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

7 Bar Association Building
8 15th and West Streets
9 Mineola, New York

10 February 17, 1968
11 9:30 A. M.

12 PRESIDING:

13 HON. RICHARD J. BARTLETT, Chairman

14 PRESENT:

15 HON. JOHN R. DUNNE, Member of the Commission

16 HON. EDWARD A. PANZARELLA, Member of the Commission

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

20 RICHARD G. DENZER, Executive Director

21 STAFF:

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

23 CHARLES B. RANGEL, Secretary

24 HELEN E. GORDON, Executive Secretary to the
25 Commission

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2 MR. BARTLETT: Ladies and gentlemen,
3 the hearing will open now.

4 I am Richard Bartlett,
5 Chairman of the Temporary Commission on the
6 Revision of the Penal Law and Criminal Code.
7 The Commission is holding a hearing here in
8 Nassau County this morning on the proposed
9 Criminal Procedure Law.

10 Here with me, and our
11 host, member of the Commission, Senator Dunne.
12 We are grateful for your hospitality, and, I
13 guess, you welcome us into the capacity, as
14 President of the Nassau County Bar Association.
15 We are happy to be here.

16 Other members of the
17 Commission here with me this morning: Edward
18 Panzarella from Kings County; representing the
19 Senate Finance Chairman, Robert Bentley; the
20 Executive Director, Richard Denzer and Counsel
21 to the Commission, Peter McQuillan, and at the
22 end of the table, Charles B. Rangel, Secretary.

23 We are here to elicit
24 comments and criticism on the proposed Criminal
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2 Procedure Law which has been tentatively formulated
3 by the Commission. We are, with this hearing,
4 concluding our first series of hearings on the
5 proposal. We will, again, re-evaluate the
6 Criminal Procedure Law in the coming weeks based
7 on self-criticism and on comments we have re-
8 ceived at our hearings, and before the conclusion
9 of the 1968 Legislative Session, we will submit
10 to the Legislature a proposed Criminal Procedure
11 Law for study purposes only. We will hold hearings
12 again on that revised formulation in the fall of
13 1968, after which we will again go through the
14 proposal and, finally, submit for and recommend
15 passage of a new Criminal Procedure Law for New
16 York State in the 1969 Legislative Session.

17 We are anxious, of
18 course, to hear from the bench, the Bar, law
19 enforcement, public and private agencies who are
20 concerned with the administration of criminal
21 justice in New York, and last, but hardly least,
22 individual citizens who are concerned about the
23 processes of criminal justice.

24 We, of course, expect
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2 that the Legislature, if it enacts the Criminal
3 Procedure Law in 1969 will, as it did with the
4 Penal Law, defer its effective date at least
5 until 1970 so that, hopefully, all of the bugs
6 and gremlins which inevitably find their way
7 into works of this kind, will have been discovered
8 and routed up.

9 The statement of the
10 Field Commission in submitting its code of eighty
11 years ago seems appropriate to this moment. They
12 said, "In submitting the result of their labors
13 to the legislature, the Commissioners will not
14 pretend to assert it is free from omissions and
15 defects, for no human work can be without them.
16 They have spared no effort to render it perfect
17 and, in return, they ask for the candid considera-
18 tion of the Legislature and the people."

19 Those words have a
20 perfectly valid ring here for us today.

21 Our first witness this
22 morning will be the Court Judge of Suffolk
23 County, Judge Stark.

24 Before you begin,
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2 Judge Stark, if there is anybody here from the
3 press sitting back there, if you wish to be
4 seated here at the table to my left, you may
5 do so.

6 JUDGE STARK: Mr. Chairman, gentlemen,
7 first I want to thank the Commission for the
8 opportunity of not having to go all the way to
9 New York City to attend one of your hearings
10 and testify. I want to thank Senator Dunne for
11 arranging for this hearing in Nassau County. I
12 think all of us know the size and complexity
13 that the two counties of Nassau and Suffolk
14 have become over the past four or five years.
15 We do, to some extent, consider ourselves an
16 entity among ourselves, and I want to thank the
17 Commission for giving myself and the other
18 witnesses the opportunity to testify this
19 morning without having to fight the Long Island
20 Expressway all the way to New York.

21 MR. BARTLETT: We are happy to be out
22 here.

23 JUDGE STARK: I have had an opportunity,
24 over the last four or five months ever since the
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2 proposed law was promulgated by Thompson Company,
3 to go through the matter in some detail. I
4 confess, I have not read every word from cover
5 to cover. This would be quite a formidable job,
6 but I have concerned myself, primarily, to items
7 in the proposal which concern the administration
8 of justice through the court process, once the
9 matter comes before a court in that that is
10 primarily a matter of my concern.

11 I would comment, first,
12 that in my overall opinion of the proposed law,
13 I think the Commission has done one tremendous
14 job. We all know the mish-mash and collection
15 of unrelated sections that we have lived with
16 for so many years under the present Code of
17 Criminal Procedure and, here again, the same as
18 you did with the Penal Law in shortening the
19 matter and consolidating many, many matters and
20 eliminating matters which were of historical
21 interest, but nothing else, I think the Commission
22 has done an excellent job.

23 I would like to comment
24 on several areas which relate to the trial
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2 process in which changes have been made, some of
3 substance. Here again, I have no argument with
4 these. In my experience in the court, I find
5 that these would be good changes. The first one
6 I would refer to, of course, is the modification
7 of the existing corroboration of the testimony
8 rule. I think the Commission has proposed a
9 very excellent standard in this regard. Basically,
10 you are putting this into the Federal situation.
11 I can't see any argument with this, I can't see
12 any prosecutor arguing with this particular change.
13 This has given us a great deal of difficulty in
14 the trial courts over many years and is a good
15 advance in the prosecution of criminal cases.

16 The overall rule that you
17 propose as to the admission of a confession or
18 statement, of course, complies with existing
19 constitutional law, and I am happy to see that
20 you didn't attempt to codify rules and, rather,
21 left the matter in a very broad field not
22 violative of constitutional process, which still
23 gives us an out in future years whether the
24 Supreme Court backs down or went ahead. This
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2 bill puts the Federal law in compliance with
3 the Federal constitutional standards.

4 One matter that has
5 given us a great deal of concern, which I am
6 happy to see is one of the recommendations,
7 is that there is only one basic form of in-
8 dictment or criminal acquisition. As all of
9 you know, the practice of different district
10 attorneys has been some use the short form or
11 simplified form, some use the long form,
12 depending on what type of indictment is chosen
13 by the district attorney. This always results
14 in a great deal of difficulty in the pre-trial
15 motion then. There is also the argument as to
16 how much you were told or weren't told. The
17 outlining of what has to be in the indictment
18 in one particular form is very good. However,
19 you still give the defendant the option of bringing
20 motion for more particulars and leave this in
21 the discretion of the court rather than to
22 attempt to codify with additional particulars.

23 I feel that the single
24 pre-trial omnibus motion is a great advance.
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2 be sufficient.

3 MR. BARTLETT: Commissioner Whitman
4 Knapp deserves the credit for that. I don't
5 know if he is running favor with judges or not,
6 but it is the most popular change we have made.

7 JUDGE STARK: I am happy to see that
8 a very muddled situation is going to be clarified.
9 This is the clarification of the Mussenden rule,
10 also, in a judge's charge to the jury in the
11 lesser included offenses. Here again, we have
12 not had any clear guidelines from the higher
13 courts and this, I feel, is a very popular
14 legislative area where the Commission can
15 recommend to the Legislature a clarification in
16 this area and some clarifications on one rule
17 that you recommended which didn't exist before,
18 or maybe it existed as an ex facto practice but
19 never a jury, is the partial verdict rule to
20 permit a jury to bring in a partial verdict under
21 charges that have been submitted to them.

22 Now, going on to your
23 proposed post-judgment motions, this again is an
24 area where I feel the Commission has done a
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2 tremendous job in attempting -- we will still in
3 later years find out whether the attempt has been
4 fruitful -- to try to combine all of the post-
5 judgment applications, other than penal, into
6 one omnibus motion. This, I think, is an attempt
7 and a very laudable one to cut down the number
8 of successive State habeas corpus applications.
9 There again, I think that's good law. It will
10 depend on how the boys Upstate look at it in
11 the prisons after four or five years from now.

12 MR. BARTLETT: It is our hope, of course,
13 to really avoid Federal litigation on Constitu-
14 tional issues by providing every ground for a
15 review in the New York courts that are available
16 in the Federal courts.

17 JUDGE STARK: Now, there are several
18 questions I have. Possibly, Mr. Denzer might
19 be able to answer them for me. I do not find,
20 in the proposed law, any particular section which
21 carries forward what is now set forth in 335C,
22 a warning prior to a felony plea of the possible
23 effect of persistent felony offender proceedings.
24 Do you contemplate mandating such a warning before
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2 a felony plea?

3 MR. DENZER: We deliberately
4 omitted that, Judge Stark. We discussed it a great
5 deal. It seems to me that when you start giving
6 every kind of warning that you can possibly think
7 of and every kind of admonition and instruction,
8 why just that?

9 JUDGE STARK: I am not arguing with it.
10 I think, if a man is represented by counsel, as
11 he has to be at all stages, we are adding an
12 awful lot of the burden to the clerk to put all
13 of these warnings in for someone who is standing
14 up there with, presumably, an educated lawyer.

15 MR. DENZER: To follow all these
16 lines to the logical conclusion, I suppose you
17 might have to advise the defendant of every
18 sentence that he might conceivably get and so on.

19 JUDGE STARK: I don't think it is
20 necessary. I just wanted to know if that was
21 proposed.

22 Also, you have eliminated
23 one section which has risen, occasionally. Under
24 the present Section 426, a jury is permitted,
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2 presumably, to make their own notes or memorandum
3 during the trial and to take such to jury room
4 with them. Now, as I see it, you have eliminated
5 any such permission, is that correct? I am
6 referring to Section 160.20.

7 MR. DENZER: They are permitted in
8 the court's discretion.

9 JUDGE STARK: But not their own notes.
10 The present code lets them take their own notes.
11 I occasionally get a juror who sits there and
12 takes his own notes and I can't stop him,
13 technically, from taking them in the jury room.

14 MR. DENZER: We haven't discussed
15 that. Do you think it is a good thing?

16 JUDGE STARK: I have mixed emotions
17 on them. There are problems of him becoming a
18 dominant factor in that he has some private notes.
19 I am, basically, against the theory if we are
20 for the jury has the opportunity to come back
21 and have testimony re-read.

22 MR. BARTLETT: We are permitting the
23 jury to have certainty as to what the witness
24 said if there is a dispute.
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JUDGE STARK: I think there is a danger if you were to continue that rule. I don't know how much of a historical precedent it is.

MR. DENZER: We did have something in there about notes originally, referring to notes and exhibits. Then, I think, we took it out.

MR. McQUILLAN: That's right.

JUDGE STARK: There are three particular areas Mr. Chairman, that I have several suggestions in for the consideration of the Commission.

Number One, in your omnibus motion to suppress, of course, you have set forth the basic three areas of which a defendant can move for a suppression of testimony, evidence allegedly illegally obtained, confession and so forth. Now, is that section proposed to be re-drafted to include the so-called Wade Suppression Hearing?

MR. BARTLETT: We will have to include that.

JUDGE STARK: This has now become a

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2 Federally mandated pre-trial hearing. I
3 believe you are going to have to provide a
4 codification of a Wade pre-trial hearing.

5 MR. DENZER: It is an awkward matter.

6 JUDGE STARK: It is a very difficult
7 matter. In my opinion, the court has been given
8 no particular standards. How are we to sit
9 there and say that this witness who is going to
10 make an in-court identification how much that
11 may or may not be tainted by all sorts of prior
12 looks at the defendant even in the lower courts,
13 and so forth?

14 MR. DENZER: At the time this was
15 drafted -- and it is the same situation now --
16 there was so much confusion now about whether
17 Wade and Stovall really held. We didn't want
18 to freeze anything in here.

19 JUDGE STARK: As I can see it, we
20 are mandated to have these hearings now, and it
21 should be put in. I don't think we can get too
22 detailed in these matters.

23 MR. BARTLETT: It would be your
24 suggestion that we keep it very broad?

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2 JUDGE STARK: Yes, Mr. Chairman.

3 Now, the second area that I feel there could be
4 additional codification, and I feel it has sort
5 of been left just hanging, a matter that concerns
6 a great deal of people in the process; the
7 district attorney, the court, the defendant.
8 This is the matter of your change of plea
9 situation.

10 Now, as I see it in
11 your proposed code, you statutorily propose the
12 change of plea, which has been the common thing
13 throughout the statute for many years, and the
14 only language you propose as any guidelines at
15 all is the language "with the permission of the
16 court and with the consent of the people."

17 Apparently, you have not
18 felt that you have to mandate a so-called
19 justification by the people as exists in present
20 law.

21 Now, I feel from my
22 own experience, that the State should, in its
23 Criminal Procedure Law, set up some basic outline
24 of that procedure. We have had all sorts of
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2 criticisms in this regard. We have seen studies
3 of the American Bar Association. We have had
4 all sorts of conflicting views on this -- how
5 much the judge should participate, how much he
6 should not participate. We have all sorts of
7 problems in this area. One that has just come
8 up recently is the Court of Appeals stating that
9 a defendant can, basically, institute a plea to
10 a fictitious crime, the crime, for example, of
11 attempted manslaughter being an allowable sub-
12 stitucional plea on a homicidal inditement. We
13 have, also, over the many years, have pleas to
14 attempted crimes where the completed crime has
15 absolutely been charged and committed. We know the
16 plea is an attempt to knock down a plea to its
17 next lower limit. The way I read the procedural
18 here, I am not sure that an attempted plea to a
19 felony where a completed felony is charged, is a
20 lesser included offense and whether there still
21 could be, for example, burglary in the third
22 degree is classed. Is that right, Mr. Denzer?

23 MR. DENZER: Yes.

24 JUDGE STARK: Let's say the D.A. is
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2 insisting on a felony plea, so they knock out
3 attempted burglary in the third degree, but the
4 man has actually made an entry or remained in
5 the building and attempted to commit a crime in
6 it. Could we still have the attempted felony
7 as an acceptable plea?

8 MR. DENZER: We do have a definition
9 of the term lesser included offense.

10 JUDGE STARK: I read it.

11 MR. DENZER: Then the statute permits
12 the plea to the lesser included offense. An
13 attempt, of course, would always be a lesser
14 included offense under this.

15 JUDGE STARK: I am not commenting on
16 whether you should set this up in legislation or
17 not. I do believe there should be a minimal
18 outline on the overall change of plea.

19 Number One, I think you
20 have to specify that the D.A. should, at least,
21 give some oral justification to the court at the
22 time he consents.

23 MR. DENZER: Oral justification?

24 JUDGE STARK: Yes. Written, I think,
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2 is ridiculous because most District Attorneys
3 take several months to file them. The justifica-
4 tion, in my opinion, is for the aid of the
5 court at that very moment.

6 MR. DENZER: This, again, is a delicate
7 issue, as you well know. Particularly, in New
8 York City, you know, there are a number of lesser
9 pleas there and just frankly speaking, it is a
10 pre-bargaining process, and the District Attorney,
11 I don't suppose, can always give an oral
12 justification.

13 JUDGE STARK: I think the Commission
14 should consider some broad procedural outline,
15 from what I hear in another joint legislative
16 commission, in that they want to set up an
17 administrative tribunal. I think your Commission
18 should be well ahead of Senator Hughes' commission.

19 MR. BARTLETT: You think we should flush
20 out the machinery for it?

21 JUDGE STARK: I think, somewhat, you
22 should outline a basic procedure in that regard,
23 that the District Attorney should give his
24 reasons to the court and then you get into the
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2 very tricky area of the questions being put
3 to the defendant about whether or not any
4 promises have been made. This is a very sticky
5 area, and you gentlemen know what I am talking
6 about. I merely recommend that something be
7 considered in that area.

8 Now, one other matter --
9 and this has been thrown in our laps by a decision
10 of the Court of Appeals three weeks ago -- we had
11 a split among the departments up to January 18th
12 on the right of a probationer to appeal an order
13 vacating his probation and proposing a sentence.
14 The Supreme Court, on January 8th, basically
15 held a conflict between the Fourth and Second
16 Departments, held that such a ratification was
17 an amended judgment under Section 516, and was
18 appealable.

19 Now, in examining the
20 Appeal Article, Article 230, I don't know quite
21 sure whether you contemplate these type appeals.
22 There possibly could be a re-sentence appeal, and
23 it could be interpreted that way. However, I
24 think there is a very serious policy question
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2 in this whole field, this whole new area of a
3 field that is now opening up because of the Court
4 of Appeals' decision three weeks ago. I am not
5 against it. I feel that if a man honestly feels
6 he has been aggrieved by a violation of probation,
7 that he should have some remedy, he shouldn't be
8 cut off; but we are going to run into a hornet's
9 nest, I think, as to what standards the Court of
10 Appeals is going to apply.

11 There are three
12 appealable actions. Number One, if there has
13 been a hearing, the Court's determination in
14 judging violation. Secondly, there are two
15 discretionary areas -- the question of revoking
16 and if the Court revokes, the question of severity
17 and so forth. It is a new area.

18 MR. DENZER: You are perfectly right,
19 and you are right also when you say it is rather
20 hazy when you say whether such an appeal can be
21 brought under the provisions. We have been
22 discussing it informally.

