now it seems the question of the propriety of the in court identification and whether it was tainted by an earlier identification or procedure.

I would like to see some attention directed to the rule of unanimity in criminal jury verdicts. Many a conviction and, yes, many an acquittal has been thwarted because of the unreasonable attitude of one juror, one juror who takes a position that is not based in any way whatsoever

upon the facts or evidence before him. As you know, historically, we've had a rule of unanimity in criminal jury verdicts. For the last four years, England has operated under a verdict system of agreement of ten. As best I can determine up to this point the system is working satisfactorily. Our system, in my judgment, is not working satisfactorily and I see no reason why we cannot provide for criminal jury verdicts of agreement of ten or certainly at the very least agreement of 11.

ASSEMBLYMAN ALTMAN: On the question of hung juries, how much percentagewise have you had in Erie County?

MR. DILLON: I could not-- I could not answer that, sir, but I can tell you that we have had very, very serious cases that took five or six weeks duration to try where 11 jurors were agreed as to a verdict within 20 minutes after beginning their deliberations and have then deliberated for more than a day or a day and a half and have had to report in disagreement and we have had a number of such cases in Erie County and in my conversations with fellow prosecutors, they have a number of such cases in

their own jurisdictions.

MR. BARTLETT: Mike, if I might suggest it, perhaps it would be useful for the District Attorneys' Association itself to attempt to put some statistics together on the question of jury disagreement. This question was raised at the Constitutional Convention because it would require a constitutional amendment, just as waiver of indictment would.

MR. DILLON: Yes.

MR. BARTLETT: I must say it didn't get very far, but we had the same difficulty then. Nobody was able to point to any statistical data on the question of hung juries and it would be useful if we could get it.

MR. DILLON: Fine. I think, Mr. Bartlett, and I say this respectfully, I think we've heard the same criticism about the proposed Penal Law and the lack of statistical data to justify some of the changes there.

MR. BARTLETT: Oh, yes, yes. I'm simply suggesting that I'm interested in the proposition.

MR. DILLON: Yes. You may be certain,

Mr. Bartlett, that during my term as president of the District Attorneys' Association that we are going to pursue this and that we're going to show great interest in it and that we're going to have affirmative recommendations with respect thereto and I'm confident that that will include or the basis for those recommendations will include statistical data showing the number of cases in which this has occurred.

MR. BARTLETT: Very good.

MR. DILLON: As Judge Marshall also pointed out, gentlemen, we are more and more confronted with the defense of insanity. In that connection, I have a recollection as a result of a meeting of the Combined Council of Law Enforcement Agencies the other day in Albany, of reading a bill that is now pending before the Legislature that would make or place the burden of affirmative proof upon the defendant to prove insanity as a defense.

I wholeheartedly subscribe to that bill and wholeheartedly subscribe to that theory because the defendant is in a position in all of these criminal cases wherein insanity is imposed as a defense to almost completely thwart the prosecution

in that he can avoid our examinations, he can avoid our tests for determining those facts which we must determine to prove his sanity and I think that that's an area of great concern to district attorneys throughout the State of New York and we do subscribe at least, as Judge Marshall says, it takes us part of the way and he would agree with going that far if not further in placing the burden upon the defendant to prove insanity affirmatively.

ASSEMBLYMAN ALTMAN: How about Judge Marshall's suggestion about panels of psychiatrists? Would you take that as conclusive evidence to be offered by a defendant?

MR. DILLON: In my experience -- in my experience, first of all, I must agree with Judge Marshall that in my experience I don't believe I've ever seen a jury any more than a district attorney, incidentally, competent to determine the sanity of a criminal defendant.

ASSEMBLYMAN ALTMAN: You would accept--

MR. DILLON: And certainly it must go to another area and I think that the only place that it can go, I would not necessarily agree with Judge

Marshall that it should be determined by a judge when he throws that up as a possible proposition but it should go to an area, it seems to me, of expertise in the field.

MR. BARTLETT: Isn't there a difficulty there?

MR. DILLON: That's the field of psychiatry. Well, Dick, we all agree that there's difficulty there. I don't want to be in a position today of criticizing that art or science, whatever it is.

MR. BARTLETT: Yes. Well, let me make a comment.

MR. DILLON: Yes.

MR. BARTLETT: I would be more interested in the panel who selected the panel than I would be in who the panel was, if you will.

MR. DILLON: Yes, I think so.

MR. BARTLETT: The difficulty is that we have within the psychiatric discipline varying points of view as to the relationship of moral or legal responsibility to mental condition and I don't believe, in your experience, you have ever found a

case in which the issue of insanity was raised where there were not two psychiatrists testifying on opposite sides of the question. I've never found or never heard of a case, have you, Judge Marshall?

JUDGE MARSHALL: No, but can I get into this?

MR. BARTLETT: Sure, it's a public body.

MR. DILLON: Sure, I never tried to keep you out of anything yet.

JUDGE MARSHALL: You know, it's very interesting. How does a prosecutor get two psychiatrists to examine a defendant when defense counsel has said to him, "You're not going to examine him."

MR. DILLON: That's what I mean, we're thwarted because they have the right now to thwart us.

JUDGE MARSHALL: How are you going to get them?

MR. BARTLETT: Very good.

MR. DILLON: So here is the type of proof now, Dick, that we have to put before a jury in many cases. We have to take a psychiatrist and place him in the courtroom and have him observe the defend-

ant, listen to the testimony, listen to the testimony of the defense psychiatrists sometimes.

MR. BARTLETT: I think this is one area --

MR. DILLON: This is in order to give any meaningful opinion and we just, you know, our evidence is becoming more and more worthless as a result of the procedures we're bound to follow.

MR. BARTLETT: Well, of course, this has always been a problem with the insanity rule, you know. The one point, however --

MR. DILLON: Yes, but the defense of insanity is in vogue today. It wasn't always.

MR. BARTLETT: Well, it's been pretty popular for a long time.

Let me say that one point considered by the Commission -- and it's not part of this proposal but we are going to consider it again -- is that when the defense of insanity is raised that an examination be required even perhaps by a panel picked by the court. That is one possibility named, a panel of three psychiatrists, for example, and the testimony, or the opinion of all three to be avail-

able to both sides.

I understand somewhat the hurdle you're trying to get by. It's a very tough one.

ASSEMBLYMAN ALTMAN: I'd just like to get back for a moment to your comment about pleas. Are you indicating that if the situation in the courts was not as it is that you would have more pleas to the indictments rather than lesser pleas? Is that what you meant to say?

MR. DILLON: Well, I think that's a fair conclusion of my intent. The point is that it's about eight or nine years ago in Erie County, I'd have to have the figures before me, the average trial time per criminal case was, I believe, 1.7 days and in less than a decade the average trial time per criminal case in Erie County is now almost five days. I believe it averages out to about 4.9 days, so that we are taking up more and more of the time of our courts in the trial of criminal cases.

Defense lawyers know that. Defendants know that. Is the solution to our problem adding more and more judges and more and more plant facilities and more and more deputies and clerks and

stenographers and assistant district attorneys and how far are the people going to go in supporting that type of program?

The point I tried to make is that we must expedite the administration of criminal justice. When I say that it takes now almost five full days for the trial of each case, that does not include the two days it now takes us on preliminary hearings that used to take less than an hour. It does not include the hearings on admissibility of evidence.

ASSEMBLYMAN ALTMAN: You have to look at the other side of the coin.

MR. DILLON: It does not include the hearings on admissibility of admissions or confessions. It will not include the hearings, if they're prior to court trial, of in court identification and its propriety. This is all to be added to that disposition time.