23 JUDGE STARK: Good. Now, one other
24 matter. Basically, I feel that the proposed
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2 Article 400 on youthful offenders is very good.

3 I have no argument with your three different
4 proposals as to how a person gets youthful
5 offender treatment. These, I feel, are good.

6 I think the misdemeanor charge can eliminate an
7 awful lot of paper work with no prior requisite
8 as a great advance. The other matter is not
9 much different as to how we operate now, where
10 it is entirely the discretion of the court.

11 There are going to be
12 some mechanical problems with the substituituion
13 of the youthful offender information.

14 MR. BARTLETT: Don't you feel we
15 should require separate instruments?

16 JUDGE STARK: Yes, I do; but we then
17 get into further areas. If you do, and right in
18 the next section you say that a youthful offender
19 can then cop a plea, so to speak, to a less
20 onerous part of the information. Now, this is
21 very academic. He would still be adjudged
22 youthful offender, all the processes of punishment
23 could be imposed, but a lot of them want to do
24 it because they have some feeling if they are
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2 charged with two things, they can get part of
3 it left in absentia or dismissed. So, they are
4 faced with lesser punishment. Here again, I
5 think there should be a procedure where the
6 people have to give some reasons at least as to
7 why they are consenting to the youthful offender
8 copping out to a lesser part of the youthful
9 offender information. I don't argue with the
10 principal, but here again, I think there has
11 got to be some procedure.

12 One thing I am very happy
13 to see is an additional disposition process for
14 a youthful offender. You all know we have had
15 this dilemma for years that we had only a choice
16 of probation, suspended sentence or commit to
17 Elmira. I am very happy to see a Class B
18 misdemeanor. The County Jail, as many of you
19 know, there are many borderline youthful offenders
20 for whom thirty days in jail would do a heck of
21 a lot more good than Elmira.

22 I am happy to see that
23 you kept the Court's discretion in effect as
24 far as privacy of youthful offenders' proceedings.
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2 That has been a matter of an individual judge's
3 choice up to now. I can advise you that most
4 judges in my County have felt there is no reason
5 to bar the public from these proceedings. We
6 have kept the proceeding separate, but anyone
7 can come in and listen, and we feel it has a
8 beneficial effect many times. I feel you are
9 quite proper in keeping the present privacy of
10 pre-sentence reports. However, you have given
11 the court leeway as far as a pre-sentence
12 conference, and let him disclose as much as
13 he wants to in the privacy of Chambers, but I think
14 you are very proper in recommending that there
15 be no authority given to a convicted man to
16 demand that he seek such an investigation.

17 All in all, gentlemen, I
18 want to compliment the Commission on what I think
19 has been a very fine job of draftsmanship. I
20 would ask you to consider some of the matters
21 I have brought up this morning, and thank you
22 again for permitting me to appear.

23 MR. BARTLETT: Thank you very much,
24 Judge Stark. You were very helpful to us. We
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2 appreciate it.

3 We will now hear from
4 the Police Commissioner of Nassau County, Frances
5 B. Looney.

6 COMMISSIONER LOONEY: Mr. Bartlett, members of
7 the Commission, staff. As the Commissioner of
8 Police of the Nassau County Police Department and
9 as a law enforcement administrator, I would like
10 to express my views, offer some recommendations
11 on behalf of the police community and I appreciate
12 the opportunity provided by the Commission to
13 appear before you at this hearing on the proposed
14 Criminal Procedure Law.

15 I want to congratulate
16 the Commission and its staff for providing us
17 with a criminal procedure to match the compre-
18 hensive and modern Penal Code you have previously
19 produced, and that is, of course, with the
20 exception of Article 35. I can appreciate the
21 tremendous task accomplished by the Commission in
22 completely revising and reconstructing both bodies
23 of our State's criminal law and those responsible
24 are to be commended for their demonstrated legal
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2 skill and drafting ability.

3 My remarks concerning the
4 proposed Criminal Procedure Law will relate to
5 those areas which concern law enforcement and
6 will be confined to concerns which it is felt
7 should be called to the attention of the Commission
8 for further study and consideration. I realize
9 that some of the suggestions and recommendations
10 I have to offer may be deemed peculiar to the law
11 enforcement effort, and for that reason, the
12 drafters may have overlooked or failed to consider
13 them in their deliberations.

14 That is why I have stated
15 on previous occasions, that the police officers of
16 our State who are legitimately and vitally con-
17 cerned with our criminal statutes should have been
18 represented on the Commission to project the
19 concerns and the viewpoint of the law enforcement
20 establishment. Nevertheless, I am not here to
21 talk about what should have been, nor is it my
22 intention to detract from the very fine work of
23 the Commission. My only purpose is to present
24 some thoughts which I sincerely believe may
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2 authorized police department, thereby conferring
3 police officer status on all police department
4 employees, including civilian personnel such as
5 clerks, mechanics, chauffeurs, school crossing
6 guards and many others.

7 MR. BARTLETT: We agree. We want to make
8 it perfectly clear we are talking about the sworn
9 officers, of course.

10 COMMISSIONER LOONEY: It would be corrected,
11 I assume, to reflect that?

12 MR. BARTLETT: Yes. We didn't intend
13 to have it have that broad reach. Thank you for
14 calling it to our attention.

15 COMMISSIONER LOONEY: I am certain that was
16 not meant to be and I, therefore, propose the
17 term "police officer" be limited to those members
18 of the Police Department who are sworn law en-
19 forcement officers.

20 Secondly, as indicated,
21 the proposed knowledge of our procedure is to
22 strictly limit the exercise of basic law enforce-
23 ment powers such as stop and frisk, arrest,
24 and search and seizure authority to the police
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2 officer. This has been the legislative trend in
3 New York State since 1963 when summary arrest
4 powers were broadened, but for the first time,
5 only extended to one category of peace officer
6 known as the "police officer." The term thus
7 took on a special legal significance requiring the
8 enactment of distinct statutory definition. Again,
9 in 1964, our legislators showed their preference
10 when they saw fit to entrust only police officers
11 with the exercise of broad confrontation powers
12 contained in the newly enacted stop and frisk
13 law. The police officer was being singled out
14 by our lawmakers and of all the many and various
15 types of peace officers he, alone, was deemed
16 worthy of receiving these grants of additional
17 powers and authority, and the reasons were obvious.
18 Our legislators felt confident that the police
19 officer could be entrusted with greater powers
20 simply because they had, by law, established
21 minimum State-wide physical, educational and
22 medical qualifications for the position and,
23 further, had mandated minimum training qualifica-
24 tions for every police officer in the State of
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2 New York. The police officer was viewed as the
3 professional law enforcement officer, and justi-
4 fiably so. That is why I seriously question the
5 geographical limitations placed on the police
6 officer's arrest powers.

7 MR. BARTLETT: Let me interrupt just
8 for a second, Commissioner. On Monday the
9 Legislature will be given a recommendation to be
10 acted upon this year to permit a police officer,
11 as defined in 154, a State-wide bailiwick for
12 felonies committed in their presence. Would this
13 satisfy you as an extension of the geographic
14 limitations?

15 COMMISSIONER LOONEY: Well, we would like to
16 see it extended throughout the State of New York
17 where a police officer would have the power and
18 be able to exercise the power of a police officer
19 throughout the State of New York.

20 MR. BARTLETT: It is our feeling, for a
21 crime he witnesses, a police officer ought to be
22 able to act everywhere, but we have some concern
23 about police from one area investigating
24 investigations into the jurisdiction without the
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2 knowledge or cooperation of the local agency as
3 possibly being disruptive of good law enforcement
4 practice.

5 COMMISSIONER LOONEY: I don't think that would
6 happen. I think the spirit of cooperation of
7 police throughout the State of New York is that
8 one department would not conduct investigations
9 in the other.

10 I would like to continue
11 and just mention some of the reasons why I think
12 they should have the State-wide power.

13 MR. DENZER: We have heard, perhaps,
14 dozens of witnesses over the last few days from
15 agencies such as Correction Departments, who want
16 full police power, some of them do, at least.
17 Their argument is that they wander around after
18 hours, and so forth, they can supplement the
19 police department and be of great help to the
20 regular police officers. I take it that you
21 don't feel you want their help to that extent?

22 COMMISSIONER LOONEY: I am speaking solely for
23 the law enforcement officers, the police officers
24 of the State of New York. I appreciate that they
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2 may have wants and desires, and I appreciate
3 their spokesman will express those, but I think
4 that when we have police officers in the State of
5 New York who complied with State standards, minimum
6 qualifications, who comply with the only State-
7 wide training program established by the Legislature,
8 I think we can hold them apart. In fact, the State,
9 itself, has held them apart and said they are
10 capable of accepting much more responsibilities
11 because we, the State legislature, have fixed the
12 minimum standards. We have indicated and fixed
13 by law a set of minimum training for police
14 officers.

15 MR. DENZER: I, personally, would happen
16 to agree with you, but I just wondered what you
17 thought about that in that they could be a great
18 help to the police while they are off duty.

19 COMMISSIONER LOONEY: I think the total
20 community can be very helpful to the police. As
21 we indicated here sometime ago, we do not believe
22 in the vigilantes. We believe that any law enforce-
23 ment must be under the supervision and control
24 and be trained by a duly authorized law enforcement
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2 agency, but I think the public can be very
3 helpful, including the quasi-judicial enforce-
4 ment people who can make any information available
5 to us.

6 The establishment of
7 such territorial restrictions by a State statute
8 is completely inconsistent with the existing
9 philosophy in this State, which is one of
10 professionalization of police officers by the
11 promulgation of State laws mandating minimum
12 qualifications and training requirements to
13 insure the proficiency of every police officer
14 throughout the State of New York whether he be
15 employed by a village, county, city or the State,
16 itself. If our police officers are all compelled
17 by this State to meet the same standards of
18 competency, it is quite illogical for the State
19 to discriminate against certain of them because of
20 their place of employment. I submit that there
21 is no valid reason whatsoever for our State's
22 Criminal Procedure Law to geographically limit
23 police officer arrest powers, particularly today
24 when we have raised the standards and increased the
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2 caliber of all our police officers on the premise
3 that crime knows no boundaries, and we have to
4 have highly capable individuals performing a law
5 enforcement function throughout the State.

6 MR. DENZER: Would you be willing
7 to have a village police officer, say from St.
8 Lawrence County in Nassau who --

9 COMMISSIONER LOONEY: (Interposing) Yes, I
10 would. If I had a police officer from anywhere
11 in the State of New York and who came to Nassau
12 County and witnessed the commission of a felony or
13 misdemeanor, I would not only agree to it, but
14 I would encourage him to take the necessary
15 action. I think these very fine, trained
16 and selected men should be encouraged to do that.
17 We are operating today not in a parochial way on
18 a village level, or a town level. We are
19 operating, at least I hope, on a State-wide level.

20 It is my contention that
21 a police officer is a police officer for all
22 intents and purposes, and it is in the best
23 interest of the public safety of the people that
24 he be not only permitted, but to be encouraged to
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2 act at any time in the State of New York. The
3 more alert and responsible police officers that
4 can be constantly engaged in the war on crime,
5 the better it will be for all law abiding citizens.
6 Under no circumstances should the State, who,
7 pursuant to State law has certified police officers
8 as such, turn around and divest them of their
9 authority to act within the State. If the
10 employing municipality wishes to restrict their
11 police officers from acting in their official
12 capacity outside of the geographical boundaries
13 of the community, it is possible that they should
14 have that option; but it is definitely not in
15 the best interests of law enforcement or the
16 people of the State of New York for the State,
17 itself, to prevent a trained and qualified police
18 officer from performing his sworn duty of pro-
19 tecting life and property and preventing crime by
20 depriving him of his police officer's arrest
21 powers and the protection they afford from civil
22 liability.

23 The incorporation of the
24 Appearance Ticket Procedure in the proposed Statute
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2 is a worthwhile innovation. For approximately a
3 year and a half, our department has been success-
4 fully employing a similar procedure in connection
5 with all misdemeanor and lesser offenses except
6 those which are non-bailable. Our experience has
7 been most favorable in that only eight defenders
8 out of eight hundred ninety-two cited failed to
9 appear. While the concept of the Appearance
10 Ticket is quite acceptable, I do believe that the
11 mechanics of the procedure, as formulated, can be
12 further defined to help insure its success and
13 further extended to provide a greater savings in
14 police man hours.

15 As proposed by the revisors,
16 the Appearance Ticket may be utilized in lieu of
17 arrest in all non-felony arrest situations and
18 the discretion to issue the ticket is bestowed
19 upon the arresting officer. The proposed procedure
20 also provides for the employment of the Appearance
21 Ticket as a method of station house release without
22 bail, as well as and in conjunction with a deposit
23 of bail.

24 In analyzing the entire
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2 procedure, it would seem that it would be much
3 more practical to limit the use of the Appearance
4 Ticket to station house releases, particularly in
5 misdemeanor cases. This would provide the same
6 desired advantages to the accused, the police
7 and the public; but more importantly, it would
8 permit a more discriminate appraisal of the
9 situation by a superior officer, thereby insuring
10 its judicious use, and would enable the finger-
11 printing and photographing of a misdemeanant as
12 required under the proposed Section 80.11, which
13 will further serve to determine if the accused
14 qualifies for immediate release by the Appearance
15 Ticket. In fact, the necessity of accomplishing
16 the identification process mandated by Section
17 80.10 and making a determination as to the need
18 for bail as provided in Section 395.20 completely
19 eliminates the use of the Appearance Ticket as an
20 on-the-street release vehicle in misdemeanor
21 situations, and properly so.

22 MR. DENZER: Commissioner, isn't it
23 possible that one of your officers might come on
24 a fight somewhere in the neighborhood? The
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2 defendant is probably guilty of assault in the
3 third degree, but he is a local boy. Wouldn't
4 it be desirable to have the police officer that
5 knows him and the family and has been around for
6 years, instead of arresting him, and bringing him
7 to a station house, just serve the ticket there on
8 the street?

9 COMMISSIONER LOONEY: In misdemeanor cases that
10 I am referring to, he would have to come to the
11 station house anyhow because your new Criminal
12 Procedure Law mandates that they be photographed
13 and finger-printed.

14 MR. DENZER: We didn't have that in mind
15 in an Appearance Ticket case, only on arrest.
16 If he just had an Appearance Ticket, he wouldn't
17 be finger-printed for that.

18 COMMISSIONER LOONEY: Then it wouldn't be
19 consistent if you were finger-printing those that
20 were brought to the station house. It would have
21 to be spelled out in talking about misdemeanors.
22 Whether it is a misdemeanor out in the street or
23 in the station house, it is pretty much the same.

24 MR. BENTLEY: Just overlook, for a
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2 moment, that it is not spelled out properly about
3 the printing and so forth. What do you think
4 about the use of Appearance Tickets?

5 COMMISSIONER LOONEY: We were the first and
6 only police department in the State of New York to
7 use the Appearance Ticket exclusively for mis-
8 demeanor and assault cases. We have used it, as
9 I said, on a County-wide basis for a year and a
10 half, and only had the eight out of eight hundred
11 ninety-two fail to appear.

12 MR. DENZER: The objection which you
13 just posed only applies to misdemeanor cases?

14 COMMISSIONER LOONEY: That is correct.

15 MR. DENZER: Now, as far as a disorderly
16 conduct --

17 COMMISSIONER LOONEY: (Interposing) No
18 objection at all to that. We have been doing it
19 for many, many years.

20 Section 75.20 should be
21 amended to conform with 70.50, 80.10 and 395.20
22 by limiting the use of the Appearance Tickets in
23 misdemeanor cases to station house releases. This
24 would provide for a much more practical and
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2 realistic release procedure and will eliminate
3 the possible indiscriminate use of the Appearance
4 Ticket, provide time for identification processing
5 and, at the same time, make it readily available
6 in appropriate cases.

7 The next consideration

8 I want to address myself to is the theory and
9 operation of the Appearance Ticket as acknowledged
10 by our revisors is identical to the traffic ticket
11 process. Also, as mentioned by the drafters, it
12 can prove advantageous to the police as a result
13 of the reduction of police involvement in post-
14 arrest processing, thereby freeing the police
15 officer for a return to his regular duties. This
16 is all very true, but unfortunately, the proposed
17 Procedure Law, the Appearance Ticket procedure falls
18 short of providing the great potential savings in
19 police man hours that would be possible if it
20 had been developed to the same extent as our
21 traffic ticket procedure.

22 In connection with the
23 processing of an arrest, the greatest amount of
24 police officer time is spent in going to court for
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2 the purpose of executing the information at the
3 time of arraignment. This time can now be saved
4 by simply authorizing the desk officer to ad-
5 minister the necessary oath to the arresting
6 officer in connection with the execution of the
7 information in all cases where an Appearance
8 Ticket has been served. This would eliminate the
9 need for every officer who issues an Appearance
10 Ticket to appear in court at the arraignment
11 merely for the purpose of executing the information.
12 This is the practice followed in traffic summons
13 cases, and there is no apparent reason why the
14 same practice and procedure cannot be adopted
15 with respect to the Appearance Ticket process. It
16 would make the use of the Appearance Ticket more
17 beneficial in every respect and provide the
18 community with more police patrol time which is
19 desperately needed today because of today's
20 increased demand for police services.

21 MR. DENZER: Excuse me. We are
22 considering that kind of legislation. The fact
23 that it isn't in here is a result of an incomplete
24 Code rather than of a decision not to have it.
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2 We are even considering one step further than
3 that -- I don't know whether you approve of
4 this -- suppose you had a form notice on all of
5 these informations that any false statement made
6 in there constitutes a crime under one section of
7 the Penal Law. You wouldn't even need swearing
8 or the oath for that. You know, the form notice
9 kind of instrument?

10 COMMISSIONER LOONEY: I am sure, though, that
11 the police officers of our State, who are so well
12 trained, would fully appreciate that, anything
13 that would indicate there were a violation of law.
14 I think it might be considered an affront to the
15 police officers of the State to put that in there.

16 MR. DENZER: Why would it be an affront?

17 COMMISSIONER LOONEY: If you indicate the
18 person that executes the information releases that
19 what he is saying is the truth we have no great
20 objection to it; but I think we can depend on
21 the police officers, too.

22 MR. HECHTMAN: This, Commissioner, would
23 be in place of swearing. He wouldn't have to be
24 sworn.
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2 MR. DENZER: It would save that much
3 more time.

4 COMMISSIONER LOONEY: Yes, that would be good.
5 We introduced and recommended legislation in that
6 area also. It is one area we will save more
7 police time than any other area. Only a small
8 percentage of any misdemeanor trials ever go to
9 trial, so, the police officer only comes to sign
10 the information.

11 It is noted that the
12 provisions of our present stop and frisk application
13 has been carried over into the present Criminal
14 Procedure Law without any further elaboration.
15 It was anticipated that specific authority to
16 employ necessary physical force to carry out the
17 stop and frisk function would be included by the
18 revisors inasmuch as the provisions of Article 35
19 of the Penal Law do not contain such authority.
20 The stop and frisk authorization provides for an
21 important and essential enforcement function and,
22 as our Court of Appeals has stated, the right to
23 stop and frisk suspects in public is a necessary
24 and indispensable police power. This limited
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2 investigative confrontation and protective frisk
3 authority should not be diluted by a failure to
4 legalize the physical contact and restraint that
5 may be necessary to its accomplishment.

6 Although the authorization
7 to employ force, if necessary, to effect a search
8 and seizure pursuant to a search warrant, is
9 clearly and specifically set forth in Section 365.50
10 of the proposed statute, such authorization is
11 conspicuous by its absence under the stop and
12 frisk provisions of Section 70.70.

13 MR. BARTLETT: We would be better off
14 taking out the reference to 345.60 and covering the
15 whole thing.

16 COMMISSIONER LOONEY: I think you are correct.
17 We have to be very direct and spell out, without
18 equivocation, as to what the police can do and, in
19 this way, give them the necessary power.

20 Statutory authorization
21 is needed and it should be included in the
22 appropriate provisions of 70.70 at the same time,
23 the Commission may wish to give some thought to
24 providing police officers with statutory authority
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2 to provide necessary force for the purpose of
3 conducting other lawful searches and seizures;
4 removing demonstrators from the highways, con-
5 trolling unruly crowds, and also to be utilized
6 in finger-printing and photographing of arrestees.

7 I think you have one
8 overall statute similar to the one we enjoyed
9 under the old 246. I think the police officers
10 of the State would be very content with that. All
11 the functions I previously mentioned are legal and
12 required police powers that we need. That is why
13 we have to exercise some degree of force.

14 I have made five specific
15 recommendations which all involve the police
16 officers of our State, ranging from the definition
17 of the term "police officers," the unrestricted
18 exercise of police officer arrest powers; the most
19 feasible utilization of the Appearance Ticket in
20 misdemeanor cases; the possible saving in police
21 man hours through a complete extension of the
22 Appearance Ticket procedure, and the need, as I
23 mentioned last, to employ force under the stop
24 and frisk and the other statutes. I feel the
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2 proposals that I have made are all very important
3 and are very vital to the law enforcement efforts,
4 and I urge your Commission to give every consider-
5 ation to their inclusion in the proposed Criminal
6 Procedure Law. Thank you very much.

7 MR. BARTLETT: Thank you, Commissioner.

8 I take it as to the effect of the rest of the
9 code proposal upon the law enforcement officer,
10 you approve of it, in general?

11 COMMISSIONER LOONEY: I approve of it, in
12 general. I feel we should give them all a chance
13 to work. I note, particularly, that the D.A.'s
14 offices throughout the State have strongly
15 recommended wire tapping. We join in that. We
16 feel that wire tapping is the single most important
17 instrument of effective law enforcement today. We
18 do not quarrel with any controls that you might
19 place on getting wire tap orders, as you have
20 recommended, and I think properly recommended that
21 they be under the jurisdiction and the control of
22 the Attorney General of the State and the local
23 D. A.

24 We have operated similarly
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2 here in Nassau County these last many years.
3 Even though we were granted the power and the
4 authority to secure wire tap orders, we did not
5 exercise that independent of the D. A. We
6 operated with him. We have total confidence
7 in him and I am sure that other law enforcement
8 agencies have the same in their D. A. I think it
9 is a good thing to have many controls on wire
10 tapping because it is sensitive. I compliment
11 you for the controls that you have placed on it.

12 MR. BARTLETT: Thank you. You know,
13 for the State-wide bailiwick and wire tapping, the
14 Governor is going to send a special message to
15 the legislators on Monday urging that they act on
16 those and other proper administration in that
17 session.

18 COMMISSIONER LOONEY: Thank you.

19 MR. BARTLETT: Is Judge Kelly here yet?
20 Do you want to catch your breath before you speak?

21 JUDGE KELLY: Please.

22 MR. BARTLETT: Judge Lockman?

23 JUDGE LOCKMAN: Chairman Bartlett, Senator
24 Dunne, gentlemen: The proposed Criminal Procedure
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2 Law reflects the same effort and dedication of
3 our revised Penal Law. It is surprisingly readable
4 when you consider that it covers the entire
5 adjective law for our criminal procedure, and
6 the finest compliment I can pay to it is that, after
7 carefully reading it, I was only able to find
8 three minor suggestions.

9 MR. BARTLETT: We are pleased there are
10 so few. We are happy to have your suggestions on
11 those.

12 JUDGE LOCKMAN: Section 1.20 refers to
13 the definition of a police officer on page twenty-
14 five. In your staff notes you recognized the
15 need for firearms being carried by jailers. We
16 are also going to need some provision for our
17 marshalls in the district court because they handle
18 prisoners. Section 50.45 on page eighty-seven,
19 dealing with Superseding Informations provides
20 that when the superseding information is filed,
21 the original information is dismissed. Provision
22 must be made that when this happens, the bail, if
23 any, is transferred to the superseding information.
24 Our experience has been that we would hold the
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2 original information, since the bail was set
3 on that, until the final disposition of the
4 matter. There is no reason why your suggestion
5 can't be followed, but in the bail provision
6 there should be provision that any superseding
7 information would be covered by the bail.

8 MR. DENZER: You are quite correct
9 and, as a matter of fact, we are working on that
10 in broad principal whereby the court may simply
11 continue the bail in single criminal action when
12 one accustory instrument is replaced by
13 another, rather than going through the whole
14 thing again.

15 JUDGE LOCKMAN: That is very sound.

16 The final correction is
17 Section 400.50 on page four hundred fifty-four,
18 which deals with Youthful Offender Sentences.
19 Under the existing law, or under the proposed
20 provision, there is no provision of what the
21 judge can do, for instance, with a youth that is
22 charged with drunken driving in relation to his
23 license. I don't know whether this is even proper,
24 but we have been requiring the defendant to
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2 voluntarily surrender his license.

3 MR. BENTLEY: Judge, the Fourth
4 Department ruled earlier this week that you
5 can't do that. That you are not the Commissioner
6 of Motor Vehicles.

7 JUDGE LOCKMAN: That emphasizes the
8 needs.

9 MR. BENTLEY: So, if you stay in this
10 Department, you are safe; but if you go out West,
11 stop it.

12 JUDGE LOCKMAN: I think it should be
13 corrected at this level.

14 MR. BENTLEY: I think the judge's
15 first suggestion was right, the Fourth Department
16 is right.

17 JUDGE LOCKMAN: Now, gentlemen, these
18 suggestions are minor and I wouldn't be taking
19 your time if that was what I wanted to discuss.
20 I am here to discuss something which is the most
21 important problem of our courts in this State,
22 which is calendar congestion.

23 Now, as you know, under
24 our present system a judge must emphasize to a
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2 defendant that there have been no promises made.
3 We must get an acknowledgment on the record that
4 there have been no promises. Judges are not
5 hypocrites and the vast majority of our judges
6 will not have any discussion with an attorney
7 where he makes any commitment whatever.

8 Now, this is roughly the
9 equivalent in a civil case of expecting a
10 defendant to acknowledge his liability and leave
11 it to the judge to set the amount. In this day
12 and age, it is time that we re-appraised this
13 situation, which has been done as you know, by
14 the American Bar Association Project for Minimum
15 Standards for Criminal Justice. I would like
16 to paraphrase -- I have copies of their language
17 here which I am going to distribute.

18 MR. BARTLETT: Do you think we ought
19 to recognize the reality of plea bargaining and
20 provide machinery for it?

21 JUDGE LOCKMAN: That is exactly what I
22 am suggesting. I think it is a starting point,
23 the way they set it up. I have their language,
24 as I say, and I would like to paraphrase their
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2 suggestions.

3 The D. A. and the
4 defendant's attorney would be permitted to have a
5 pre-plea agreement conference when it was in the
6 public interest, and it is public interest that give
7 standards for that, among which are a prompt
8 sentence on the theory that a prompt sentence is
9 a better punishment than a delayed sentence; that
10 in certain instances a public trial should be
11 avoided; that in many instances, the defendant,
12 by pleading, then assists the D.A. in convicting
13 other defendants, and this could be considered;
14 and one of the other grounds given, the important
15 ground, is calendar congestion.

16 Now, the judge could not
17 participate in this conference between the
18 attorneys, but if they agree and their client
19 agreed, the defendant agreed, the judge could
20 then permit, at his discretion, a disclosure of
21 the entire agreement including the agreement as
22 to what the sentence would be. The judge then
23 would independently make his own decision, and
24 if he felt, considering everything, that this
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2 agreement, including the sentence were proper,
3 he would advise the parties that the proposed
4 sentence is all right provided the information
5 he has been given as to the background of the
6 defendant is accurate. If this information were
7 not accurate, he could then sentence otherwise,
8 provided he included in the record the background
9 material that was different than the material
10 he had been supplied.

11 Now, they don't say this
12 in the American Bar Association Plan, but I
13 think it is apparent to all of us that all of
14 this should be on the record. Once the agreement
15 is reached and it is told to the judge, it should
16 be on the record in the presence of the defendant.
17 Then, the judge should be given time to analyze
18 it and think about it. Then, when he makes his
19 decision, that should be put on the record and,
20 of course, the background of the defendant should
21 be delineated on that record. Then, when the
22 judge gets the probation report, he indicates on
23 the record where he exceeds the agreement. I
24 think that should be done to make a good job into
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1 a great one.

2 MR. BARTLETT: Thank you for your
3 suggestions. We would take another hard look
4 at the reduced plea situation.

5 JUDGE LOCKMAN: I would like to leave
6 these with your secretary, if I may.

7 MR. BARTLETT: Thank you very much,
8 Judge Lockman.

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10 Speaking for the Nassau
11 County Magistrates Association, Judge Tanenbaum.

12 JUDGE TANENBAUM: Mr. Chairman, gentlemen,
13 I appear here on behalf of the Nassau County
14 Magistrates Association, solely with two questions
15 which have arisen by reason of the pre-code and
16 the pre-procedure, the first dealing with the
17 question of the requirement of stenographic
18 minutes, and secondly, the question of the furnish-
19 ing of those minutes as part of a return on an
20 appeal. I don't know what position the Magistrates
21 Association have taken Upstate with reference to
22 this problem, but I know it is a problem which
23 has arisen time and again. The Nassau County
24 Magistrates Association respectfully recommends
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2 that all local criminal courts of the Second
3 Judicial Department of the Appellate Division
4 should be required to employ a stenographer to
5 record all proceedings occurring in such courts.
6 At the present time there is neither judicial
7 precedent nor statute which makes such provision
8 mandatory. However, there exists two enabling
9 statutes. First, Section 186 of the Village Law
10 provides the Board of Trustees may, by unanimous
11 vote, appoint and fix the compensation of a
12 stenographer to take the testimony of witnesses
13 and to act as clerk for the police justice. For
14 such Board they authorize the police justice to
15 employ such stenographer from time to time as such
16 services are required by said police justice.

17 The second statutory
18 enactment, Section 703A of the County law provides
19 in part, whenever the District Attorney of any
20 County, in the performance of his duties shall
21 be required to prosecute a contested criminal
22 proceeding before a magistrate of a town or village,
23 unless pursuant to law a stenographer be regularly
24 employed by such magistrate or in the court over
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2 which he presides, such District Attorney may
3 employ a stenographer to take the testimony on
4 such trial.

5 It must be noted that the
6 above quoted statutory provisions are permissive.

7 In addition, in
8 Section 703A of the county law, the District
9 Attorney is authorized to employ a stenographer
10 for the purposes of trial only. Thus, it appears,
11 and experience has shown, that some local criminal
12 courts have not taken advantage of the existing
13 permissive legislation.

14 The Nassau County
15 Magistrates Association strongly believes that
16 it is better practice to require that a stenographer
17 be utilized in all local criminal courts. The
18 stenographer's duties should include the taking
19 of the minutes of procedures which are included in
20 the judgment roll. I refer to the minutes of
21 arraignment, hearings to suppress evidence and
22 other pre-trial hearings, trial, or change of plea
23 or withdrawal of plea of guilty and sentencing.
24 This is particularly so in the Second Judicial
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2 Department when it now requires that all appeals
3 from a judgment of order of all the local criminal
4 courts be taken to the Appellate Term of the
5 Supreme Court.

6 In the case of People vs.
7 Lila Bermish, New York Law Journal July 12, 1966,
8 at Page Thirteen, an appeal from the Village Police
9 Justice Court wherein there was no stenographic
10 record made, the Honorable Paul Kelly, Judge of
11 the County Court of Nassau County stated as
12 follows: "The judge should endeavor to have a
13 full and complete record of the trial. The
14 employment of a stenographer would ensure that
15 the minutes are accurate and complete. More
16 important is the fact that the trial judge should
17 be as free as possible from clerical duties. He
18 would then be able to diligently investigate the
19 issues involved and rule on the admissibility of
20 evidence. Moreover, the presence of a certified
21 stenographer would ensure a smooth trial and
22 alleviate personality conflicts upon an appeal."

23 The Nassau County
24 Magistrates Association endorses the statement
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2 of Judge Kelly and respectfully recommends that
3 legislation be enacted requiring all local
4 criminal courts to employ a stenographer for
5 procedures which are included within the judgment
6 roll.

7 MR. BARTLETT: Do you make this a town
8 or village charge, or a county charge?

9 JUDGE TANENBAUM: I am coming to that in just
10 a moment, if I may.

11 Another problem of major
12 importance is where the local criminal court should
13 bear the expense for the defendant's copy of the
14 stenographic minutes. Section 756 of the Pre-Code
15 of Criminal Procedures states as follows: "Return,
16 when and how made. The Magistrate Court or courts,
17 in rendering the judgment, must make a return to
18 all the matters stated in the affidavit and must
19 cause the affidavit and return to be filed in the
20 office of the County Clerk within ten days after
21 the service of the Affidavit of Appeal. A copy
22 must be sent to the D.A. and to the attorney taking
23 the appeal."

24 The intermediate appeal
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2 at courts which have interpreted this statute have
3 rendered conflicting opinions. The County Court
4 of Nassau County has held, "Accepting that a
5 return must contain the minutes of the trial, this
6 Court is of the opinion that the clear language
7 of the Statute Code of Criminal Procedures
8 Section 756, that the Magistrate or Court rendering
9 the judgment must make a return and send a copy
10 of the return to the D.A. and to the attorney taking
11 the appeal..." can lead only to the conclusion
12 that the statute requires that the return served
13 upon the appellant contain a copy of the minutes
14 of the trial. I refer to People vs. Roquefort,
15 50 Miscellaneous Section, Page 404.

16 MR. DENZER: You have read our appeals
17 provision in this section, have you not?

18 JUDGE TANENBAUM: I am coming to that,
19 Mr. Denzer.

20 The court, in the same
21 case, continued and said, "It is regrettable in that
22 it places a heavy financial burden on village or
23 town governments, but that consideration would not
24 justify a ruling contrary to the intent of the
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2 Legislature expressed in the amended statute."

3 While it is not clear
4 from a reading of the opinion, the defendant
5 Roquefort did not claim indigency, the Second
6 County Court, notwithstanding a conclusion that a
7 return was not complete without the stenographic
8 or long-hand minutes of the trial, held that the
9 requirement under Section 756 of the Code of
10 Criminal Procedure only obligates the Magistrate
11 to send a copy of the return, and nothing more,
12 to the attorney for the defendant. The Court
13 stated that the defendant or appellant could
14 examine a transcript of the minutes at the County
15 Clerk's office or could pay the stenographer the
16 fee for obtaining a copy of the transcript. I
17 refer to the case of People vs. Freeman, 44 Mis-
18 cellaneous, Section 10.16.