ASSEMBLYMAN ALTMAN: Isn't this part and parcel of a defendant's rights, however?

MR. DILLON: So I say we hand down 800 indictments a year and holding these court facilities to a maximum we can try 185 cases. Somebody has to

tell me what I am to do with the other 600 cases or more that are indicted as felonies and district attorneys throughout the State of New York are being criticized for reduced pleas and we have all read much of felony conviction rates --

MR. BARTLETT: Not by this group, not by this group.

MR. DILLON: -- which are a source of great disturbance to me personally for personal reasons and a source of great disturbance to district attorneys throughout the State of New York because it is not their problem; it is not their responsibility, and the responsibility is in the great minds of the State of New York to expedite this system of criminal justice so that when a man is indicted for a felony, unless there are unusual circumstances which justify a reduction, he should be tried for that felony.

Now, that's what we would do, that's what we want, that's our ideal situation.

ASSEMBLYMAN ALTMAN: But haven't we also taken pleas for years on end?

MR. DILLON: Yes, but we've never seen, we've never seen a joint legislative committee report

that comforts and talks about felony conviction rates.

MR. BARTLETT: I think your problem here is publicity given to a long-standing and integral part of the administration of criminal justice in this and every other state. It isn't the reduction that is not always simply because you can't bring them to trial.

MR. DILLON: Well, aside from my own, Mr. Bartlett, that's the first public pronouncement that I've ever heard that it's a long-standing and accepted procedure.

MR. BARTLETT: I say so.

MR. DILLON: I say it's the first I've heard except for my own statements along those lines.

MR. BARTLETT: I'd be pleased to join with you in that and, as a matter of fact, I think you and I can agree that there are a number of cases where the punishment which is appropriate for the offense and for the defendant may well be within the limits of a lesser included offense.

MR. DILLON: Well, that's proved in case after case by the fact that where there has been reduction of the charge the court finds it, in its

proper discretion, to suspend sentence and place on probation, et cetera.

MR. BARTLETT: Exactly.

Well, we recognize the problem. It's a tough one. Thanks very much, Mr. Dillon.

MR. DILLON: Thank you.

MR. BARTLETT: And we look forward to hearing the report of the Association in New York. If I may suggest it, I think it's the 15th that we are having most of the court officers and the present peace officers list on the 15th. We want to give you all the time that we possibly can. It might be better if you arrange to come on the 16th so that we could accommodate you then.

MR. DILLON: Well, we certainly will, Mr. Bartlett and gentlemen, and thank you very, very much.

MR. BARTLETT: I know someone else has indicated he wants to testify this morning. I'm going to have to ask him to come back. I did agree because several people had things they wanted to do at noon that I would adjourn for lunch at noon. Mr. Birzon?

MR. BIRZON: Yes, Mr. Bartlett.

That's perfectly all right.

MR. BARTLETT: Can I get you to come back this afternoon. I'd appreciate it because we are 20 minutes behind now.

We will convene again at two o'clock and we will run until we've heard everyone who wishes to be heard. Thank you very much.

(Whereupon, at 12:20 P. M. a luncheon recess was taken until 2:00 P. M.)

AFTERNOON SESSION

MR. BARTLETT: The witness is the City Judge, William Ostrowski. Judge Ostrowski has submitted a written statement and is implementing the statement with oral comments.

He raised a point first as to the use of deadly physical force by a police officer executing a search warrant where the resistance offered amounts to the use or threatened use of deadly physical force.

The chairman agreed that this probably needed clarification because we apparently were in agreement as to the circumstances under which the officers should be able to use deadly physical force and he is now addressing his comments to the corroboration rule contained in Article 30, I believe, of the proposed statute.

JUDGE WILLIAM OSTROWSKI: I was just about to say that the present rule that a conviction cannot be had upon the testimony of an accomplice unless he can corroborate it which is in 399 of the Code is changed by the CPL and the provision of corroboration is eliminated. In its place the new

law requires that the court instruct the jury that accomplice testimony in general is inherently suspect on the ground of possible motives of self-interest on the part of such witnesses and that the jury must scrutinize and weigh such testimony with care and caution and the staff comment refers to the rigidity of the present rule and characterizes accomplice testimony as polluted and self-interest. The comment continues, "In many instances, however, the indicated credibility defects are not present and the accomplice testimony may be highly reliable and utterly convincing. Yet such testimony -- indeed the testimony of 20 such witnesses -- is arbitrarily stamped insufficient as a matter of law."

Now, I agree that this rule should be changed for the reasons given by the Commission. However, it is puzzling that while the Commission is advocating a relaxation of the accomplice corroboration rule, they have advocated and the Legislature has passed a statute, 130.15 of the Penal Law, which is more rigid than its predecessor, 20.13 of the Penal Law which required corroboration in rape cases. The new law now requires corroboration for all sex offen-

ses with one minor unexplained exception.

In *People vs. Friedman*, the reason for this corroboration rule as stated by the court in a 1910 decision, "This provision of the statute is derived from the common law and has been applied for centuries. As has been said frequently, it has its origin in the fact that crimes of this nature are easily charged and very difficult to disprove, in view of the instinctive horror with which mankind regards them."

The first part of this statement recalls the oft-quoted quip of Oliver Wendell Holmes, "It is revolting to have no better reason for a rule of law than that it was laid down at the time of Henry IV."

The second part of the statement can be applied with equal vigor to a considerable number of other crimes but sex offenses are the only crimes for which corroboration is required. Other corroboration rules are concerned with the nature and quality of the evidence rather than with the type of crime involved.

In *People v. Downs*, 1923, the Court of

Appeals held that the required corroboratory evidence must tend to establish "first, that the crime of rape was committed by somebody and, second, that the defendant was the one who committed the crime." This means that the testimony of the victim and of the physician who examined her is not enough and there must be additional evidence which tends to connect the defendant with the crime. Without the latter, usually unavailable, evidence, a woman walking along the sidewalk of any city in New York State who is dragged into an alley or automobile and raped by one or more men will never see a conviction for the crime.

MR. BARTLETT: Judge, may I ask in that connection, if you are advocating a relaxation of the strict corroboration rule?

JUDGE OSTROWSKI: Yes, sir.

MR. BARTLETT: In the sex crime area?

JUDGE OSTROWSKI: Yes, sir.

MR. BARTLETT: Would you require at least as strong a charge on that kind of submission as being proposed in the accomplice rule?

JUDGE OSTROWSKI: The same kind of proposition as the accomplice, yes. This is the only

crime on the streets that is burdened by such a difficult burden of proof.

Perhaps the time has come to re-evaluate the reasons for such a rule.

Now, the only additional thing that I want to comment on and it's something that came to my attention since the preparation of the memo that I have submitted to your honorable body, and that is a recent decision of the New York Court of Appeals five weeks ago, four to three decision, three cases, People vs. Radunovic, People vs. Sigismondi and People vs. Roccaforte. Radunovic and Roccaforte had their convictions for assault in the 3rd degree reversed because they had raped their victims and the Court held that the 3rd degree assault must be corroborated, an element lacking in both cases.

The Court affirmed the dismissal of an indictment against Sigismondi for possessing a dangerous weapon because his knife was used to aid him to rape his victim and there was no corroboration.

Now, Judge Breitel in his concurring opinion said this: "There is a serious difficulty in this area from the law. It is an immature jurispru-

dence that places reliance on corroboration, however unreliable the corroboration itself is, and rejects overwhelming reliable proof because it lacks corroboration, however slight, and however technical, even to the point of token satisfaction with the rule."