19 It should be noted that
20 the defendant Freeman did not claim indigency.
21 Thus, it is clear there is a lack of uniformity
22 among the courts in their construction of
23 Section 756 in the Code of Criminal Procedure.
24 The Nassau County Magistrates Association strongly
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2 urges that the proposed New York Criminal Code
3 Procedure Law include a section which clearly
4 states who will pay for the defendant's copy of
5 the stenographic minutes where the defendant does
6 not claim indigency. The inclusion of such a
7 section would insure that a defendant appellant
8 in Nassau County would receive the same equitable
9 treatment as a defendant appellant in any other
10 place. In addition, lower criminal courts will
11 be relieved of heavy financial burdens. Such
12 a procedure would also alleviate pressure on
13 some of the property owners in the area.

14 The League of Magistrates
15 of Nassau County respectfully recommends, one,
16 that an indigent defendant appellant be furnished
17 a copy of the stenographic minutes without charge
18 after submission of evidence establishing such
19 indigency. That if a non-indigent defendant
20 appellant requires a copy of stenographic minutes,
21 that he be furnished with a copy of the steno-
22 graphic minutes after payment of the usual fees.
23 I refer to Sections 456 of the Code of Criminal
24 Procedure and Section 722C and 722E of the County
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2 to file a return or an amended return remain
3 upon the defendant appellant, and I refer to
4 the cases of People against Newman, 137 Miscellane-
5 ous, 267; People against Helms, 144 Miscellaneous,
6 695; such practice conforms to the prevailing case
7 law.

8 So that, Mr. Chairman,
9 in line with the question propounded previously,
10 I think that if the stenographic minutes were
11 mandated in the first instance, half of the
12 problem would be solved. The other question of
13 when a defendant does or does not pay for them,
14 I believe there is adequate legislation presently
15 enacted in the other companion statutes to cover
16 the situation.

17 Those are the views of
18 the Nassau County Magistrates Association,
19 gentlemen, and we respectfully request your
20 consideration.

21 MR. BARTLETT: Thank you very much,
22 Judge. I take it in the other provisions relating
23 to the local criminal courts you are satisfied
24 that it is a workable scheme?
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JUDGE TANENBAUM: Yes.

MR. BARTLETT: Thank you very much.
Judge Kelly?

JUDGE KELLY: I just got word from
Senator Dunne you are going to take a five
minute recess.

MR. BARTLETT: We are going to take a
little break.

JUDGE KELLY: It is a good idea.

(WHEREUPON THE COMMISSION RECESSED AT 10:55 A.M.
AND RECONVENED AT 11:05 A.M.)

MR. BARTLETT: Our next speaker will
be Judge Paul Kelly, Nassau County Court judge.

JUDGE KELLY: Mr. Bartlett and members
of the Commission, I have been retained by the
uniform and non-uniformed members of the court
staff, as well as the probation members to
discuss the section of the proposed law which
will have the tendency to deprive them of police
officer status and the right to carry arms. I
might say that this retainer is strictly in my

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2 head. I was very much interested when I first
3 read this, and I wondered what exactly was the
4 cause behind it. I had occasion to discuss it
5 very briefly with several different people and,
6 apparently, there has been, throughout the State,
7 some abuse of this particular phase of the duties
8 and obligations of the various men involved. So,
9 I will confine my remarks to the Nassau County
10 situation as we see it.

11 Now, first of all, let
12 me go into the question of the uniformed and non-
13 uniformed personnel of the county courts and
14 district courts, and the probation officers
15 certainly. I don't believe that I have to tell
16 this Committee or its members of the type of
17 individual that these people are dealing with
18 day in and day out. The court personnel are
19 involved in the protection of the public in the
20 courts, the protection of the judiciary in the
21 courts, the protection of jurors, the safeguarding
22 of the rights of the defendant as far as jurors
23 are concerned. All of these obligations, of
24 course, of necessity, requires, every once in a
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2 while, some brush with violence. Now, first of
3 all, I would like to say that the personnel that
4 I am discussing are men of the very highest moral
5 qualities. Most of them are college men, college
6 degree men, most of them are career men who have
7 made their life's work this job which they are
8 attempting to do and are doing so well. I am
9 quite at a loss to understand the necessity of
10 this very drastic change. I feel that any power
11 that these men are given cannot be said to be more
12 than is necessary.

13 We will take, for
14 instance, the question of the protection that
15 must be afforded to both the public and to the
16 judiciary and the personnel of the court, itself.
17 Now, it is true we do have, as far as our
18 defendants are concerned, we do have -- when they
19 are brought in from the county jails -- we do
20 have the uniformed sheriffs who are, of course,
21 peace officers; but there is another phase of
22 this that might possibly have been overlooked.
23 That's the question of the bail, the bailee.
24 Now, last year, for some two or three months,
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2 because of an incident that arose, I had the
3 occasion to require that before my court would
4 open on sentence day -- which at that time was on
5 Friday, but now it is most every day -- I would
6 revoke the bail of the defendants, bring them
7 into the back and have them searched. Now, in
8 two months' time I would like to show you exactly
9 what was the result of this particular search.

10 (RESULTS OF SEARCH WERE THEN PLACED ON THE
11 COMMISSION'S TABLE)

12 JUDGE KELLY: (Continuing) Now, these
13 were men who were out on bail, walking the streets
14 and walking the court corridors. This is what
15 we received in the search. This particular knife,
16 the man who had it had a short fingernail. So,
17 he had put in it a piece of paper that would hold
18 the blade up so he could get it out. That blade
19 is honed down to razor sharp.

20 Now, I would say that in
21 the course of a year, the personnel in the court
22 that I am involved with has had, at least, one
23 serious physical brush with some defendant or
24 other. To reduce the rights of these men who are
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2 attempting to carry out their duties, I think,
3 would be a gross miscarriage of justice.

4 MR. BARTLETT: Judge Kelly, would you
5 be satisfied with the proposition that was
6 advanced before the Commission in the last couple
7 of days where we have been considering that we
8 give peace officer or police officer status to
9 the court officers while they are in and about the
10 court house or the jail?

11 JUDGE KELLY: I don't think I would
12 agree. Now, let me go one step further, Senator
13 Bartlett. We have probation officers who are
14 constantly on the go and on the move. This
15 doesn't mean just eight hours a day. These men
16 are going at midnight. They are being called out
17 at two o'clock in the morning to come down to
18 such and such a corner because somebody has blown
19 his top under the influence of drugs or guns,
20 and the mother is there, and asks "Will you come
21 and get my son?" The answer might well be bring
22 a cop along, bring a policeman. When I use the
23 word "cop," I do it in the higher sense. Many
24 times that is not possible. These men have to
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2 meet these individuals in their homes.

3 MR. BARTLETT: In my suggestion, I
4 wasn't covering the probation officer.

5 JUDGE KELLY: I am covering this
6 entire thing in one lump. I don't see what is
7 the purpose, I don't see what is going to be
8 gained by taking the police officer status from
9 the men who are involved in this work. There
10 has not been, to my knowledge -- and I have been
11 involved with the courts of Nassau County for
12 some twenty-five or thirty years -- there has
13 not been, to my knowledge, any abuse of this
14 status by any of our officers. Now, if there is
15 a dire need in the City of New York or Upstate,
16 or somewhere else, for this sort of situation,
17 well and good, meet it. I am saying for out
18 here, and I think I can say for Suffolk County --
19 I have been in conference also with Judge Stark.
20 He feels the same way I do, that the peace officer
21 situation and the peace officer status of the
22 men involved in handling criminals -- that's what
23 we are talking about, we are not talking about
24 men involved in civil or anything else, but
25 handling of criminals -- I think they should be

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2 given exactly the same status as police. I
3 see no reason to distinguish it and I see no
4 reason to differentiate it.

5 MR. BARTLETT: Shall we require the
6 same training of them, Judge?

7 JUDGE KELLY: I would say, in a
8 different sense, we do. It may very well be we
9 don't teach them the different methods of
10 handling rough criminals and, perhaps, that's
11 another reason they should be given this status,
12 to protect themselves, but we do have men that
13 I am talking about of the highest caliber, who
14 are educated and dedicated and who, I feel,
15 should be given every protection. They feel,
16 these men in their experience feel, that this
17 particular ideology of giving them peace officer
18 status is necessary to them and to their
19 protection and the protection of the men they are
20 attempting to protect.

21 I say, why don't we
22 listen and why don't we agree with these men who
23 are experienced, who are not ignorant, who are
24 not doing this lightly, but who feel they need
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2 this status for their particular job and to
3 carry it out properly?

4 MR. DENZER: Commissioner Looney
5 apparently doesn't agree with you.

6 JUDGE KELLY: Commissioner Looney has
7 his ideas and I have mine. Commissioner Looney
8 has been a police officer, I believe, for
9 practically all of his adult life. I have been
10 on the other side of the fence for a great deal
11 of mine, and I am now back on the other side. I
12 have seen it on both sides.

13 MR. BARTLETT: I sense that the
14 Commission, to begin with -- we never intended,
15 as our notes indicate, that the gun situation be
16 changed as to those who now enjoy an exception
17 under the Sullivan Law -- but we intended doing
18 that by amendment to the Sullivan Law, itself,
19 you see. I think the only question remaining
20 for us, about which we are concerned, is the
21 off duty arrest power as opposed to the arrest
22 power of the private citizen.

23 JUDGE KELLY: The crime situation that
24 we are facing today, it would appear to me that
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2 it wouldn't be a bad idea to have a few more
3 men out with that power if they are accredited
4 and if they are fit to meet that obligation. I
5 feel that every one of the men that I speak for
6 is so fitted to meet that. I think it would
7 help all over to have that situation.

8 MR. BARTLETT: The correction officers
9 in New York City indicated that to the extent
10 that their training might not be the equivalent
11 of that required by the State for all policemen,
12 they would be willing to change their curriculum
13 to include whatever was required by the police
14 standards.

15 JUDGE KELLY: I think that might be
16 very splendid and I am sure the men I am talking
17 about might be very happy to also have that
18 situation occur.

19 MR. BARTLETT: Thank you very much,
20 Judge. Do you want your exhibits back now? I
21 have got to tell you, Judge Kelly, I opened this
22 one. I am darned if I know how to close it.

23 JUDGE KELLY: I didn't bring with me
24 the hypodermic needles either.
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2 MR. BARTLETT: Thanks, Judge.

3 JUDGE KELLY: Thank you.

4 MR. BARTLETT: We will next hear from
5 Ralph Caso, the Presiding Supervisor from the Town
6 of Hempstead.

7 Just one minute, please.

8 I neglected to introduce the other member of the
9 Commission who joined us a few minutes ago,
10 Assemblyman Charles Rangel from Manhattan.

11 SUPERVISOR CASO: As Chief Executive of
12 the Town of Hempstead, may I welcome you to Nassau
13 County. I think, since Judge Kelly talked about
14 the hard criminal, I am going to talk about the
15 other spectrum of that, if I may.

16 As Chief Administrator
17 of the Town of Hempstead, I should like to bring
18 to your attention the inadequacy of prevailing
19 judicial procedures and penalties applying to
20 housing violations. Involved here is the larger
21 principle of punishment and its effectiveness as a
22 deterrent.

23 Gentlemen, we have an
24 extremely unsatisfactory situation in the
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2 In addition, as you know,
3 the caseload grows heavier every day, and the
4 backlog increases. In New York City, it has been
5 noted that judges sometimes have less than three
6 minutes to devote to each arraignment, in non
7 traffic cases. Because of the pace the court
8 must maintain, the administrator, Lester Goodchild,
9 is quoted in the press as saying, "The court is
10 sliding on a downward path."

11 I have certain, specific
12 proposals which I shall put before you today, and
13 I am most eager for your reactions. My office has
14 already contacted men of such stature as the
15 Honorable Lincoln Schmidt, Presiding Judge of
16 Suffolk County's District Court, and Howard Hogan,
17 Presiding Justice of the Appellate Term for the
18 Ninth and Tenth Judicial Districts, and William
19 Bulman, Jr., Member of the Judicial Conference of
20 New York State, who wrote to us on behalf of
21 Thomas F. McCoy, the State Administrator. I was
22 gratified that these and others viewed my suggestions
23 most favorably.

24 At a recent meeting I
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2 called to consider, with Nassau County's law
3 enforcement agencies, the rising suburban crime
4 rate, the syndrome of crowded courts was most
5 evident in a declining prison population together
6 with a rising crime rate. This is a paradox we
7 find throughout the State and, in fact, throughout
8 the Nation.

9 Why? Partly at least
10 because our courts are so bogged down with traffic,
11 housing and other minor infractions, it is not
12 humanly possible for the judiciary to give their
13 fullest wisdom to the disposition of the more
14 serious crime cases. The judiciary is performing
15 miracles as it is; the system itself requires
16 change, and these changes must come from the
17 legislators, administrators of government and
18 advisory groups such as this.

19 Now, let me give you a
20 couple of figures. During the last year, between
21 June of '66 and May '67, the Town of Hempstead
22 Building Department did an intensive study of
23 two hundred summonses issued for housing violations.
24 Only seventeen percent of these resulted in fines.
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2 Though the law specifies maximum penalties of
3 two hundred dollars per day and/or fifteen days
4 in jail, the average sentence, in these cases,
5 was five dollars.

6 The average case took
7 five and a half hours of an inspector's time,
8 in addition to the time of the clerical and legal
9 staffs. We estimate that the taxpayer paid
10 four thousand dollars in inspectors' salaries for
11 these two hundred cases...and the payment of
12 the defendant to the State was a five dollar bill.
13 This is not to suggest that justice can be
14 measured in monetary terms or that the administra-
15 tion of justice should be a profitable enterprise.

16 One more point, between
17 issuance of the summons and the final disposition,
18 an average of thirteen weeks elapsed, including
19 the granting of an average of three adjournments
20 each. Some of these cases involved only annoyance
21 to neighbors, but some offended the amenities,
22 caused blight and deterioration to a street or a
23 neighborhood, created substandard, unhealthy con-
24 ditions, or danger to life and limb.

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2 Further, the violations
3 are found very often in quarters housing welfare
4 clients for which the taxpayer is paying scale
5 rentals to insure decent, sanitary conditions.
6 Slumlords of the worst kind feed on these situa-
7 tions knowing that the client is fearful, unaware
8 of his rights, and unsophisticated about means of
9 redress. It has cost us, in the Town, tremendous
10 time and money to keep a constant check on such
11 situations. The violator, who is allowed to go
12 virtually without punishment, adds a periodic five
13 dollar cost to his overhead and considers it a
14 pretty good buy.

15 Aside from the sentencing
16 policies of the court, the law, per se, has proven
17 unworkable. Most housing violations are considered
18 misdemeanors. In arguing a case, the State must
19 show proof "beyond a reasonable doubt." This
20 burden of proof makes it extremely difficult to
21 secure a conviction. If the offenses were tried
22 as civil cases, only "a preponderance of evidence"
23 would be required. In view of the nature of the
24 offenses involved, I think most reasonable men
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2 would agree that these suits should be tried as
3 civil matters.

4 This would not only
5 assist the municipality in arguing a case, but
6 would remove the judge's reluctance to stigmatize
7 the defendant with the guilt of a criminal offense.
8 Further, imprisonment should be eliminated as a
9 penalty and a more realistic scale of fines should
10 be imposed so that the punishment would, in fact,
11 do what all punishment is supposed to do -- serve
12 notice on both the culprit and the community that
13 the State will not tolerate violation of the law.

14 Without revisions in the
15 law, our hands are tied. During the last few
16 years, the Town of Hempstead has employed every
17 device and technique available to protect the
18 local physical environment. We adopted the State
19 Building Code and the Housing Code required by the
20 Federal Government in compliance with an urban
21 renewal program. Working closely with neighborhood
22 civic groups, we have mounted campaigns to eliminate
23 negligence and carelessness in the maintenance of
24 residential and commercial premises. We adopted an
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2 emergency lighting law, a law pertaining to
3 places of public assemblage, unsafe building and
4 abandoned vehicle laws.

5 We have militated against
6 air and noise pollution. We have requested...and
7 received Federal denial...of a grant for intensi-
8 fied code enforcement in target areas of the Town.

9 But most important,
10 gentlemen, we have currently under consideration
11 by the Federal Department of Housing and Urban
12 Development an application for funds to execute
13 a community renewal program. This, we felt,
14 would round out our present machinery for what we
15 often refer to as our "fight against blight."

16 Gentlemen, I can tell
17 you right now that without guarantees of strenuous
18 code enforcement by all local law enforcement
19 agencies, this grant will be denied. So, as you
20 can appreciate, I am talking now not about
21 abstracts; I'm talking about money in the tax-
22 payer's pockets. We want this grant.

23 I, therefore, plan to
24 request of the Nassau State Legislative Delegation
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2 that it introduce a measure to create an adminis-
3 trative tribunal to adjudicate housing violations.
4 There is much precedent for this type of vehicle
5 within the Department of Labor, Workman's Compen-
6 sation, State Liquor Authority and other sectors
7 of Government.

8 A body of referees, the
9 number of which shall be determined by the
10 Legislature, would be selected by their qualifica-
11 tions and knowledge of Town law, building, zoning
12 and maintenance problems. Drawn from the locality
13 and expert in their field, they would judge with
14 full knowledge of the local scene, its sensitivities,
15 and objectives.

16 Criminal liability would
17 be removed.

18 The complainant would be
19 in a much more favorable position in building a
20 case and ultimately bringing the offender to
21 justice.

22 The prison sentence would
23 be removed.

24 The scale of fines would
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2 be drastically increased to force immediate
3 compliance and discourage repetition of the
4 violation. Courts throughout the State would
5 be immediately relieved of the burden of hundreds
6 upon hundreds of cases a year.

7 Time and money would be
8 saved the building and legal departments of
9 municipalities. The highly undesirable time lag
10 would be eliminated before the offender was forced
11 to correct the violation.

12 From every aspect, the
13 public would be better served.

14 I want to thank you for
15 the time you've allowed me to discuss this matter
16 with you and, as I said earlier, I would be
17 grateful for whatever thoughts or reactions you
18 might have.

19 MR. BARTLETT: Thank you, Mr. Caso. It
20 is a very interesting proposition. There has
21 been discussion of the distribution of this kind
22 of violation. Indeed, some have even recommended
23 that most vehicle and traffic infractions be
24 handled administratively. We did not recommend
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2 any particular machinery for it, but I know that
3 the staff of the Commission would be happy to
4 talk with the legislatures, and of course, Senator
5 Dunne is our bridge in that regard.

6 SENATOR DUNNE: Sure.

7 SUPERVISOR CASO: I am sure he would be
8 most helpful to us. Thank you very much.

9 MR. BARTLETT: Thank you very much. It
10 is a most interesting idea.

11 Mr. James McDonough,
12 speaking for the Nassau County Legal Aid Society,
13 Attorney in charge of the Criminal Division of
14 the Legal Aid Society.

15 MR. MC DONOUGH: Mr. Chairman, members of
16 the staff of the Committee, I can make a comment
17 upon my friend Judge Kelly's remarks which are not
18 in my prepared remarks, but I am really surprised
19 at his apprehension because my office and my
20 fourteen and fifteen lawyers handle about fifteen
21 thousand alleged criminals a year, and we never
22 have that problem at all. Maybe it is because
23 we are very careful financially and we never
24 accept a client except if we are convinced he is
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2 absolutely excellent.

3 MR. BARTLETT: Of course.

4 MR. MC DONOUGH: While I and several
5 members of my staff have carefully considered
6 the proposed Criminal Procedure Law in its entirety,
7 I must necessarily confine my remarks today to
8 those sections about which we have serious reser-
9 vations. I should not do this without first
10 congratulating the Commission for those proposals
11 which are altogether new, necessary and in our
12 judgment wisely drafted. On the other hand, we
13 had hoped that the Commission would give greater
14 consideration to some of the major reforms or
15 conceptual innovations in the areas of money bail,
16 grand jury procedures and discovery, that some of
17 us have strongly felt were long overdue. For this
18 reason, I hope the urgency of the need to implement
19 the new penal law will not discourage this
20 Commission or the legislature from taking a
21 longer look at these areas before final action
22 is taken upon this proposal.

23 In our review of the
24 proposed code, we tried generally to group our
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2 suggestions, our criticisms, under the same
3 general heading. For that reason, we shall not
4 follow the numerical order of the sections.

5 The first general subject
6 is Grand Jury, 95.40, Subdivision 4. This sub-
7 division deals with a waiver of immunity. Sub-
8 division 4 appears to require that where a
9 witness before the grand jury is questioned about
10 matters beyond the area covered by his waiver of
11 immunity, he may withdraw or qualify such waiver
12 by orally asserting before the grand jury his
13 refusal to answer such question unless he is
14 granted immunity. Particularly because the
15 witness is not permitted to have his counsel
16 with him before the grand jury, it would seem
17 that the section should give him greater pro-
18 tection by requiring the District Attorney to
19 advise the witness that the propounded question
20 does go beyond the area of immunity, and advise
21 him of his right to refuse to answer such questions
22 without being granted immunity. The section, in
23 our opinion, should go further by prohibiting the
24 use of any such testimony against the witness if
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2 he has not been advised of his rights under the
3 section.

4 Preliminary Proceedings in
5 Lower Criminal Court, Section 50.35, provides for
6 a new type of felony complaint which does not have
7 to allege a prima facie case or legally sufficient
8 evidence as defined in 35.10. This could mean
9 that the defendant might have to remain in jail
10 even though it was eventually established that
11 the people were unable to establish a prima facie
12 case. This is made more serious by the fact that
13 90.50 and 90.60 in effect do not require any
14 more evidence at the felony hearing than is con-
15 tained in the felony complaint. Again, by virtue
16 of 90.50 (7) the ordinary exclusionary rules of
17 evidence are generally inapplicable in a felony
18 hearing which means, in effect, that the defendant
19 may be held for the grand jury on the basis of
20 hearsay or other inadmissible evidence if such
21 testimony suggests "only reasonable cause to
22 believe that the defendant committed the felony
23 charge."

24 MR. BARTLETT:

Excuse me, Mr. McDonough.

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2 I don't know whether you know that New York is
3 about the only jurisdiction that I ever heard of
4 right now, at least, that may require more than
5 reasonable cause for the holding of a grand jury.
6 As a matter of fact, in most jurisdictions where
7 there is a grand jury, for example a Federal
8 system, all you need there is reasonable cause
9 even in a grand jury proceeding.

10 Now, in that setting,
11 it doesn't seem very drastic to permit a holding
12 for the grand jury under basis of reasonable cause
13 alone.

14 MR. MC DONOUGH: My quarrel, Senator, is
15 with the elimination of any real evidence, shall
16 we say. This could be completely hearsay, it
17 could be most anything, and I think this is
18 dangerous.

19 MR. BARTLETT: It is not the standard,
20 it is the evidenciary rule we waived.

21 MR. MC DONOUGH: That is essentially it.

22 The next topic is Bail.
23 Although the sections on bail are an improvement,
24 the new law does not answer the problem of whether
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2 the whole procedure of financial bail is consti-
3 tutional when an indigent is involved. Any
4 financial bail to an indigent is tantamount to
5 no bail at all. I would recommend that there be
6 a presumption that generally all defendants be
7 released in their own recognizance (excepting
8 only Class A felonies) and that the court impose
9 stringent conditions, where necessary, to insure
10 the defendant's presence. For example: the
11 Court could require the defendant to report daily
12 to a local precinct or to a probation officer
13 between the dates of his scheduled court appear-
14 ances. The impetus to force a defendant to appear
15 should be that if he fails to appear, he will be
16 charged with a new crime. The threat of another
17 charge and possible incarceration is more of a
18 deterrent than the loss of money, which, in all
19 probability, is not even the defendant's property.

20 When our guys do get
21 out on bail, somebody else puts up their houses.

22 The jury trial is the
23 next topic, formation and conduct of jury. I
24 read this thing as recently as this morning and,
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2 perhaps, we have got the wrong slant on this.

3 MR. BARTLETT: If I may ask a fast
4 question about bail -- you are asking then that
5 we give first priority to IOR and then the bail
6 modeled after the Federal act?

7 MR. MC DONOUGH: Yes. Of course, keeping
8 in mind always that the indigent can't normally
9 furnish bail at all. You have got one man that
10 has five hundred dollars and his background is
11 just as good and just as worthy of trust to come
12 back as the fellow who hasn't five hundred dollars
13 bail, and the indigent goes to jail. I think that
14 the Manhattan Bail Project and other studies have
15 established that they had relatively small difference
16 in the ratio of return to court between those
17 released in their own recognizance and bail.

18 MR. BARTLETT: The suggestion was
19 made yesterday, Mr. McDonough, that the bench
20 warrants issued recently in New York City with
21 disappearing defendants is fantastic.

22 MR. MC DONOUGH: They always tend to, I
23 wouldn't say exaggerate, but to emphasize the
24 numbers that don't come back, but they don't keep
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2 tabs as well sometimes on those that do. I
3 think Commissioner Looney's comment on that,
4 on the summonses, was quite interesting, too.

5 This is on jury trial,
6 conduct of jury. This is Section, 140.15 (1)
7 establishes a uniform procedure for the selection
8 of jurors. Briefly, it provides for the "full
9 box method" where twelve respective jurors are
10 placed in a box and take an oath to answer all
11 questions truthfully. Some question may arise
12 that the prospective jurors may be examined
13 individually or collectively, both. Does this mean
14 that first the District Attorney, then the
15 defendant's counsel will examine each juror in
16 turn and challenge such juror for cause or per-
17 emptorily as he finishes his examination, and
18 then that may prevent him from exercising a per-
19 emptory challenge, or does it mean that each
20 party will ask their own questions of the twelve
21 jurors? In its present form, the question may
22 require a decision by the judge about what method
23 is to be used.

24 I might add that our
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2 experience out in Nassau County, at least in my
3 twenty-five years, is that it is only in capital
4 cases that you have a voir dire with the individual
5 witness sworn in turn and examined. Now, that
6 may be partially the reason. I am not quite
7 clear on this.

8 MR. BARTLETT: We intended the first
9 one that you suggested; that the people examine,
10 exercise their challenges and if they are satis-
11 fied with the twelve, as I understand it.

12 MR. MC DONOUGH: I think what they meant
13 was that they would do what they do now, put
14 twelve jurors in the box, swear them, then the
15 District Attorney would examine all of them at
16 that time, though when he is finished, he would
17 have to exercise his either dismissal for cause or
18 peremptorily challenge. Then, after that, the
19 defense attorney takes over. Is that the process
20 you had in mind?

21 MR. BARTLETT: Yes. The fact that we
22 are discussing this shows that we should make it
23 clearer.

24 MR. MC DONOUGH: Now, a more serious one is
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2 140.35 Subdivision 2. It provides, in substance,
3 if there are no alternate jurors available, Sub-
4 division 2 of this section provides that the
5 trial must proceed even though it is found that
6 the juror is "grossly unqualified" to serve,
7 which is unknown at the time of selection, or
8 that a juror has engaged in misconduct of a sub-
9 stantial nature. This cannot be justified, in
10 our judgment, for any reason. Both circumstances
11 can and should be grounds for a mistrial under
12 Section 145.10, Subdivision 1, as constituting an
13 error or defect prejudicial to the defendant and
14 depriving him of a fair trial.

15 If we are going to --
16 under this provision here, you can go half-way
17 through a trial and some juror might get up in
18 the courtroom in the jury box and say, "I am
19 sure this man is guilty." If there are no alter-
20 nates available, you have to go on with him and
21 you can't declare a mistrial.

22 MR. DENZER: You must note that it
23 says that if it doesn't reach a mistrial stature.

24 MR. MC DONOUGH: What does constitute a
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2 mistrial?

3 MR. DENZER: If you loosen up the
4 mistrial requirements there, you run into a double
5 jeopardy problem. In other words, if the mis-
6 conduct isn't sufficient to justify a mistrial,
7 how can you terminate this trial and then start
8 another one? That is the difficulty here.

9 MR. MC DONOUGH: That is one question
10 I would like to ask you though, which is a more
11 important one. How can the defendant get a fair
12 trial if, concededly, there are two jurors in the
13 box who either committed gross misconduct during
14 the trial or who are obviously unqualified?

15 MR. BARTLETT: Misconduct of a sub-
16 stantial nature, but not under 145.10, Mr.
17 McDonough. This mistrial motion is based on
18 conduct inside or outside the courtroom which is
19 prejudicial to the defendant as to deprive him
20 of a fair trial. I think your question goes to
21 the conduct of a fair trial.

22 MR. MC DONOUGH: No defendant can be
23 said to have had a fair trial if it appears that
24 two jurors who are going to go into a jury room
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2 and determine innocence or guilt in any way that
3 would be normally unqualified.

4 MR. DENZER: Suppose the misconduct
5 reacts against the people; it is the people that
6 don't like this juror, but it doesn't reach the
7 mistrial requirement? That is, it isn't that
8 bad. Now, if you can't declare a mistrial on it,
9 then you probably can't try the case over again.
10 That's what we run into here. So, if the people
11 would necessarily, therefore, prefer to go on with
12 this trial even though they do have an unqualified
13 juror.

14 MR. MC DONOUGH: I see no exception for
15 the defendant in here. From a defendant's stand-
16 point, an attorney would not normally want to go
17 on with the trial.

18 MR. DENZER: You would not have that
19 problem with the defendant because it is he who
20 is asking for the mistrial.

21 MR. MC DONOUGH: Perhaps, again, I have
22 misread this; but as I read it, these conditions
23 occur. Either it is demonstrated that a juror
24 who was thought to be qualified is grossly
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2 unqualified, or a juror has engaged in misconduct
3 of a substantial nature, I assume, during the
4 trial. Now, if there are no alternates available
5 at that point, you go ahead and complete the trial.

6 MR. BARTLETT: I think you do misread
7 it, Mr. McDonough. We didn't intend the language
8 in 140.35 to qualify or bear upon the question of
9 the right to mistrial, which is your present
10 remedy, right?

11 MR. MC DONOUGH: Yes.

12 MR. BARTLETT: We were trying to deal with
13 situations where a juror who has been sworn and
14 heard part of the case, let's say, are to be
15 excused in circumstances where a mistrial would
16 not be justified, the grant of a mistrial, and
17 only in those circumstances.

18 We will take a look at
19 the language to make sure we are conveying it.

20 MR. MC DONOUGH: Would you please? It is
21 not clear. If it meant what we thought it did, it
22 needs reviewing.

23 The next topic is jury
24 trial upon order of dismissal, 150.10 and 150.20.
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2 This section confers upon the people the right
3 to appeal a directed verdict of acquittal. It is
4 renamed a trial order of dismissal, apparently to
5 avoid the obvious double jeopardy claim that would
6 follow any effort to prosecute after an acquittal.

7 MR. BARTLETT: Correct.

8 MR. MC DONOUGH: But, of course, they
9 are the same whatever label you give it.

10 MR. DENZER: They are an acquittal.
11 We think of an acquittal as a jury verdict or a
12 verdict by the trial judge.

13 MR. MC DONOUGH: Also, it provides that
14 the Appellate Court can reverse a trial order of
15 dismissal even though it agrees that the trial
16 evidence was insufficient if it finds that the
17 trial evidence would have been sufficient had the
18 trial court not erroneously excluded evidence
19 prompted by the people during the trial. Under
20 this proposal, a trial court must allow the
21 prosecution to make an offer of proof out of the
22 jury's hearing to make a record for an appeal
23 under the section. It further provides that the
24 Appellate Court must treat the prosecutor's offer
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2 of proof as evidence, itself, if they first find
3 the preferred evidence was erroneously excluded.

4 Now, I think some former
5 District Attorney might have drawn this one.

6 MR. BARTLETT: I think that's right.

7 MR. MC DONOUGH: Number one, and you can
8 conceive that by changing the label, this man is
9 no longer in jeopardy because it is only a question
10 of law that the judges rule on. I would like to
11 save the next question that is a question of law.
12 You can argue the question of law, but the
13 consequence, a defendant in custody cannot safely
14 move for a directed verdict except upon the pain
15 of remaining in custody while the people prosecute
16 an appeal without any merit whatever. It is
17 conceivable even, as you say, the judge can make
18 a horrendous error of law upon the trial. So
19 can an attorney be wrong in his appeal.

20 MR. DENZER: I think if a trial order
21 of dismissal were granted, the defendant would be
22 released. I don't think there is any authority
23 for holding him. It is like a -- well, I don't
24 know quite what it is like. I don't think there is
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2 any authorization for the court to hold them
3 after this. It simply gives the people the right
4 to appeal.

5 MR. MC DONOUGH: You are on dangerous
6 grounds. If the court has no right to hold him,
7 then, of course, he is acquitted.

8 MR. DENZER: Not exactly. It is
9 similar to acquittal, but we don't give them any
10 authorization to hold them.

11 MR. MC DONOUGH: This should be written
12 in here somewhere in this section because you
13 know there could elapse a period of six months.

14 MR. DENZER: Would you be satisfied
15 if that provision were put in there that after
16 a trial order of dismissal and a prior appeal,
17 the defendant must be released and could not be
18 held?

19 MR. MC DONOUGH: I wouldn't be happy. I
20 would be happier. I think we have done all right
21 with this over the years. Just because a few
22 judges may have made a mistake or the prosecutors
23 thought they did. Now, they won't consider
24 corrected verdicts at all under this provision.
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2 MR. DENZER: It does seem a little
3 anomalous a judge cannot throw out the case with
4 the grand jury minutes with impunity; but once the
5 people go to trial, then he can just dismiss it,
6 like, and there is nothing the people can do. The
7 case is dead.

8 MR. MC DONOUGH: I think it is a little
9 different as to the grand jury proceeding. In
10 the trial, he has read the whole case. I just
11 want to comment a little further on that.

12 What can be said in the
13 defense of a situation wherein a defendant moves
14 for a corrected verdict, the evidence is in-
15 sufficient as a matter of law, the court so rules,
16 the people appeal and six months or so later, it
17 comes before the trial judge. The defendant has
18 been in continuous confinement in jail or on five
19 hundred dollars bail. Of course, we come back to
20 the same question again. The next logical step
21 would be to confer upon the people the right to
22 appeal on a jury verdict.

23 MR. DENZER: That is a judgment of
24 fact. That is a verdict based on facts. This
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2 trial order of dismissal is purely a legal
3 determination that the evidence was not legally
4 sufficient to establish the crime. Now, he is
5 either right or wrong on the law. He is not
6 making any factual determination. He is just
7 saying in the crime, there is no evidence to
8 establish the crime.

9 MR. MC DONOUGH: Isn't the fact that it
10 was heard, that legally those facts were in-
11 sufficient to make a case?

12 MR. DENZER: Sufficiency is a matter
13 of law and lack of weight of evidence. Now, if
14 there is evidence concerning every element of
15 the crime, even though you don't believe it, it
16 is a legally sufficient case. That is the legal
17 determination. If the jury doesn't believe it
18 or if the evidence isn't weighty enough, that
19 is purely a factual question. There is a real
20 distinction there.