After reviewing the all but overwhelming evidence in the Radunovic case, Judge Breitel said, "It is difficult for a layman to understand such a result and it is just about as difficult for a lawyer."

MR. BARTLETT: So at the very least, Judge, an amendment would be appropriate to make it crystal clear that the corroboration in the sex crime area relates only precisely to those crimes, not to other crimes?

JUDGE OSTROWSKI: At a minimum, certainly at a minimum.

MR. BARTLETT: Right, right.

JUDGE OSTROWSKI: Because the court here was dealing not only with the judicial problem but with also a legislative rule that they felt bound by.

Now, I'd just like to quote briefly

from two dissents and then I'll be finished. In his dissent, Judge Bergan said, "Sigismondi and Roccaforte present merely issues of credibility as to assault in which the assaulted person was believed on the trial. If a man had been assaulted, this would be sufficient. It ought to be sufficient too if a woman is assaulted".

Now, I personally agree wholeheartedly with the views expressed by Judge Scileppi in his dissenting opinion. He said, "The result reached by the majority is truly strange and astounding and carries extremely mischievous if not dangerous consequences. It is now necessary to prove a rape case in order to convict for assault with a dangerous weapon or to convict for simple assault committed on a female who has been defiled."

This, in my opinion, is a license to commit rape. This is an intolerable situation. The decent law-abiding citizen is no longer safe in his home or on the streets. I cannot agree with the growing judicial attitude which continually favors the criminal defendant at the expense of the rest of society. This is wrong and our courts must become

conscious of the need for the protection of society as well as those charged with the crime.

Thank you very much.

MR. BARTLETT: Any questions?

(No response.)

MR. BARTLETT: Thank you very much, Judge.

Let me say as to your last point, it strikes me that doing anything with the history, the historic corroboration rule in the sex crime area, you and I would agree, even if we agreed it was desirable is a difficult undertaking. However, it does not seem to me to be so impossible of accomplishment legislativewise that we strictly limit the corroboration rule to the sex crimes themselves and not to crimes which may have been committed at the same time or in relation to or in connection with the underlying sex crime.

I agree with you it makes no sense whatever and I don't know whether the Commission will be in a position to sponsor such legislation but I'll certainly recommend it to individual legislators.

JUDGE OSTROWSKI: All right.

MR. BARTLETT: Good. Thank you very much, Judge. Appreciate your coming.

COMMENTS ON THE PROPOSED
CRIMINAL PROCEDURE LAW

"This memorandum has been prepared for the primary purpose of evaluating selected provisions of the proposed New York Criminal Procedure Law (CPL), as prepared by the Temporary Commission on Revision of the Penal Law and Criminal Code, for the purpose of determining whether or not these provisions should be enacted in their present form by the New York State Legislature. It is based upon a careful study of the proposed law in the light of the existing Code of Criminal Procedure (CCP), the present and immediate past Penal Law (PL), judicial precedents and seven years of experience as a judge of the City Court of Buffalo which handles thousands of criminal and quasi-criminal cases annually.

"With respect to criticism, I emphasize, and it will be apparent, that it relates to less than 5% of the draft. The vast majority of the Criminal Procedure Law is a momentous achievement and

a great credit to the Commission and its staff.

"The enactment of the Criminal Procedure Law is solely a legislative function. I hope that what follows is useful in the performance of that task. It has been prepared in the spirit of Canon 23 of the Canons of Judicial Ethics of the American Bar Association which says, "A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice, and to ascertain whether they tend to impede the just disposition of controversies; and he may well contribute to the public interest by advising those having authority to remedy defects of procedure, of the result of his observation and experience."

"One of the giant steps forward is the liberalization and clarification of bail procedures which undergo radical surgery in Title V of Part Three. For example, for the first time in New York, provision is made for a 'partially secured bail bond' which is defined (380.10,13.) as a 'bond secured in part by a deposit of a sum of money not exceeding ten percent of the total amount of the undertaking.' If bail is fixed at \$500.00, the defendant could, if

approved by the judge, secure his release by deposit of \$50.00 and filing a promise to forfeit \$500.00 if he fails to appear in court when required.

"Pre-arraignment cash bail may be deposited with police at any time and is limited to \$500.00 for a class A misdemeanor, \$250.00 for a class B misdemeanor and \$100.00 for a petty offense (395.10,395.20). This procedure is intertwined with another innovation, the 'appearance ticket' (70.50,2; Art.75), which police may use instead of arrest in non-felony cases and which is similar to the present traffic ticket. It should be noted that present maximum bail of \$500.00 on a non-felony charge in a court of special sessions, such as the City Court of Buffalo, (737,CCP), does not appear in the CPL.

"A hearing upon a felony complaint cannot be adjourned for more than one day without the defendant's consent (90.50.9.1). However, the People no longer would be required to establish a 'prima facie case' and instead, must show 'reasonable cause to believe that the defendant committed a felony' - a less stringent level of proof (90.60,1.). Moreover, the ordinary exclusionary rules of evidence would not

apply to a felony hearing and hearsay and otherwise incompetent evidence might be used (90.50,7.). A person charged with a felony and in custody more than 48 hours without commencement of a hearing must be released on his own recognizance unless the People show good cause for the delay consisting of some compelling fact or circumstance (90.70). While the People are required to proceed more quickly, they are allowed to establish their case with greater ease. Hence, ordinarily unnecessary delay is avoided in the preliminary phases of a felony prosecution.

"A defendant held for grand jury action and confined more than 45 days without grand jury action must be released on his own recognizance unless the People show good cause for the delay consisting of some compelling fact or circumstance (95.80).

"'After a criminal action is commenced, the defendant is entitled to a speedy trial' (15.20). (Should the CPL deal with the subject of deliberate or unexplained delay in commencement of a criminal action?)

"All of the foregoing provisions -

bail, appearance tickets, accelerated felony hearings and grand jury proceedings and speedy trial - form part of a common plan designed to materially reduce the number of persons detained in custody without having been convicted of any offense and must result in reduced jail populations. Defendants, district attorneys and taxpayers have everything to gain and little, if anything, to lose from these new procedures for which the Commission deserves nothing but praise.

"Two changes brought about by the CPL are particularly noteworthy to judges of local criminal courts. Section 58, CCP, requires the arraignment judge to inform every defendant charged with a misdemeanor of his right to have his case presented to the grand jury and of his right to have his case adjourned for that purpose. Failure to so inform is, by itself, reversible error. People v. Haskell, 9 N.Y. 2d 729, 214 N.Y.S. 2d 344 (1961). In practice, the vast majority of defendants do not have the slightest idea of what the judge is talking about and the right of grand jury presentation is rarely exercised. Such right is preserved in 85.55, CPL, but

the court is no longer required to tell the defendant about it. This is a welcome change which substantially reduces the verbiage required on arraignment - at a time when the defendant is quite often confused and upset - without infringing on the rights of the accused in any material respect.

"The second change - a considerable time-saver for courts with a large volume of traffic cases such as the City Court of Buffalo - is brought about by 85.10(4), CPL; Section 669, CCP, requires that, upon arraignment, the court must inform the defendant of his right to an adjournment to obtain counsel and of his right to communicate, free of charge, by letter or telephone, in order to obtain counsel and in order to inform a relative or friend of his arrest. Furthermore, when a simplified traffic information is used, the court must also advise the defendant of his right to a bill of particulars (147-f, CCP). Under the CPL, all of this information may be printed on the traffic ticket and need not be repeated by the judge.