21 MR. MC DONOUGH: You would consider, at
22 least, the hope of putting that automatic release
23 provision in there in the event this happens,
24 which might be helpful.
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2 MR. DENZER: Sure.

3 MR. MC DONOUGH: Next is deliberation of
4 trial by jury, 160.30. This permits the trial
5 court judge to marshall the evidence during jury
6 deliberations in response to a juror's request.
7 "Marshalling" is no longer required in the jury
8 charge under Section 155.10. While this is a
9 necessary provision, I have always felt that if
10 the trial court judge refers to testimony on any
11 issue, he ought to be required to refer not only
12 to the direct testimony on that issue, but to any
13 cross examination that might have been addressed
14 to that same issue. There has been a rather
15 pervasive and long standing view among defense
16 counsel that "marshalling" as we have known it
17 has too often unfairly focused only upon direct
18 testimony. This section might provide some guide
19 lines or criteria to obviate this situation.

20 The jury and most
21 judges I know do this, just give a direct examina-
22 tion of the witness, and to the jury he is the judge
23 speaking. Of course, in summation and whatnot,
24 reminds them of what was said on cross, but if the
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2 judge does this, certainly he is going to try
3 to marshall. At the request of the juror, I
4 think, in all fairness, he should make some
5 reference to the cross examination.

6 MR. DENZER: It is a very hard thing
7 to legislate. It may be just necessary to refer
8 to what a witness testified to. That is the
9 evidence received. Now, if every time he refers
10 to that, he has to go through the whole cross
11 examination of the defendant --

12 MR. MC DONOUGH: It is not impossible. If
13 it is difficult to marshall the direct evidence,
14 it might be difficult to marshall some of the
15 parts, but the last impression that the jury
16 has is the judge's marshalling of the direct only.

17 Now, Sentence Procedure,
18 210.30. I regard this and the following sections
19 as representing an extremely dangerous unsuper-
20 vised extension of the police powers of probation
21 officers by fallaciously equating probation and
22 parole for all purposes. This section would
23 grant to a probation officer the blanket authority
24 for arresting and searching a probationer at any
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2 time he has reasonable grounds to believe a
3 defendant has violated a condition of his sentence.
4 The commission can be assured that with such
5 power no "unsuccessful" search conducted anywhere
6 at any time of an arrested probationer will ever
7 be brought before the court, notwithstanding
8 Subdivision 4.

9 This, of course, is the
10 old story. If they don't find anything, they
11 don't go to the court or judge with it, but
12 this can permit harassment of a lot of people on
13 probation unnecessarily, in our judgment, anyway.

14 The only basis under this
15 and subsequent sections for the revocation of a
16 sentence of probation is a finding that a
17 probationer has violated a condition of his
18 sentence. How then can Subdivision 5 of Section
19 210.30 authorize a court to commit a probationer
20 to jail without bail when the court has reasonable
21 grounds to believe that a person was "about to
22 violate the conditions of sentence." The evil
23 here appears to be compounded by the lack of any
24 limitation in this section or elsewhere on the
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2 duration of commitment.

3 I don't know, again,
4 whether we read this language correctly, but
5 this seems to me it should be considered.

6 MR. BARTLETT: If we limit it to
7 "has violated," Subdivision 5 to "has violated?"

8 MR. MC DONOUGH: "Has violated," as to
9 that portion of it, but I still say you have
10 gone much too far in giving probation officers --
11 I have a great deal of respect for probation
12 officers -- but there are some there, as in other
13 areas, that there are some that could conceivably
14 break into a house in the middle of a night and
15 see if a man has a hypodermic needle, and that
16 would be a violation of the probation. I think
17 you have got to consider that there is a difference
18 of parole where a man has been judged, at least
19 temporarily, unworthy of rehabilitation and then,
20 at the discretion of the warden of the parole board,
21 he has been given a chance to go back into society
22 under very, very stringent control as with respect
23 to the man who is considered to be rehabilitated to
24 go back to society without going to jail. You
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2 just can't harass him and go around searching him
3 all the time.

4 I have one more, Proceed-
5 ings After Judgment. Despite an obvious intention
6 to bring order to the area of post conviction
7 attacks of judgments of convictions, the proposed
8 new motion to vacate a judgment (Title M) creates
9 as many problems as it solves.

10 Perhaps I can shorten
11 this because I do understand that this is
12 probably the gist of this point. Well, I will
13 go on -- under 225.10 a motion to vacate a judg-
14 ment must be brought in a court of conviction,
15 but Subdivision A allows a motion to be brought
16 on the grounds a court lacked jurisdiction over
17 the defendant. Traditionally, such claim was
18 brought by habeas corpus; but unless changes in
19 the grounds for bringing the writ are changed to
20 go along with the procedure law, the end result
21 will be a proliferation of motions in the
22 sentencing court without cutting down on the
23 writs in the county of incarceration.

24 MR. DENZER:

We would like to get rid

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2 of the writs on this ground. We are not positive
3 of the constitutional law involved. We are not
4 certain we can get rid of writs of habeas corpus.

5 MR. MC DONOUGH: You might agree we
6 might have just as bad a problem if they are
7 not eliminated.

8 MR. DENZER: This covers other kinds
9 of motions, like newly discovered evidence.

10 MR. BARTLETT: We had hoped, as I
11 indicated earlier, we had made this broad enough
12 to include Federal habeas. We really think our
13 State courts should be reviewing these questions.

14 MR. MC DONOUGH: I think that is a good
15 point.

16 Further under 225.10
17 conditions are set forth under which the trial
18 court must deny the motion if there has been a
19 prior one decided on the merits in a state or
20 federal court. In essence this codifies a limited
21 form of res judicata (See, People v. Mazzella,
22 13 N.Y. 2d 997). While a limitation on repeated
23 motions is desirable, frank recognition should be
24 given the fact that most post-conviction motions
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2 are brought by defendants themselves. Since
3 these persons are obviously unschooled in the law,
4 it seems rather harsh to impose even a limited
5 form of res judicata merely because, at some
6 earlier time, they were unable to articulate a
7 proper point.

8 This is further reinforced
9 by 225.30 (1) which sets out procedure by stating
10 that the motion papers must contain sworn allega-
11 tions based on personal knowledge or upon informa-
12 tion and belief but if the latter, the affidavit
13 must state the sources of the information and the
14 grounds for the belief. Since the statute is
15 written in the form of "must" a pro se defendant
16 could have his motion dismissed on a technical
17 failure to comply and then because he did not or
18 was not able to explain the reason for the dismissal
19 find a subsequent motion denied because he had
20 brought an earlier one.

21 Now, of course, there
22 are a lot of defense lawyers who like to see a
23 drastic reduction on post-conviction motions,
24 but this is one of the aims of this; while I
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2 can't quarrel too much, I don't think it is
3 always fair to the individual involved.

4 MR. DENZER: Well, of course many
5 courts, particularly those in New York City, are
6 deluged by these prisoners also, which are treated
7 as quorum novice now, or something else, and they
8 don't have any facts stated and there is nothing
9 sworn to; just general statements should be
10 disposed of in the papers, and another one comes
11 in a week later from the same defendant, and that's
12 the situation we partly had in mind here.

13 MR. MC DONOUGH: 375.40, with regard to
14 the suppression of evidence. We oppose this
15 section which allows such motion to be heard
16 during trial in the local court if demanded by
17 the people since this motion is usually the maker
18 of the case, there is no reason in my mind why a
19 trial should commence before it is heard.

20 It appears this might
21 be more applicable in New York City, where they
22 have the three judges instead of a jury; but out
23 here where we don't have that, I think the judges
24 would agree that we do frequently, if the
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2 defendant pleas, that the motion to exclude is
3 not granted or, sometimes, there is a motion to
4 dismiss the indictment. So, you dispose of the
5 case there instead of going all the way through
6 to the trial stage, having a jury selected,
7 having half of the case which conceivably could
8 be a little tainted and, then, have them excused
9 and then have the hearing. I don't see any sound
10 reason for this.

11 MR. DENZER: You are talking about
12 misdemeanor cases?

13 MR. MC DONOUGH: I think you are talking
14 about any cases.

15 MR. DENZER: In misdemeanor cases. I
16 think the provision in the felony cases, say the
17 motion has to be made and determined before the
18 trial, and misdemeanor cases during trial. That
19 is because in the New York City criminal courts
20 the volume is such that it is almost impossible
21 to handle these by pre-trial motions, and the
22 calendar would become so clogged that that
23 provision was put in to permit more expeditious
24 handling during the trial.
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2 MR. MC DONOUGH: Couldn't you confine
3 it then to New York City? In practically every
4 other county in the State, I think the defendant
5 has a right to a jury trial for a misdemeanor
6 case.

7 MR. DENZER: That may be, but it
8 is difficult to make law -- of course this is
9 a contradiction of what I am saying, the fact
10 that you do have a jury trial out of the City
11 and not in it -- but we have an aversion to
12 legislation which makes one rule for New York
13 City and another for out of New York City, one
14 for one court and another for that court.

15 MR. MC DONOUGH: I don't think we should
16 gear this around New York City.

17 MR. BARTLETT: We will consider it.

18 MR. MC DONOUGH: Section 37, change of
19 339 of the Code to allow a conviction on the un-
20 corroborated testimony of an accomplice. Although
21 the section indicates such testimony should be
22 received with caution, it broadens the definition
23 of accomplice. The dangers inherent in broadening
24 the conviction of such are as real today as when
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the rule was announced.

MR. BARTLETT: You did not disappoint me. Just a minute ago I whispered to Mr. Denzer he hasn't even mentioned the accomplice rule yet. Thank you very much.

MR. MC DONOUGH: Thank you, gentlemen.

MR. BARTLETT: Two witnesses who indicated they were going to be very brief and they have to be at other places, I did agree to take out of order. Mr. Copertino from the Suffolk County District Attorney's office.

MR. COPERTINO: Thank you very much.

Mr. Bartlett and members of the Commission, I have here a very brief statement on behalf of George J. Aspland, District Attorney of Suffolk County, which reads as follows: "As a member of the Legislative Committee of the New York State District Attorneys' Association, I took part in formulating the recommendations expressed to this Commission by the Association through its President, Michael Dillon, District Attorney of Erie County. Those recommendations are in consonant and in keeping with my views on the

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2 proposed Criminal Procedure Law. Respectfully
3 submitted, George Aspland, District Attorney,
4 Suffolk County, New York."

5 MR. BARTLETT: We heard Mr. Dillon in
6 New York on Thursday. He gave very extensive
7 comments on the Code. Most of them have our
8 approval, I do say. They did bring some interest-
9 ing points to our attention and we were glad to
10 have it. We are delighted to have Mr. Aspland's
11 statement adjoining in those recommendations.
12 Please convey my best personal wishes to Mr.
13 Aspland.

14 MR. COPERTINO: Thank you.

15 MR. BARTLETT: Charles Stetz, speaking
16 for the Nassau Police Conference.

17 MR. STETZ: This is an underwriting
18 of the position of the Nassau Police Conference.
19 We represent twenty-two police districts in the
20 County of Nassau, all Villages, Cities and
21 Towns.

22 In Sections 70.20 and
23 70.30 we feel that power should be given to a
24 police officer to make arrests anywhere in the
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2 State even if a misdemeanor is committed in the
3 presence of an officer. If crime has no limita-
4 tions in the State, then a police officer should
5 have the same authority to extend his power
6 throughout the State. It seems that the statute
7 should reflect this concern of theirs in controlling
8 crime on a State-wide basis. For example, I am a
9 policeman in the Incorporated Village of
10 Hempstead, yet I am permitted to live anywhere
11 in the County of Nassau. On my day off, my
12 neighbor tells me that someone is breaking into
13 her house or raping her daughter. How can I tell
14 this neighbor that I have no jurisdiction as a
15 policeman outside of my municipality. Yet, if I
16 were to act and suffered a permanent injury,
17 there is no provision in the law to give me
18 three-quarters disability, because I acted as a
19 citizen and had no authority as a police officer.
20 Another example, while a police officer travels
21 to and from work and sees a crime committed, even
22 though he is in uniform, he has to make a citizens
23 arrest, because he has no jurisdiction outside of
24 his own municipality.
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2 MR. BARTLETT: Did you hear my comment
3 earlier that on Monday, the Governor is going to
4 recommend to the Legislature the adoption of
5 State-wide arrest power for police officers of
6 felonies committed in their presence? That is,
7 at least, a step toward what you are urging.

8 MR. STETZ: Thank you, sir.

9 Under Section 205.20,
10 we feel that the courts have been too lenient
11 with habitual felons. By their leniency, they
12 have released many more who have shown a pattern
13 of disregard for law and order. We feel that it
14 is only fair to the public, that those who show
15 a record of continuous violations of our laws,
16 the courts should take a strong and stern attitude
17 towards these habitual violators.

18 Under section 70.40, we
19 object to the reference to 35.30 of the Penal Law.
20 We feel that it should be changed to allow a
21 police officer to use all physical force if
22 necessary.

23 Under Section 365.50, we
24 object to the words "other than deadly physical
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2 force" as it appears. If a police officer has
3 the right to make an entry, he should use such
4 force as it is necessary to get in and not be put
5 in a position of not being able to subdue the
6 subject with weapons. The staff comment on this
7 section says: "in which the police officer can
8 subdue the subject with his hands and fists or
9 even with a billy, within reason. Assuming he
10 has failed, he may not use his revolver, but must
11 call for reinforcements." What if the situation
12 arises where the police officer tries to enter
13 and the subject has a revolver or other weapon
14 and resists the officer's entry, should this
15 officer then use his revolver or should he run? A
16 situation like this facing a police officer is
17 very ridiculous and dangerous to the officer and
18 anyone else who might be present.

19 MR. BARTLETT: We had this brought to
20 our attention, it was not our intention, of course,
21 to limit the policeman's rightful use of his
22 weapons if he is confronted with someone who is
23 armed, and we will make it clear.

24 MR. STETZ: Thank you very much.
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2 Section 95.40 compepls a
3 witness to give evidence before a Grand Jury and
4 in so giving evidence which may incriminate him,
5 he receives immunity unless he waives such immunity
6 or it was gratuitously given. The problem that
7 exists, is to see whether or not some provisions
8 should be inserted by protecting a police officer
9 and refraining from making them subject to dis-
10 charge if they accept a waiver of immunity or
11 testify. A police officer, as it now stands, can
12 testify before the Grand Jury and his testimony
13 cannot be used in a criminal proceeding against
14 him unless he waives his immunity. However, under
15 State decisions he may because of his oath of
16 office or his relationship to his job be subjected
17 to loss of his job. In this way, he differs
18 from any citizens who may testify and who will
19 only be subject to criminal prosecution if they
20 sign a waiver of immunity, and not loss of their
21 job.

22 We feel, referring to
23 this section, that we are second-class citizens
24 and as you recall, Garrett versus the State of
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2 New Jersey -- I assume you have a copy of this
3 which was presented by the State Conference, which
4 you are very familiar with.

5 MR. BARTLETT: You know that State
6 Legislators are subject to the same burden.

7 MR. STETZ: I can understand that.
8 After listening to Judge Kelly speak before, I
9 have to speak for the members of the Nassau
10 Police Conference, which I stated before includes
11 twenty-two police departments throughout the
12 County. I have to object to those statements.
13 We who are policemen in the State of New York have
14 to meet certain qualifications, and these qualifica-
15 tions should be met by everyone and anyone who
16 wants the power of a policeman. If certain
17 officers, Transit Authority or whoever it was,
18 want police status, they should have it in a court,
19 but please let the policeman who has the training
20 and experience handle the crime that may be
21 committed in the street. Thank you.

22 MR. BARTLETT: You are in accord with
23 what I said, that if these other groups want
24 police officer status, they should be required
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2 to meet the same minimum requirements set by the
3 police training council as you do.

4 MR. STETZ: Yes, sir.

5 MR. BARTLETT: I take it, other than
6 these points, your organization is in accord with
7 these proposals?

8 MR. STETZ: Yes, sir.

9 MR. BARTLETT: Thank you very much. The
10 ladies haven't been heard. Mrs. Marie G.
11 Santagata.

12 MRS. SANTAGATA: You did it perfectly,
13 Senator. With a name like Bartlett, I don't
14 know how you did it so well the first time.

15 I thank you, gentlemen,
16 for the Nassau County Women's Bar Association. I
17 hope the difference is only quality of the voice
18 and not the quality of the testimony.

19 MR. BARTLETT: We also welcome your
20 President, Mrs. Friedenber, and I assume that
21 that is a member of your group in the back row,
22 my colleague from the Constitutional Convention,
23 Doctor Heidelberg?

24 MRS. SANTAGATA: Yes. Thank you very much,
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2 Senator.

3 We address ourselves
4 today to very specific sections of the new Code
5 or Proposed Code of Criminal Procedure. We have
6 comments with regard to some of the other
7 sections, but I am sure they have been eloquently
8 handled this morning and will be during the course
9 of this testimony.

10 We congratulate you on
11 the proposed Code as it is and with the reflection
12 that you are going to give it, and also on the
13 general intent of the Legislature in the handling
14 of family court proceedings, the Family Court
15 Act, the approach to the Narcotics Commitment
16 Act and the various other philosophies that
17 have accompanied the statutes for rehabilitation
18 and correction for those charged with crime.
19 However, with regard to the use, there are some
20 times when the philosophy and the practice do not
21 mesh. The Women's Bar Association has a special
22 interest because from 1957 to 1963, our Association
23 manned the courts of this county to handle all
24 those youthful offenders who were indigent and who
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2 were charged with a crime. At that time, we
3 were not fortunate enough to have Mr. McDonough
4 and the public offender staff. Also, I speak as
5 an individual with my own practice of more than
6 twenty years now and, in addition to that, to
7 the service given to the county as Chairman of
8 the Nassau County Youth Board and Special Advisor
9 to our county executive on youth.