Again, this is a considerable improvement without infringing on the rights of the accused in any material respect. This change would have to be implemented by a revision of the uniform traffic

ticket authorized by Section 207 of the Vehicle and Traffic Law and prescribed in Title 15, Chapter 1, Subchapter G, of the Codes, Rules and Regulations of the State of New York.

"Consideration might be given to adapting the provisions of 85.10(4), CPL, regarding a printed statement of instructions, to all appearance tickets (Art. 75, CPL), regardless of the nature of the offense for which they are issued.

"Section 90.50, CPL, makes many excellent changes in archaic provisions of the CCP governing felony hearings. At present, a defendant is limited to a statement not under oath and can be asked only the five questions in 198, CCP, which must be asked by the court. Neither the district attorney nor the defendant's own counsel may ask him any questions. All witnesses in the case must be excluded while the defendant makes his statement (202, CCP). All of this is eliminated by the CPL. In view of these changes, consideration might be given to eliminating the provision for an unsworn statement by a prospective witness at a material witness hearing (330.50, 1.(b)).

"An excellent improvement in the administration of justice is made by Sections 85.05, 85.10, 90.10 and 105.30, CPL, which require the court, upon arraignment, to furnish the defendant with a duplicate copy of the charges against him regardless whether he has been indicted for a felony or is simply charged with a minor traffic infraction.

"Section 2013 of the Uniform City Court Act (UCCA) requires that juries in criminal cases be placed in charge of a peace officer while deliberating. In Buffalo City Court this means a member of the Buffalo Police Department. Sections 160.10 and 185.55, CPL, provide that the jury may be placed 'under the supervision of an appropriate public servant or servants.' If Section 2013, UCCA, were to be amended to conform with the CPL, court clerks could be substituted for policemen and the latter thereby made available for duty more directly related to law enforcement.

"Another excellent change is the elimination of the term 'peace officer' (with one exception noted hereafter) which has been the occasion for both confusion and double talk (1.20,15. and extensive

staff comment). All law enforcement officers will be known as police officers. The only criticism I would make is that deputy sheriffs would continue to be excepted from the provisions of Section 426 of the Election Law which makes it a crime for police officers to engage in certain political activities. Hence, under the present language of the CPL, deputy sheriffs would be the only law enforcement officers in the state who would be permitted to use their official power or authority in aid or against any political party, or to control or influence the political affiliation, expression or opinion of any citizen. They would also be the only law enforcement officers whose appointment and promotion is specifically allowed to be based on party adherence or affiliation. Other definitions of 'police officer' are found in Section 132 of the Vehicle and Traffic Law, Section 480(7) of the Executive Law, Section 209-q(2) of the General Municipal Law and Section 58(3) of the Civil Service Law. 'Peace officer' is now defined in Section 154, CCP, for all purposes. Consideration might be given to defining 'police officer' in the CPL for all purposes and eliminating

the definitions found in the other statutes cited above.

"However, 'peace officer' remains as part of the close pursuit law, 315.10, CPL. The staff comment states that this is a uniform act adopted by numerous states and that, 'Therefore, no substantive changes are made therein.' Nevertheless, 'police officer' is used in the very next section, 315.20, which together with 315.10, constitutes Article 315.

"Some sections of the CPL make certain provisions mandatory which might better be left to the discretion of the court. Examples are:

"1. A defendant has an absolute right to a bill of particulars when a uniform traffic ticket is used (50.25(3)). With respect to infractions, my experience is that the ticket usually tells all there is to tell.

"2. The uniform traffic ticket cannot be used for misdemeanors (50.25(1)). In practice the ticket is quite adequate for such charges as driving without a license (501, Vehicle & Traffic Law), or without insurance (319, V&TL) or operating

an unregistered motor vehicle (401, V&TL). The information described in 50.15, CPL, should be discretionary or at least limited to offenses with possible multiple details such as leaving the scene of an accident (600, V&TL) or reckless driving (1190, V&TL).

"3. Under certain circumstances, the court must issue a summons instead of a warrant of arrest (60.20(3)). This should remain discretionary as it is now.

"4. A warrant of arrest may be executed on any day and at any hour (60.60(1)). This authorizes an arrest on a no left turn charge (1110 (a), V&TL) at 3:00 A.M. or on Sunday. Section 170, CCP, makes Sunday or night arrest, in non-felony cases, discretionary with the judge and so it should remain. By comparison, 801, CCP, and 365.30 (2), CPL, both require searchwarrants to be executed between 6:00 A.M. and 9:00 P.M. unless a judge authorizes otherwise.

"5. A motion to suppress evidence, made in a local criminal court (such as the City Court of Buffalo) must, upon request of the People,

be determined during trial (375.40(3)).

"6. An eligible youth (400.05,2.) who is not charged with a felony and who has not previously been adjudged a youthful offender, must be accorded youthful offender treatment (400.20,2.).

"Section 65.40 (1), CPL, allows service of a summons by a complainant. This has the potential of creating inflammatory situations and the occasion for more offenses.

"Section 2011, UCCA provides that a jury trial is waived unless demanded on arraignment, or within five days thereof if counsel is not present. This is a requirement much criticized by lawyers and judges. 175.50, 6., CPL, provides that the time within which to request a jury trial shall be governed by appellate division rule. In order for such rule to apply to city courts, Sec. 2011, UCCA, would have to be amended.

"Section 200.30,2., CPL, authorizes commitment of a defendant convicted of a felony or a class A misdemeanor for a period of 30 days for a 'thorough physical or mental examination'. However, no guidelines or standards are provided and this

confinement may be made without any factual or other showing of the need or necessity therefor.

"Section 205.10, 2., CPL, provides for a pre-sentence conference which 'may be held with defense counsel in the absence of the defendant.' Perhaps this section should be re-evaluated in the light of People v. Anderson, 16 N.Y. 2d 282, 266 N.Y.S. 2d 110 (1965), in which the court said, "What is of primary importance after all is the strong social policy in favor of requiring the presence of the defendant."

"Section 305.10, 1.(c), CPL, provides that in an action pending in a city court, such court may order production therein of a defendant confined in a county jail of such county. Only a judge of a superior court can order the production of a defendant confined in any other institution. 335.20, 3., CPL, has similar provisions relating to production of witnesses. Consideration should be given to expanding the powers of city courts in this area, as a matter of convenience, to include production from any institution in the county or, at least, from the county penitentiary.

"Article 310, CPL, is the Uniform Extradition Act which the Commission says has been adopted by about 85% of the states. 'Because of its character as a 'uniform law', no effort has been made to effect any substantive changes therein.' Nevertheless, consideration should be given to clarifying the procedure to be followed in conducting the examination before the local criminal court. This is vague now (844, CCP) and will continue to be vague (310.36, CPL).

"Diametrically opposed legal philosophies seem to have prevailed in two different areas of the CPL. Material witness orders will be available in felony cases only, 330.20, 2., CPL. On the other hand, the securing of testimony outside the state for use in a proceeding within the state is provided for in a prosecution for any crime. 360.10, 1., CPL.

"Section 375.30, 1., CPL, requires notice by the People to the defendant of intent to use evidence consisting of conversations overheard by unlawful eavesdropping or statements of a defendant obtained by a public servant engaged in law enforcement

activity. No notice is required of intent to use tangible personal property obtained by search and seizure. The Commission comments, 'The requirements of notice predicated in this section are prompted by the fact that, while a defendant ordinarily knows before trial that property constituting potential evidence against him has been seized from his premises or possession .. he may well be unaware that .. the People plan to introduce evidence of .. statements which he may have made to police..' I suggest that a defendant might be totally unaware of a seizure of evidence from his premises in his absence. On the other hand, he is fully aware of statements which he has made to police although he may not recall details. Consideration should be given to extending the notice requirement of 375.30 to include all of the subdivisions of 375.20. 375.60,6., CPL, provides that upon the hearing of a motion to suppress evidence, 'the people have the burden of proving by a preponderance of the evidence that the evidence sought to be excluded was not obtained in an unlawful or improper manner.' This is a change in the present rule that the burden of proof is on

the person attacking the manner in which evidence is obtained. People v. Alfinito, 16 N.Y. 2d 181, 264 N.Y.S. 2d 243 (1965).

"Section 405.10(9), CPL, concerning the mental fitness of the defendant to proceed, says, 'Where an order of examination has been issued by a superior court, the psychiatric examiner must also set forth his opinion as to whether the defendant is or is not a dangerous incapacitated person.' Shouldn't this opinion be included regardless of which court ordered the examination?

"Both under existing law (913-e, CCP) and under the proposed law (400.20,1, CPL) youthful offender treatment is limited to defendants charged with a crime. I suggest that this treatment be extended to offenses other than crimes. The new Penal Law contains 12 offenses which are violations and not crimes. Likewise, most offenses under city ordinances are violations and not crimes. A youth charged with robbery, burglary or larceny, if otherwise eligible, can be given youthful offender treatment, but one charged with public intoxication or some other petty offense, cannot. What is good for

the serious offender should also be good for the petty offender.

"Section 400.35, CPL, provides that a youthful offender trial 'must be conducted, where appropriate, pursuant to the rules of evidence applicable to criminal proceedings.' The phrase 'where appropriate' is undefined and makes the statute vague. Under what circumstances would a court be authorized to deviate from the ordinary exclusionary rules of evidence?

"Upon a youthful offender conviction, the court may impose a reformatory sentence of imprisonment with a maximum of four years (400.50, CPL; 75.10,1., PL). A defendant charged with a class B misdemeanor, which carries a maximum penalty of three months imprisonment, must expose himself to the risk of serving four years in order to obtain the benefits of youthful offender treatment. This seems to be an unconscionable disparity in potential sentences. I suggest that youthful offender sentence maximums should vary in proportion to the seriousness of the original charge.

"The section dealing with the execu-

tion of searchwarrants contains an unfortunate limitation on police officers who encounter resistance to their authority (365.50, 1.,3.). They may use "as much physical force, other than deadly physical force, as is necessary to execute the warrant." At least in the Penal Law (35.30(2)) we allow police officers to use deadly physical force to effect the arrest of a person who is attempting to escape by the use of a deadly weapon. Under the CPL, the policeman is legally immobilized if a person resists a search warrant with a deadly weapon. Might should be on the side of law and order.

"In a comment which introduces Article 30 - rules of evidence - the Commission says, 'Upon the theory that the various types of criminal proceedings .. are all subject to a basic evidentiary pattern, the proposed Criminal Procedure Law prescribes its rules of evidence in the 'General Provisions', thus according them across-the-board application .." If this is a good theory, and it is, then Sec. 130. 15, PL, which contains the corroboration rule for sex offenses, logically belongs in Article 30, CPL. It would then join the corroboration

rule for unsworn evidence of a child less than 12 years old (30.20,3.) and the corroboration rule for confessions (30.90).

"The present rule that a conviction cannot be had upon the testimony of an accomplice unless he be corroborated (399, CCP) is changed by the CPL (30.70) and the requirement of corroboration is eliminated. In its place the new law requires that the court instruct the jury, 'That accomplice testimony in general is inherently suspect owing to possible motives of self interest on the part of such witnesses, and that the jury must scrutinize and weigh such testimony with care and caution.' In a staff comment, the Commission refers to the 'rigidity' of the present rule and characterizes accomplice testimony as 'polluted and self-interested.' The comment continues, 'In many instances, however, the indicated credibility defects are not present and the accomplice testimony may be highly reliable and utterly convincing. Yet, such testimony - indeed the testimony of twenty such witnesses - is arbitrarily stamped insufficient as a matter of law.' I agree that this law should be changed for the reasons given

by the Commission.

"However, it is puzzling that while the Commission is advocating a relaxation of the accomplice corroboration rule, they have advocated and the legislature has passed a statute (130.15, FL) which is more rigid than its predecessor (2013, FL) which required corroboration in rape cases. The new law now requires corroboration for all sex offenses with one minor, unexplained exception. Both 130.15, FL, and 2013, FL, were derived from Sec. 283 of the former Penal Code. In People v. Friedman, 139 A.D. 795, 124 N.Y.S. 521 (2nd Dept., 1910), the court said, 'This provision of the statute is derived from the common law, and has been applied for centuries. As has been said frequently, it has its origin in the fact that crimes of this nature are easily charged and very difficult to disprove, in view of the instinctive horror with which mankind regards them.' The first part of this statement recalls the oft-quoted quip of Oliver Wendell Holmes, 'It is revolting to have no better reason for a rule of law than that it was laid down at the time of Henry IV.' The second part of the statement can be applied with equal

vigor to a considerable number of other crimes, but sex offenses are the only crimes for which corroboration is required. Other corroboration rules (30.20, 30.30 and 30.90, CPL) are concerned with the nature and quality of the evidence rather than with the type of crime involved.

"In People v. Downs, 236 N.Y. 306, 140 N.E. 706 (1923), the court held that the required corroboratory evidence must tend to establish 'first, that the crime of rape was committed by somebody and, second, that the defendant was the one who committed the crime.' This means that the testimony of the victim and of the physician who examined her is not enough and there must be additional evidence which tends to connect the defendant with the crime. Without the latter, usually unavailable, evidence, a woman walking along the sidewalk of any city in New York State who is dragged into an alley or automobile and raped by one or more men will never see a conviction for the crime. This is the only crime of violence on the streets the prosecution of which is burdened by such a difficult rule of proof.

"Perhaps the time has come to re-

evaluate the reasons for such a rule.

"Signed) WILLIAM J. OSTROWSKI
Judge, City Court of Buffalo
42 Delaware Avenue
Buffalo, N.Y. 14202

"February 1, 1968."

MR. BARTLETT: Now, Mr. Paul Birzon.

I have the feeling, Mr. Birzon, that we heard from you at another hearing some time ago, am I correct?

MR. PAUL I. BIRZON: It was some time ago, Mr. Bartlett.

MR. BARTLETT: 1964?

MR. BIRZON: About that time in connection with the RPL hearings and, unfortunately, if I can begin on this note, similar to our experience-- when I say "our" I'm referring to the Bar in general in this period -- we have encountered somewhat of a difficulty with the relatively short notice with which this community was provided as to the date of your hearing. I assume you've had some scheduling problems yourself but we run into this one difficulty in this county which may not be unique here and that is that any statement or presentation to be made by a committee of the local bar association must receive,

and properly so, clearance and approval by the Board of Directors which meets periodically and because of the time within which we've had on it, the Criminal Law Committee of the Erie County Bar Association, the time to alert ourselves to your coming and to make preparation for the presentation, unfortunately there wasn't time to present something to the Board of Directors for their approval, so I speak today as a member of the bar only and not in any representative capacity.

MR. BARTLETT: Mr. Birzon, let me say that the committee, the Commission, would still welcome a subsequent expression from the bar association by way of brief. We will conclude our hearings on the 17th of February but hardly our deliberations then. We'll be working on this throughout 1968 and no submission for passage will be made, as you heard me say this morning, until January 1969 so we surely would hope that we would hear from the Erie County Bar in the meantime when you have concluded your deliberation.