10 I would take the sections,
11 so there could be no misinterpretation as to what
12 we suggest, section by section since they are so
13 few and they are so brief.

14 Section 400.05, which
15 states who is an eligible youth. Under the
16 present Code, an eligible youth is one who has
17 committed a crime not punishable by death or live
18 imprisonment and who has not previously been
19 convicted of a felony. The proposed Code adds
20 or has a previous judgment of conviction for a
21 crime. It is respectfully submitted that this
22 provisions is unduly restrictive, particularly
23 since the crime might be a misdemeanor arising
24 out of the Vehicle and Traffic Law and further,
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2 might be one that was considered a crime in another
3 jurisdiction where there is no such thing as
4 youthful offender treatment.

5 MR. BARTLETT: You are objecting to the
6 eligibility requirement that a conviction for a
7 crime renders one ineligible?

8 MRS. SANTAGATA: Yes.

9 MR. DENZER: You prefer the present
10 law which denies it only when a conviction is
11 for a felony?

12 MRS. SANTAGATA: Yes.

13 MR. DENZER: The reason for that
14 change is that the purpose of the youthful
15 offender treatment is to avoid the stigma of
16 a conviction for a crime. That is the principal
17 purpose, and if a person already has been con-
18 victed of a crime, there isn't much point in
19 the youthful offender process. That's why we
20 made that condition there. What good is it to
21 avoid a conviction for a crime if the defendant
22 has already been convicted of a crime?

23 MRS. SANTAGATA: With regard to that,
24 very briefly, certainly the committing of two
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2 crimes or three is worse for a defendant youth
3 than just the one, and secondly, he might not
4 have had the opportunity to request youthful
5 offender treatment if it were a crime in another
6 state, such as California, where they don't have
7 such a provision such as we have.

8 MR. DENZER: I agree with you.

9 MRS. SANTAGATA: Under Section 400.20 of
10 the Proposed Code, Subdivision 1 provides that
11 at arraignment the court must advise the
12 defendants of the availability of youthful
13 offender treatment and if the defendant does not
14 request the Y. O., the criminal action upon the
15 indictment or information must proceed. Perhaps,
16 we are reading too much into it, but we question
17 whether this waives the eligibility, if not the
18 request at arraignment? Does the court have
19 discretion to extend the time at which youthful
20 offender treatment might be used? Therefore, we
21 direct the words must proceed as a criminal
22 charge, be changed to "may."

23 Subdivision 6 of the same
24 section which relates to any statement made by the
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2 defendant in the course of the probation
3 examination or investigation -- it is respect-
4 fully submitted that the said section is not
5 sufficiently restrictive. It is suggested that
6 all information obtained as a result of probation
7 examination or investigation be inadmissible
8 against him and further, is unavailable directly
9 or indirectly to the trial judge. Further, the
10 language of the Proposed Code states that no
11 statement should be used against him in any
12 criminal action or other legal proceeding.
13 Certainly, the intent here is that it should not
14 be used in the youthful offender proceeding, and
15 I am sure that's what the Legislature meant; but
16 we questioned it and felt, perhaps, this should
17 be spelled out specifically. May I just add that
18 with regard to this subdivision 6, we feel very
19 strongly with regard to this particular provision,
20 and I think the reasons are obvious. Certainly,
21 any defendant is entitled to a trial by a judge
22 who is impartial and who is not colored by
23 hearsay or any previous information that may
24 be given to him and, certainly, the youthful
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2 offender should not get less, but at least equal
3 to any other defendant.

4 Section 400.35 --

5 MR. BARTLETT: (Interposing) Actually,
6 the only way to avoid this completely would be to
7 require that the judge who considers the youthful
8 offender application and denies it, could not
9 then preside over the trial if it proceeded
10 because, inevitably, the probation report of the
11 investigation conducted on the question of
12 eligibility is going to contain something in the
13 nature of statements from the defendant, and
14 usually does.

15 MRS. SANTAGATA: Very often, the same
16 file and same report is used at the time of a
17 pre-trial conference for a type of deciding on a
18 reply, and that judge has the file and then the
19 question, maybe you go right to trial on the
20 basis of that file.

21 MR. BARTLETT: This would be pretty
22 tough in counties like mine where we only have
23 one county judge.

24 MRS. SANTAGATA: Well, Section 400.35, I
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2 think, is the one where I think it is rather
3 sentence construction and not intent of the
4 Legislation, states in part that such trial must
5 be conducted where appropriate, pursuant to the
6 rules of evidence applicable to criminal pro-
7 ceedings. I am sure that the Legislature meant
8 that such trial must be conducted pursuant to the
9 rules of evidence applicable to criminal pro-
10 ceedings and, therefore, it is suggested that
11 the words "where appropriate," be deleted to
12 avoid misinterpretation. This, where it might
13 seem should be taken as a matter of course that
14 these rules should apply, we know that there
15 has been and had to be case law stating that the
16 rules of evidence in a criminal case apply to
17 youthful offender proceedings and, therefore,
18 I don't think it should be left open to either
19 interpretation or question again.

20 Section 400.50, we
21 are pleased, of course, with the change regarding
22 the sentencing and disposition of youthful
23 offender treatments and I think, in part, we have
24 to be grateful to Senator Dunne for a portion of
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2 this, and for that we are grateful. We hope, also,
3 this will give impetus to the local county jail
4 to proceed in short time programs for those
5 youngsters that are housed there for even short
6 periods of time.

7 Section 400.60 of the
8 Proposed Code relates to the privacy of the
9 proceeding; and this, perhaps, is the one that
10 you have received during the course of your
11 discussions on these sections, the most of the
12 differences in opinion on. Our position in this --

13 MR. BARTLETT: (Interposing) Not
14 yet, but we are expecting to.

15 MRS. SANTAGATA: Our position with regard
16 to this particular section is that since the
17 basis of youthful offender proceedings is the
18 treatment of a youth as an individual with all
19 of the protection and rehabilitation and
20 correction of the individual, that the proceedings
21 should be private. We also say that if it is
22 left to the discretion of the court, the attorney
23 and the defendant must then guess as to how these
24 proceedings will be handled. In some counties
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2 some of the judges handle it with open courts
3 and in the very same court, other judges handle
4 it with a closed court. I do not feel that this
5 is what the Legislature really intended and,
6 therefore, I think, that the "may" in these two
7 paragraphs should be changed to "must."

8 MR. DENZER: One of the reasons for
9 the "may" is that it is impossible in New York
10 City Criminal Court to handle them as private
11 proceedings. Again, the volume is such that it
12 just can't be done under present facilities.

13 MR. BARTLETT: We understand your point.
14 It may be that leaving it at "may" is a victory
15 for you as opposed to "must be in public," which
16 is the position taken by some, as you know.

17 MRS. SANTAGATA: Yes, I do know that. Our
18 own feeling has been that if we were to consider
19 it and have it private then, of course, it could
20 commence even from the time of arraignment and I
21 think, perhaps, Senator Bartlett, that part of
22 the reason that people, in addition to the practical
23 aspect of the space, part of the aspects are the
24 fact that there are so many that blame much of the
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2 crime on youth crime, and you are besieged with
3 the fact that there should be a greater crackdown.
4 In Nassau County, the statistics that we have here
5 do not bear this out, and the statistics do not
6 bear that team crimes are on the rise. It has
7 held its line in Nassau, and the amount of crime
8 we have here for youth is less than one percent
9 of the potential youth offender population, and
10 our youth population is forty-two percent of our
11 total population. So, we are talking about
12 approximately seven out of every thousand
13 youngsters.

14 Section 400.65 of the
15 Proposed Code which relates to the sealing of the
16 record after adjudication. It goes along with
17 the present Code, but still leaves open the
18 question of a direct record, the custody records
19 or a similar term that would indicate a record other
20 than the arrest. Under the present Code and the
21 new Code as proposed, the youth would still have
22 to answer the question whether he was twenty or
23 sixty, "Were you ever arrested?", in the affirma-
24 tive, and the secrecy of the adjudication then
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2 becomes a myth. So then we had respectfully
3 requested that in this vein the Legislature look
4 again to see if this proceeding and the arrest
5 record could also be sealed and the question
6 would not have to be answered in that fashion.

7 MR. DENZER: Of course, one of the
8 great opponents to what you say is the telephone
9 company. They are afraid, with the number of
10 women operators they do not want people of bad
11 moral characteristics around these women, and
12 the only way you can find out is to ask the
13 question "Have you been arrested?"

14 MR. BARTLETT: It is a tough question
15 and has been debated more than once, as you know,
16 in the Legislature. I understand your point.

17 MRS. SANTAGATA: Thank you.

18 MR. BARTLETT: Thank you very much.

19 We will have two more
20 witnesses before we break for lunch. Mason
21 Hampton? I know he was here earlier. If not,
22 we will hear from Mr. Eugene Lamb; speaking for
23 the Nassau County Bar Association.

24 Mr. DeVine, do you want to
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2 be heard right after Mr. Lamb?

3 MR. DE VINE: I would, yes.

4 MR. LAMB: Senator Bartlett,
5 Senator Dunne and gentlemen, thank you for the
6 opportunity. I am speaking as one member of
7 the Nassau County Criminal Courts and Procedures
8 Committee. We have studied the various sections
9 of the Code and I address myself only to that
10 section which addresses itself to search warrants,
11 which would be Section 365.05. Generally, I
12 would agree with everyone else here that this
13 Committee has done an excellent job in granting
14 this Code. Certainly, compared to the other Code,
15 it reads much easier and, I think, it has taken
16 into consideration all of the existing case law.
17 Of course, when we get into the field of search
18 warrants, search procedure, we are running right
19 neck and neck with the Supreme Court coming down
20 with new decisions. In this respect, the importance
21 of search warrants, under Section 365.05, it is
22 suggested whereas instead of the present proposal
23 that the application be made by a police officer, a
24 district attorney or other public servant, that the
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2 application be made by a police officer above
3 the grade of sergeant or by a district attorney
4 or a State Attorney General. This would seem to
5 limit all other public officials from giving a
6 search warrant. It does not, in fact, stop any
7 other public official putting his application
8 through a police sergeant, or a district attorney
9 or State Attorney General. This will assure two
10 things.

11 One, it will help to
12 screen most of the applications to see that they
13 meet the requirements not only of the statute, but
14 of the constitution of the State of New York,
15 and of the United States and be in conformity
16 with the latest decision of law that has come
17 down, as these decisions do from the court
18 quite rapidly outlining the standards that must
19 be followed.

20 It would give the proper
21 police officer, who should be qualified with
22 respect to his knowledgeability as to the
23 requirements, the opportunity to screen the
24 applications to see that the application is
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2 proper and, in the event the application, itself,
3 is improper or there is no reasonable or probable
4 cause, he can eliminate that immediately, and it
5 doesn't tie up the calendars of the courts with
6 these applications.

7 MR. BARTLETT: I take it you wouldn't
8 go as far as we have in our proposal, limiting
9 it only to the prosecutors and the Attorney
10 General?

11 MR. LAMB: No. I think you are
12 in a different area with eavesdropping and wire
13 tap. I wouldn't limit myself to that because I
14 think the entire proposal on eavesdropping might
15 have to be completely rewritten and even might be
16 divided into two separate categories. I wouldn't
17 restrict it in the area of search warrants. I
18 think some very strict guidelines have been laid
19 down over the years which have been refined time
20 and time again. I wouldn't go that far. I
21 would, however, limit it to a proper grade police
22 officer or assistant district attorney, or
23 assistant attorney general.

24 With respect to
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2 Section 365.05, the proposed legislation uses the
3 term "designated place, designated person or
4 designated vehicle." It would seem that that
5 section, in conjunction with the latest section,
6 describes the former content of the application
7 and of the search warrant, itself, requires a
8 specifically described person, place or vehicle,
9 and that if the word designated is also meant to
10 mean described, then there is no change required.
11 However, it might be a little better delineated
12 to follow the case law of descriptive language
13 saying "a described place, described vehicle or
14 described person."

15 MR. BARTLETT: Okay.

16 MR. LAMB: We have then Section
17 365.20 and 365.25. The authorities given in
18 365.20 we have no objection at all. They are
19 logical and they are extensive enough to cover
20 all of our situations. However, with the
21 execution of a search warrant, where it originates
22 in a court and is delivered to an officer of the
23 State-wide jurisdiction, you can run into the
24 position, as shown by your own notes, where you can
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2 have a warrant issued out of Erie County to a
3 police officer of the City of Buffalo and
4 executable in Nassau County.

5 Now, these sections on
6 search warrants do not describe a method of
7 attack upon the search warrant, and it would
8 seem that the intent of the Committee is to allow
9 that under the motions for suppression of evidence,
10 which are all inclusive and were included. It also
11 allows for the motion to suppress evidence to be
12 made in anticipation of a possible criminal
13 proceeding; that is, you can make the motion
14 before there is any information or any indictment.
15 This would require, and as a practicing attorney,
16 it would necessitate the attorney, if he seeks
17 to make such a motion to suppress, to know where
18 that warrant was issued from. Since the warrant
19 can be issued against an unoccupied house and an
20 unoccupied motor vehicle, also against a person,
21 we know from our experience that most defendants,
22 even if they are shown a search warrant, can't
23 tell you the court or district. We then become
24 involved in the process of determining where
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2 we can make our application, where the search
3 warrant was issued from.

4 MR. DENZER: At what point have we
5 reached here?

6 MR. LAMB: We are reaching here
7 with respect to a recommendation that in Section
8 365.20 or 365.25, that in addition to the pro-
9 visions there, that it make a provision that the
10 search warrant or a copy thereof be filed with
11 the Clerk of the County in which the warrant is
12 executed, so that an attorney trying to make his
13 suppression motions, as provided by this Proposal,
14 can find that search warrant, know the court it
15 was issued from and, at least, take some activity
16 with respect to it.

17 I took a long time building
18 up to it to try to illustrate the one thing I wanted
19 to bring out, that it be filed in the Clerk's
20 office of the county of which it is executed as
21 well as which it is issued. That is not a return,
22 only a copy of the search warrant. With respect
23 to 365 --

24 MR. BARTLETT: (Interposing) Exactly
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2 what he would have been shown had he been home?

3 MR. LAMB: Surely. We know that a
4 defendant often times says, "They showed me a
5 piece of paper," and that's all they can tell
6 you. 365.35, in the application, states that the
7 application must be sworn to. We would suggest,
8 since the language is not included, that the
9 language be that it be sworn to before the
10 magistrate. The language does not require a
11 swearing before the magistrate, or the existing
12 case law or existing Code does require a swearing
13 before the magistrate going to pass upon the
14 application.

15 MR. BARTLETT: What do you think of the
16 idea? To get around this business of swearing
17 which is, according to the police, very trouble-
18 some to them in lots of matters other than just
19 a search warrant situation, and provide that
20 whenever an application is made, whenever a
21 complaint is made or an information, that the
22 police officer be held accountable for the same
23 penalties as attached to perjury by our providing
24 equivalent penalty for a false, unsworn official
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statement?

MR. LAMB: I would like to address myself to the search warrant only, Senator.

MR. BARTLETT: Suppose we did attach the same burden as for perjury here, but do not require them to be sworn?

MR. LAMB: I do not think the effect would be the same. These papers could be drawn up in a police station, or the D.A.'s office, and the judge would sign it without ever having seen the officers. Therefore he had no examination of the officer and he only has the papers before him.

The next section after that provides that the judge can take testimony inquiring into the matter, assumedly, from a person other than the applicant who might have knowledge or information, and he must make a record. There is also a requirement, under the Constitution, that the application must be made upon oath or affirmation.

Now, the case law has been such that many of these search warrants were thrown out where, though there may have been an

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2 examination, there has been no examination by
3 the judge who has signed it to determine reasonable
4 grounds and probable cause. I don't think the
5 affirmation in the police department would
6 accomplish what you want, at least in this instant.
7 This doesn't give the magistrate or signing judge
8 a chance to examine either the applicant or any-
9 one else if he just has papers pushed in before
10 him on his desk.

11 Thank you very much.

12 These are all the recommendations that we have
13 come up with with respect to search warrants.

14 MR. BARTLETT: Thank you very much. We
15 appreciate hearing from you.

16 Mr. DeVine? Is Mr.
17 Peter Parcher here?

18 MR. PARCHER: Yes.

19 MR. BARTLETT: Do you want to be heard,
20 Mr. Parcher?

21 MR. PARCHER: Yes.

22 MR. BARTLETT: We will take Mr. DeVine
23 after lunch then.

24 MR. PARCHER: Mr. Chairman, members of
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2 the Committee, my remarks are going to be limited
3 to referring to some of the changes that some of
4 the members of the Bar Association Committee on
5 the Criminal Law Procedure dealt with in the
6 processing of felony cases. Actually, this comes
7 in three parts. The first part deals with the
8 question of preliminary examinations or felony
9 hearings, and it would seem to me and to the
10 members of the Committee that have discussed it,
11 that everybody from the Crime Commission on down,
12 the President of the Crime Commission on down, has
13 said that the lower courts, in most of the juris-
14 dictions in this country, but also in this State,
15 are far too crowded and far too busy for the
16 good of everyone. It seems that these lower courts,
17 perhaps, perform the most important function in
18 reaching the first offender, the person who
19 commits the initial misdemeanor, the youthful
20 offender by being able to deal in a slow and
21 careful manner and bring the majesty of the law
22 to these first persons, young persons, persons
23 who have committed petty crimes before they get
24 into the vociferous category. One thing
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2 that always seem analogous to me is the amount
3 of time that has to be spent by the judges in
4 preliminary examinations.