MR. BIRZON: Yes. Well, we welcome that opportunity, Mr. Bartlett.

As the vice chairman of the Criminal Law Committee of the Bar, I'm sure that some kind of submission will be made to you.

MR. BARTLETT: Right.

MR. BIRZON: I'll try not to abuse the courtesy that you've extended to me. I think my remarks can be rather short. Many of them involve the attitude and opinions, I suppose, of one who has been on the defense side of the bar and as such they will, I think, reveal some value judgments which conflict in many instances with those expressed in your proposed legislation.

Now, I noted the passage of the RPL, that 2444 of the Penal Law related to the use of criminal conviction records for impeachment of credibility purposes on trial was omitted, was repealed, and in the disposition table there was no indication and it was not, in fact, translated into any portion of the RPL. I was hopeful that perhaps it wouldn't find its way in any other legislation but I see that although it doesn't appear in the same language, it would appear that 30.70 -- I beg your pardon --

MR. BARTLETT: Not 70, it's --

MR. BIRZON: 30. --

MR. BARTLETT: 30.80, would it be?

MR. BIRZON: 30.50, 30.10 and 30.60

appeared to allow, and I think clearly would allow, on cross-examination of a defendant or any other witness the revelation of a past criminal record and it would appear on 30.10 that this would incorporate 4513 of the CPLR which contains language almost identical to that which had been contained in 2444 of the old Penal Law.

Now, I think this is an unfortunate judgment myself. I think it's an archaic rule and I think it's a rule that tends to defeat some of the more sound aspects of the administration of criminal justice.

As you all know, perhaps as much as 90 percent of all criminal cases are disposed of by way of plea prior to trial, for many reasons. There has been some comment earlier today relative to plea bargaining and this has become the subject of a great deal of study by various bodies throughout the country and I think it is a very serious subject of

legitimate concern and one of the great problems, as anyone who has tried and defended a criminal case will tell you, that one of the great problems in the preparation of a proper defense is the fact that one's client may have a criminal record which, by and large, effectively prevents the use of very valuable testimony, testimony that a jury should hear.

Now, the reason it prevents it is one of a practical nature, not of a legal nature, and it seems to be somewhat less than logical to allow a jury to hear evidence of a man's conviction of a felony or misdemeanor perhaps 20 years ago and expect that jury to confine their deliberations as to that conviction on the question of credibility. It simply isn't so. They don't do that. They characterize the defendant on the basis of the kind of record he has. He's a bad man, he's a good man, and on that kind of basis their deliberations as to the question of guilt or innocence on the particular charge before them is clearly effective.

Now, many times, to be sure, a juror can consider and I think clearly in a clear fashion consider a prior conviction on the question as to

whether this man should be believed now, but I suggest to you that without qualifying this procedure in any way by limiting the right of a prosecutor to cross-examine and bring out this type of information and present it to a jury, by allowing him to bring out aged information is simply not sensible because it doesn't go to the purpose of the rule.

In our experience, I don't think we can defend the proposition that a man has been convicted or who has been convicted of a crime 20 years ago is not a believable person.

MR. BARTLETT: If it were perjury, it might be relevant, might it not?

MR. BIRZON: If it were perjury?

MR. BARTLETT: Yes.

MR. BIRZON: I don't think so, Mr. Bartlett. I still think that there's a large measure of irrelevancy to the fact that a man has been convicted of a crime in the past as related to his ability to tell the truth today. Now --

MR. BARTLETT: It's not his ability we're talking about; it's his propensity.

MR. BIRZON: Well, I think one can

quarrel with that but I think the important thing here and, of course, the rule doesn't make him incompetent as was the case in the old common law, but the problem is that in, I think, all of our experiences, those who have been involved in criminal cases, juries tend to look upon these criminal convictions, conviction records of defendants who testify, in a very prejudicial light and not one that is confined in its relation to credibility. It tends to bring in through the back door character evidence when it should not be brought in merely by virtue of the man taking the stand and I put this to you, that in terms of the kind of inherent pressures that are built into our system of criminal justice administration, pressures upon a man to plead guilty to a crime when he would otherwise elect to go to trial, that this is probably one of the most compelling; it's the idea that if he sought to defend himself with a criminal record that his chances of doing so successfully would be much diminished if not nil.

ASSEMBLYMAN ALTMAN: What do you suggest, that no question be asked of the defendant as to his prior criminal record?

MR. BIRZON: I suggest one of two things, either that -- and that makes some sense to me -- or if one doesn't want to take the whole hog, I think that there should be some kind of a time limit put on it. I think although these time limitations are difficult or arbitrary at best, it makes some sense in this area.

Perhaps in the Legislature's judgment, a man who has been convicted of a crime within the past five years, criminal convictions within the past five years, to use a figure for you might be admissible for that purpose but not beyond that.

MR. BARTLETT: You're almost suggesting, are you not, Mr. Birzon, that this be an extension of the amnesty principle which has been considered in depth by the Legislature? As a matter of fact, they've taken some substantial steps on first offenders.

MR. BIRZON: I think it's a most important one too in view of the recidivist rate.

MR. BARTLETT: You're not suggesting that a person who has two convictions for armed robbery and one for perjury, to give a horrible

example, who now offers himself and who is a stranger in the jurisdiction and offers himself as an unbiased independent witness to the commission of another crime and appears for the defendant, that the jury ought not to be able to know something about his background?

MR. BIRZON: Well, I think I misunderstood your earlier question when you mentioned perjury. I think that would be the one, the one crime or conviction for crime that would bear or have some relevancy to the question of whether this man should be believed. I misunderstood that question before and I'm sorry but I would agree that certainly that should be brought out.

Now, with respect to your current question, I can see again the relevancy of the crime of perjury. I can see a jury, a juror, saying to himself and should say to himself, the man has committed perjury before, I must look upon this testimony now with some suspicion, but the fact that he committed robbery before it seems to me not to be relevant particularly to the question of whether he's telling the truth. It's only relevant to whether this

man is a good man or a bad guy and on that kind of basis, a jury should not be able to make a determination of guilt or innocence.

MR. BARTLETT: Of course, I'm assuming that whatever rule you want imposed would be equally applicable to people's witnesses as well.

MR. BIRZON: Oh, yes. Oh, yes. It's a question of logical relevancy along that line.

Staying in the area of Article 30 -- and I'll be very brief on this because I think this is simply a matter of value judgment -- I disagree with the innovation contained in 30.70 in that it represents the elimination of the accomplice, the corroboration rule for accomplices. I think that because of the very nature of the instructions that the Commission is recommending that this kind of testimony is inherently suspect is as good a reason as I can present for requiring corroboration in the case of an accomplice. Almost every jurisdiction either by case law or by statute has this kind of rule --

MR. BARTLETT: It's not "almost every" is it?

MR. BIRZON: Well, it's more than half so far as I know.

MR. BARTLETT: Yes, about two-thirds perhaps. The federal rule, of course, is what we propose here.

MR. BIRZON: Yes.

MR. BARTLETT: Which is almost exactly the present federal rule.

MR. BIRZON: Yes, and as you pointed out in your notes, in your comment rather, as a practical matter it would be perhaps a foolhardy prosecutor who would go into a case where the accomplice's testimony, the accomplice is the principle witness without some kind of corroboration, so I wonder whether the concern of the Commission for those few cases where you may have a good appearing accomplice, one who is convincing, whether statistically the concern of the Commission is supportable.

I find that as a matter of human experience, and perhaps you have too, that all too often, you may find the professional liar being a very convincing person and the converse of that, of course, is true as well but I think that this may prove unfor-

fortunate in that it presents the possibility of one of the great horrors that occur to anyone involved in the administration of criminal justice. When you have a case that's dependent entirely upon an accomplice, upon one witness, and the guilt or innocence of the accused must be determined by the jury evaluating that man's credibility, you have the highest risk of convicting the innocent person. The highest risk is there, much as it would be in the case of a pure identification, one witness identification, kind of a case. A great risk is involved there and this is the kind of thing that the criminal law has always attempted to build safeguards against and it concerns me somewhat and I think that certainly in the case of an accomplice who has been granted immunity, for his motivation or where his motivation to falsify may be at its greatest height, that some qualification of the rule that you propose should be made.

Now, I note the absence in the proposed Criminal Procedure Law of the counterpart of 552-a which calls for the return of prints in the event of an acquittal or dismissal. That doesn't concern me

terribly, to be very frank with you, because as a practical matter the prints are going to Washington and the state court can't compel their return but this is what concerns me and that is the Commission obviously has been sensitive to the notion of indelibly imprinting an arrest record upon a man when some other alternative is available and thus we have a summons, we have the appearance ticket and so forth. Now, given the case that all too often happens of an arrest -- pardon me, that ultimately results in a finding that there should not have been an arrest, that there were no grounds for arrest, that there is a dismissal, not only a dismissal on technical grounds but there is a finding that this is a mistake --

MR. BARTLETT: Let's assume an acquittal.

MR. BIRZON: Well, I think this, Mr. Chairman, that an acquittal can only indicate perhaps that there wasn't sufficient evidence. It doesn't mean perhaps that there wasn't some reasonable ground to believe. Now, we have here, let's assume, a case of a false arrest. Now, quite aside from any civil

remedies which is a practical matter and not available, not enforceable by many members of the community now, what do you do with the arrest record? And I should like very much to see the attention of the Commission addressed -- and I trust that the CPL would be the proper vehicle for this -- the attention of the Commission addressed to the problem of vaporizing or eliminating for all purposes an arrest record perhaps under a procedure whereby this could be made discretionary with the judge -- I don't know that it should be mandatory in all cases -- but perhaps this can be made discretionary with the judge. We find too often that the incidence of crime occurs among our young people. In many instances, they are YO, but the arrest record remains and they seek employment later on and this comes back to haunt them and I think unfairly so, particularly when there were no grounds or no reasonable grounds for the arrest to begin with.

ASSEMBLYMAN ALTMAN: Well, that has been taken up in the overall amnesty provisions even in terms of arrest and you'd be amazed at how many colleagues of ours in the Legislature feel that an

arrest should be made available and particularly where there have been applications made for civil service jobs. I don't disagree with you at all. Quite to the contrary. I think perhaps in the case of young people who have been arrested there should not be any record.

MR. BIRZON: Well, my concern really is for his failure to discriminate against the different types of arrest. That is, there could be arrests which result in dismissal or acquittal but based upon reasonable grounds and I see no reason why a governmental employer, well, be it governmental or otherwise, should not know that fact and make an evaluation of the individual for employment but if, in fact, the arrest was not based upon reasonable grounds -- and this can be determined by a judge through some procedure that is easily established -- then it seems to me it's totally unfair for that type of thing to taint the individual's record.

I should like to see some more questioning --

MR. BARTLETT: You mean a situation where a youngster is arrested and almost immediately

it becomes apparent to everyone, including the arresting officer, that it was a case of mistaken identity, he was miles away and could easily establish it?

MR. BIRZON: Yes. You see, if you take --

MR. BARTLETT: Giving the extreme case.

MR. BIRZON: I mean if you take the most extreme case, as this was, or even a more extreme case, there's no remedy. There's absolutely nothing built in to remedy the situation and it's this inflexibility that I think is somewhat objectionable.

With respect to the youthful offender provisions, I heartily approve and I think this was long awaiting the insistence in the proposed document that the magistrate inform the individual, the youthful person, of his rights under the youthful offender provisions. I think this is excellent; I think this is very wise.

With respect to one aspect, however, I should like to see some change and that is this: The theory of the youthful offender legislation, as

I understand it, is to remove the contamination of taint of a criminal conviction from a young person so that after the proceedings are completed, the records sealed, he can receive, in fact, a fresh start and I think most people would agree with the wisdom of that in selected cases but I fail to see why, given that theory, the youthful person should have to relinquish an important and otherwise constitutional right to a trial by jury in order to secure that status.

MR. BARTLETT: Isn't that going to destroy the very secrecy aspect which is supposedly so important to him?

MR. BIRZON: I don't think any more so than if we provide properly for it in the grand jury. The grand jurors are instructed not to reveal the proceedings in which they are involved and I think the petit jurors could be likewise. I think some safeguards could be built in there, although I grant you there is some element of danger. I think, however, that this should be discretionary with the youthful offenders. I think a jury trial should not be, or the elimination of a jury trial should not be a penalty that he has to pay to acquire a status that

the Legislature in its wisdom feels he should have because he is a young person.

ASSEMBLYMAN ALTMAN: But if you were counsel to a young man under certain circumstances you would prefer a jury trial rather than to have a judge hear it without the accoutrement of the opening, the summation and the voir dire.

MR. BIRZON: In the case where I think my probability of success is greater before a jury because of the nature of the prospective evidence, I should certainly like the ability, the right, to select that mode of trial. I should not like to be confined to only one mode of trial and I think these are difficult judgments that counsel must make at a very early stage in the proceedings before the indictment is even returned.

He must, for example, make application for youthful offender treatment.

MR. BARTLETT: Of course, he must request it in each case, even in the first case, in the first category where it's automatic upon request, but you're saying that the choice he's really faced with is a jury trial and no YO protection, and are you

suggesting that the choice in practical terms is a jury trial and no YO, or YO and adjudication as a YO?

MR. BIRZON: Well, yes, I think as a practical matter that's what it is.

MR. BARTLETT: That's what it really comes down to.

MR. BIRZON: Yes, and the choice should be YO with or without a jury. I don't see why the mode of trial should be relevant to the theory underlying the youthful offender legislation.

Just one comment on 375.60(4) dealing with a motion to suppress and the hearing in connection therewith. One of the problems that doesn't seem yet to be resolved, very little case law on this, is whether or not a defendant who takes the stand in connection with a suppression hearing will then be faced with the use of that statement against him at the trial where evidence in chief is offered.

Although the case law that I have seen indicates that that will not be usable, it seems to me perhaps to be wise to legislate this and make clear by statute that any testimony given by the defendant in connection with a suppression hearing of

one kind or another not be usable in connection with the trial.

MR. BARTLETT: You would permit him to testify upon the taking of testimony at the suppression motion to a set of facts and then permit him to testify to the set of facts upon his trial and not be impeached?

MR. BIRZON: I'm sorry, I didn't make myself clear. Assuming he does not take the stand, that is it should not be introduced as evidence in chief by the prosecution.

MR. BARTLETT: I see what you mean.

MR. BIRZON: But of course, it should be used for impeaching purposes.

MR. BARTLETT: Of course, it could be used to impeach him.

MR. BIRZON: Oh, yes, yes.

ASSEMBLYMAN ALTMAN: So as a practical matter now, it's not being admitted into evidence where we've had motions to suppress and then there was a subsequent trial, the judges generally take the position that they will not permit this into evidence.

MR. BIRZON: They generally do, but it's

my impression of the law in this area that it's somewhat vague and I should like to see it nailed down in black and white because of the great danger. We haven't had a Court of Appeals expression on this yet and one always gets that queasy feeling as a defense lawyer in the possibility that this particular judge is going to go the other way and without something before one and by way of statute, one gets very uneasy and I think we have an opportunity to rectify that here.

MR. BARTLETT: We agree though that we are only talking about its use as evidence in chief?

MR. BIRZON: Yes, yes.

With respect to the discovery provisions, I am delighted and I know a number of defense lawyers with whom I've conferred on this are delighted to see the liberalization of the discovery rules as set forth in Section or Article 125. However, as human nature has it, we are not satisfied.

I feel very strongly in one particular area as to that area and that is the statement of witnesses prior to trial. I know the Rosario rule and under the Rosario rule --

MR. BARTLETT: That's really not discovery.

MR. BIRZON: Pardon?

MR. BARTLETT: Rosario doesn't really recite a discovery.

MR. BIRZON: That's right, that's right.

MR. BARTLETT: It's only preparation for cross really, isn't it?

MR. BIRZON: That's right, Mr. Bartlett.

MR. BARTLETT: Sure.

MR. BIRZON: And I think logically there should not be any distinction or any reason to distinguish between presenting a witness' statement to defense counsel on the trial when he may have just moments to explore and study it as opposed to providing him with those statements prior to trial so that he can make extensive preparation and investigation.

Now, the objection to this procedure has traditionally been, well, you give a defense counsel this material before trial. He's going to

harass witnesses and that sort of thing, and that simply isn't factually so and there are many protections that can surround that kind of danger.

MR. BARTLETT: Would you agree that discovery is expanded, I'd like to see it blown way out to here, would you agree if that's done that the principle of reciprocity has to be observed?

MR. BIRZON: It depends upon the area in which that principle is to be applied.

MR. BARTLETT: Well, the point was made this morning, I think Judge Marshall made it --

ASSEMBLYMAN ALTMAN: Judge Marshall.

MR. BARTLETT: -- that surely statements of witnesses in the hands of the defendant's counsel, if the same are available from the prosecution, ought to be available from him.

MR. BIRZON: I have no immediate objection to that. Again, if we view the trial as a search for the truth and within the limitations of the Fifth Amendment of privilege --

MR. BARTLETT: Of course, this is what hangs us up on true reciprocity, is the Fifth.

MR. BIRZON: Yes, I don't think there

will ever be true reciprocity. I don't think there can be while we have the Fifth Amendment nor perhaps should there be, given the nature of the criminal trial and given the burden of proof, the placement of the burden of proof, which is in large measure a reflection or an extension of the Fifth Amendment privilege but in terms of discovery today, I think that the criminal trial could be expedited, that it could be more intelligently and better prepared if statements of witnesses were given to defense counsel prior to trial.

I think it's important to bear in mind in this connection that the majority in most communities today, the majority of defendants are indigents and are reliant upon assigned counsel in one form or another, either public defender or what-have-you, and this always -- the lack of funds always -- raises a question about adequacy of investigation and although funds are available by statute for investigation now, I think it makes it much more important today to allow the defendant to view statements of witnesses prior to trial.

I can see no reason other than the one

that's judicially been given and other than the lack of reciprocity to deny that to him.

I think also that we should have legislatively and statutorily expressed the greater latitude in the rule where I think by statute the people should be required to furnish either to the defendant or to the court in camera for his study any information, evidence, statements or what-have-you that the prosecutor has reason to believe can tend to exonerate the defendant and if he is in doubt that material should be given to the judge.

Now, this is the rule today and it's applicable to all states but it's somewhat hazy as rules normally are when they have no case law. I think this is something that deserves the attention of the Legislature.

Those are the specific areas that I had in mind this morning to comment on and I'd just like to take perhaps a moment to say this in response to some of the comments made this morning.

I am in total disagreement with any notion of entertaining an alteration of a unanimous verdict. I think it's dangerous. I think it's un-

necessary and certainly until such time as was suggested by the Commission this morning --

MR. BARTLETT: Excuse me. I have to be excused just one minute. Senator Dunne would you carry on for me for just one minute? I'll be right back.

MR. BIRZON: I think until such time as it can be shown statistically that the incidence of hung juries is so great that it poses some real impediment to the smooth administration of criminal justice and that the hung jury situation is, as was suggested, that is 11 to 1 or 10 to 2 as opposed to a five to four situation if we have statistics on that, and that's harder to come by, I don't think that the Commission should even entertain the notion, in fact, the fact that this is now the law in England is not particularly soothing to me. I think we breathe freer air as a result of these safeguards that have been with us for centuries and this would also, I think, go to the complaint of the delays encountered in connection with criminal trials. Now, there are delays but the question is not whether delay is bad. Nothing is bad in and of itself. Is delay necessary?

And on many occasions delays are necessary because there are hearings that have to be made as a result of the new rulings of the Supreme Court and with one other comment, I'd like to close and that is in connection with the suppression hearing.

MR. PANZARELLA: Just before you go into that, on that unanimous decision of a jury, what do you feel about the three to two decision of a three-man bench?

MR. BIRZON: I don't like it and I disagree with it but that's the law. I realize it and I see it here in your statute and again I think it's counter to the principle, obviously, counter to the principal reasons for relinquishment.

I think insofar as our theory of our criminal law has always been, he who carries the burden must establish to everyone's satisfaction guilt beyond a reasonable doubt. This is simply inconsistent. If the one person has a doubt then clearly the conviction must be suspect and I'm in disagreement with the decision although I recognize it as the law.

The only other comment relates to :

375.30. The Commission has, in Subdivision 1, required the people if it intends to offer evidence of a certain kind at the trial to alert the defendant of that fact so the defendant can demand a hearing, but the statute as presently worded limits the kind of evidence as to which the defendant has to be alerted to statements or testimony and I see no logical distinction between the proposed statement of the defendant and something taken from his person during the course of a search and seizure and I think that the Subdivision 1 ought to be amended to include not only things under Subdivisions 2 and 3 but also under 1 which would have been tangible property obtained by means of an unlawful search and seizure. I think this would go, incidentally, to avoiding a multiplicity of pre-trial hearings that have been objected to this morning.

Thank you very much.

MR. BARTLETT: I got back in time to thank you, Mr. Birzon, for your testimony. We do look forward to hearing from the bar association when you've completed your studies.

Ladies and gentlemen, I have no other

listed witnesses here. Is there anyone else here who wishes to be heard?

(No response.)

Well, I want to thank you all very much for coming. It's only by means of such hearings as this that we are able to evaluate a reaction on the part of the community at large, the bench and bar, law enforcement, as to the acceptability of our proposals. This is a long process. We'll be at it, as I indicated this morning, at least through the coming year before we make our final recommendation to the Legislature. I don't believe I mentioned then but I will now, even then we would recommend that the effective date of adoption be delayed another year to assure every opportunity for careful scrutiny of the proposed new code.

We expect that a substituted bill which undoubtedly will differ from this in a number of particulars will be introduced in the Legislature before the end of this current session. For those of you who want to continue to follow the proposals and give us the benefit of your comments, I suggest that you communicate with your legislators about getting

copies of those bills when they are available. I think it's safe to say it will be toward the end of this session that this takes place but that will be the proposal upon which we will hold hearings during the remainder of 1968.

Again, thank you all for coming. It was a pleasure to be in Buffalo.

(Whereupon, at 3:00 p.m., the hearing was concluded.)