5 Under the new Code as you
6 are proposing, the preliminary examinations will
7 be continued principally to insure that persons
8 aren't unlawfully held in jail or until such time
9 as the grand jury can meet. It really seems to
10 me, that most times what the preliminary examina-
11 tion has become is a very limited discovery
12 proceeding for the defense attorney.

13 MR. BARTLETT: That is our view of it.

14 MR. PARCHER: I don't know what reason
15 is required, but it is something just above a
16 credible scintilla, somebody saying somebody did
17 this thing. That, of course, frustrates the
18 judges at the lower courts because they can't go
19 into the parts of what the attorneys might like
20 to know about. It takes an awful lot of a police-
21 man's time and it really doesn't help the defendant
22 in the first place.

23 I say this -- you take
24 my remarks subject to connection -- abolish the
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2 preliminary hearings to free the lower court
3 judges for the very, very significant work they
4 are performing in the misdemeanor and first
5 offense areas.

6 The second thing refers
7 to the grand jury. Nobody on the Committee that
8 I belong to would ever suggest abolishing the grand
9 jury. I wasn't really around then, but I have
10 read about the Tom Dewey racket investigations of
11 the Thirties and anybody who has heard or
12 witnessed anything of the investigatory work of
13 the grand juries, of the racket work of the
14 grand juries, of the investigation into police
15 misconduct, organized crime, public misconduct,
16 recognizes they have a very significant value. They
17 also have a secondary value, it seems to me, and
18 that is when the defense counsel finds himself
19 in a position where he is dealing with a sympathetic
20 situation, -- the client who stole a car because
21 his wife was pregnant -- would like to go before the
22 grand jury. The D. A. has a reason for requiring
23 a grand jury, too, where he has a hot potato on his
24 hand and would rather not make the decision himself.
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2 In ninety percent, or the vast majority of
3 routine cases, the grand jury is merely performing
4 the obvious, merely holding somebody just as the
5 magistrate of the district court or lower court
6 level has to do, holding somebody merely for trial
7 because somebody has had to have done it.

8 I know that in the early
9 1900's, the old Section 222 of the Code proposed
10 a process whereby the defendant, with the consent
11 of the district attorney, could waive a grand jury
12 proceeding, upon a felony case I am talking about,
13 of course, and proceed on information. In 1928,
14 in a case called People versus Batistta, the
15 Court of Appeals clearly held that Article I,
16 Section 6 of the Constitution is a jurisdictional
17 provision and that waiver of a grand jury is not
18 a personal right.

19 I say this -- probably,
20 the ruling was wrong in 1928. I think that it is
21 wrong today. In Illinois versus Bradley met
22 the very same issue in 1956. There, Judge
23 Schaeffer, I understand, has become the Chief
24 of their equivalent to the Court of Appeals. He
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2 discusses Batistta and says it is judged wrong.
3 This is a personal question. He refers to a case
4 in there called, I believe it is, Cancinni
5 versus The People, which dealt with the personal
6 right of waiver of trial by jury. In the
7 Batistta case, the Court of Appeals relied very
8 heavily upon, it seems, information and analogy. A
9 man can't even waive his rights to trial by jury.
10 In Patton versus the United States case it says
11 that isn't so, and all of you know better than
12 that. What happened to the question of the
13 right to waive trial by jury.

14 Many of the prosecutors
15 have met this problem head-on and said this is
16 wrong, this is a personal right, the right to
17 waive grand jury.

18 MR. DENZER: You have got to go to
19 the specific language of the specific constitution.
20 You are asking us to construct a system of waiver
21 here after the Court of Appeals has held that a
22 constitutional amendment would be needed, and that
23 is a pretty risky thing to do.

24 MR. PARCHER: I am not necessarily
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2 proposing that. I think it depends upon the
3 language of the particular constitution. The
4 Federal Constitution's language, I think, is
5 pretty similar to our State Constitution's
6 language and Federal Constitution, which is the
7 start of Article I, Section 6, have construed
8 that to be a personal right not a jurisdictional
9 right; but assume, for the sake of this
10 Commission, that it would be a right to impose
11 legislation with the existence of a 1928 Court
12 of Appeals case. Then, I say this -- perhaps --
13 if you members agree --

14 MR. BARTLETT: (Interposing) We
15 recommended this to the Constitutional Convention,
16 as a matter of fact, the Bill of Rights Committee
17 on which Doctor Heidelburger and I served, wrote
18 that proposition into the proposed constitution.
19 I have reason to believe that an amendment will
20 be offered to this session of the legislature to
21 accomplish that purpose.

22 MR. PARCHER: Thank you. The third
23 phase is this -- if there aren't going to be
24 preliminary exams, one reason the defendant's
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2 attorney wants to conduct it is to get his
3 limited chance of discovery, get his bite of
4 the lawyer. It seems to me that that could be
5 replaced. I don't think this would necessarily
6 require legislation, but I think it would be
7 helpful to clarify it throughout the State. Why
8 not at the felony court level where the defense
9 is entitled, under the constitutional interpre-
10 tation to the Miranda hearing, The Mapp hearing,
11 The Berger hearing, so on and so forth? I know
12 that in Nassau and, I thin, in the City, these
13 hearings are periphtrated. They occur over an
14 eight, ten, twelve month basis, depending on the
15 calendar situation, some in the calendar part,
16 some immediately before part, some when the judge
17 is available. Why not allow the defendant to
18 demand, on notice to the district attorney, one
19 pre-trial hearing and by specifying that which he
20 wants, to go into encompass all these questions
21 that he probably wants to find out in the first
22 instance, in the preliminary examination. It
23 would seem to me, in that way, no extra burden
24 would be placed on the felony court judges because,
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2 ultimately, they have to go into these questions
3 anyway. The defense counsel would, much earlier
4 in the game, know whether he has got a shot of the
5 trial or whether he doesn't have a shot of the
6 trial. The D.A. wouldn't have to be frustrated
7 by bringing in policemen and handling three to
8 four to five hearings before a case is either
9 tried or disposed of. It seems to me that, in
10 terms of conferencing these cases, once a defense
11 attorney knew what was really involved, if he had
12 any legitimate method of handling the case other
13 than by disposition, I think right after the
14 hearing would be a logical time for the conference.

15 MR. DENZER: For what court?

16 MR. PARCHER: In the particular felony
17 court in the particular jurisdiction.

18 MR. DENZER: Not in the lower court?

19 MR. PARCHER: No, in the Superior Court.

20 It would be the County Court here or the Supreme
21 Court in the City.

22 Thanks very much for
23 allowing me the opportunity to discuss this with
24 you.
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2 MR. BARTLETT: Thank you very much. I
3 think you will see something happen on the waiver
4 of indictment.

5 Ladies and gentlemen,
6 we will suspend now and resume at two o'clock.

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8 (WHEREUPON THE COMMISSION ADJOURNED AT TEN
9 MINUTES TO ONE AND RECONVENED AT TWO-FIFTEEN P.M.)

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11 MR. BARTLETT: Ladies and gentlemen,
12 we will get under way again, please. Our first
13 witness this afternoon will be Henry DeVine,
14 Nassau County District Attorney's Office, Chief
15 of the Appeals Bureau.

16 MR. DE VINE: Mr. Chairman, Senator
17 Dunne and Commissioners, first let me say that I
18 appear before you today not as a District Attorney
19 and not as Chief of the Law and Appeals Bureau.
20 Rather, I appear before you as Chairman of the
21 Criminal Committee of the Nassau County Bar
22 Association. Secondly, it is clear that we don't
23 appear a spokesman for the entire bar, and I
24 question -- and I am not certain in my own mind
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2 as to whether I am even talking for all of the
3 members of my own Committee. We have worked as
4 best we can in the time allotted to us to formulate
5 a judgment regarding some of the more critical
6 areas of this new Code. I will make an effort
7 to assess or get a consensus of what the
8 Committee's opinion was on these various areas.

9 So, from that point of
10 view, let me say at the outset, that one of the
11 good things that the Committee saw in this Bill
12 was the restriction in the case of wire tapping,
13 to the Attorney General and to the elected District
14 Attorney. I think that on that score, the
15 Committee was unanimous that there was no need to
16 extend the right for wire tap to any police
17 officer. The good practice is one that I am
18 proud of in my own county. You heard Commissioner
19 Looney speak earlier. The practice has been,
20 in this county, for the police to come to the
21 District Attorney's office wherever a wire tap
22 or an eavesdrop was required. We have worked
23 that closely with the Department in preparing
24 the affidavits after preparing the orders. We
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2 do this not only in connection with the wire tap
3 and the eavesdrop, but also, as best we can, with
4 regard to the search warrants. We are also working
5 along the same line with the fire marshalls and
6 the other people who are now in a position where
7 they must apply for a search warrant. I say, that
8 it is a good, healthy practice. So, on the basis
9 of our own experience and the collective judgment
10 of our own Committee, we feel that we must
11 compliment you on the stand which you have taken.

12 Now, the second most
13 important point has to do with your relaxation
14 of the accomplice rule. In all fairness, that
15 matter has not been thoroughly deliberated on the
16 part of my own Committee, and so, I would hesitate
17 to make a Committee statement on that particular
18 point.

19 The third point that I
20 would like to speak about has to do with your
21 relaxation of the discovery and inspection, not
22 only in behalf of the defendant, but also in
23 behalf of the District Attorney. This is something
24 that I think, to a man, all members of the
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2 Committee are strongly in favor of, and based
3 upon my own nineteen years of experience, I
4 personally endorse the position which the
5 Committee has taken. I think it is a great
6 step forward.

7 Also, not mentioned here
8 today, was the addition of the defendant's right
9 to take advantage of the material witness pro-
10 ceedings. Surely there was no good reason why
11 the right to take advantage of a material witness
12 proceeding should not be extended to the defendant,
13 and this is something brand new and is something
14 which our Committee, of course, to a man, is
15 greatly proud of. We also want to compliment
16 the Committee for the efforts it has made to
17 codify the various forms of the indictment and,
18 particularly, I am interested in that part of
19 the Bill which is going to compel, particularly
20 the Appellate Division, to particularize the
21 basis for their action. Those who have worked in
22 this very specialized area know what a great
23 problem can arise when you try and get at the
24 underlying basis for the court's action. You know
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2 that the Court of Appeals is a court of very
3 limited jurisdiction. In the absence of a death
4 case, they are a court of law, and it is juris-
5 dictional that the order of the Appellate
6 Division specify precisely what the basis of the
7 Appellate Division's action might be, and I think
8 that to that accord, this Committee has gone
9 a long way to make it very clear that there is a
10 clear burden on for departments to specify
11 particularly what the basis for their action is.
12 This will surely be helpful to all of us.

13 We also want to endorse
14 the position which the Commission has taken with
15 regard to the apparent delegation of authority
16 to both the Appellate Division and the Court of
17 Appeals to establish their own rules and regula-
18 tions with regard to perfecting the appeal. This,
19 I think, is a wonderful step forward, and I hope
20 that both the Appellate Division and the Court
21 of Appeals will have the courage to pick up this
22 responsibility and go forward with it.

23 One of the most staggering
24 things is the printing obligation which we have
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2 in some of these cases. Almost no dispute may be
3 regarding the facts. I argued, recently, a first
4 degree murder case, People versus Dominick
5 Carbonerra in the New York State Court of Appeals.
6 There was a trial and, of course, thereafter an
7 extended Huntley Hearing held. Not one question
8 was raised regarding the fairness of the trial.
9 The only issue -- and there were plenty --
10 presented, had to do with the conduct of the
11 Huntley Hearing following the trial. Nevertheless,
12 the taxpayers of this County were burdened by
13 having to print that entire record, and it seems
14 that with this delegation of authority now being
15 clear, why, hopefully the courts, themselves, will
16 be able to pick up the ball and formulate a few
17 rules which seem to be more equitable and, at the
18 same time, re-protect the rights of the defendant.

19 Some of the recommenda-
20 tions which came to our minds, of course some have
21 already been discussed. I am particularly
22 interested in that part dealing with the
23 defendant's right to waive the presentation of
24 his case to a grand jury and to proceed by
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2 indictment. If anybody is truly interested in
3 manpower, in the delay and the difficulty that
4 we have in moving a case for trial and getting
5 a disposition, then you should have the birdseye
6 view that I have and see just exactly what happens
7 at this particular stage of a criminal case.
8 Unfortunately, so few have intimate knowledge
9 of it. We may have as many as a hundred fifty
10 cases presented to a grand jury in one month. This
11 involves manpower, tying up grand jurors, in-
12 convenience to witnesses, to say nothing of the
13 unbelievable amount of police that are tied up
14 in these grand jury presentations and really, for
15 no reason, if the defendant, represented by
16 counsel, wants to get on with the case, it appears
17 against him, have his trial, have his hearings
18 or what have you. I think that whatever this
19 Commission can do to streamline that particular
20 stage of the case, you will take a tremendous
21 step forward.

22 MR. BARTLETT: Do you agree that this
23 would probably require constitutional change? That
24 that's the prudent way to go about it?
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2 MR. DE VINE: Frankly, it may very
3 well be the prudent way to go about it. I would
4 like to tell you I have done a little study on
5 this and I would greatly appreciate it if you
6 would give me the opportunity to be heard.

7 MR. BARTLETT: Yes.

8 MR. DE VINE: 1683 is the starting point
9 for this problem, gentlemen, believe it or not.
10 The Legislature adopted what they call the Charter
11 of Liberties and Privileges. It provided that in
12 all cases, capital or criminal, there shall be a
13 grand inquest who shall first present the offense
14 and then twelve men of the neighborhood to try the
15 offender who, after his plea to the indictment,
16 shall be allowed his reasonable challenges. This,
17 according to my research, is the first evidence
18 of this provision in our State here in New York.
19 1683!

20 Now, nothing more
21 happened, you see, until the Constitution of 1821.
22 Now, what was it on the minds of the gentlemen in
23 1821? They wanted to borrow the Fifth Amendment
24 and the Fifth Amendment provided, as you all know,
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2 in so many words, that no person shall be held
3 to answer for any mechanical or other inference
4 definition unless on indictment by the grand jury.
5 So, there was a clear legislative history to
6 show that by 1821 we were borrowing the protections
7 for our people in this State that were then in
8 existence in the Fifth Amendment. That section
9 has been carried forward since 1821, and it
10 appears in our Constitution today.

11 Now, why is all of this
12 important? It is important, it seems to me,
13 because if we are borrowing from the Fifth Amend-
14 ment, then what the Supreme Court of the United
15 States says with regard to a defendant's right
16 under the Fifth Amendment may very well apply
17 with full force and effect to a defendant's rights
18 under Article I of Section 6. One need but look
19 at Rule 7 of the Federal Rules to discover a very
20 expensive practice statute which enables the
21 defendant to waive the presentation of his case to
22 a grand jury. It is unquestioned that these
23 Federal statutes have been sustained by the courts
24 right up to and including the Supreme Court of the
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2 United States. So, you see, we do have some
3 historical basis to conclude that there is
4 nothing necessarily sacred about Article I,
5 Section 6. Moreover, we find support for this
6 position in many of the other states who have
7 exactly the same language in their state con-
8 stitutions that we find in Article I, Section 6.

9 MR. BARTLETT: That is Illinois.

10 MR. DE VINE: Illinois, for example,
11 what does it say, no person shall be held to
12 answer for a criminal offense unless on indictment
13 of a grand jury. Illinois, Massachusetts,
14 Pennsylvania, Maryland, these are some of the
15 states that have provisions in their state con-
16 stitutions that are not materially different from
17 Article I, Section 6, and in each instance the
18 state court of last resort has said that the
19 defendant may, pursuant to statute, waive the case
20 being presented to the grand jury and he may
21 proceed by information. The most recent pronounce-
22 ment was in 1956 in Illinois versus Bradley, and
23 the decision was written by Judge Schaeffer. He
24 is a most highly regarded judge in this country
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2 today. He is now the Chief Judge of the Illinois
3 Supreme Court. Along with Judge Schaeffer, Chief
4 Cager, the Judge of California. They are very
5 influential. They treated this problem. They said
6 there was no real reason why a defendant should not
7 be permitted to by-pass the grand jury if he
8 chooses, and to go forward on information. I might
9 also say that he gave some consideration to the
10 1928 action of our own New York State of Court of
11 Appeals. It was referred to here this morning by
12 Mr. Parcher, and of course, they rejected the
13 rationale of this decision. As best I can gather,
14 the case is based upon no study or analysis of
15 these historical basis for Article I, Section 6.
16 Seemingly, the court rested their determination
17 upon two things. First, what they considered to
18 be the great public injury which would take place,
19 if we were to permit a defendant, represented by
20 counsel, to proceed by way of information instead of
21 waiting to have his case presented to a grand jury.

22 Now, the plain and
23 simple fact of the matter is, gentlemen, that a
24 study of the situation in the Federal courts in
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2 Illinois and all of these other major states, will
3 conclusively prove that the fears of our State
4 Board of Appeals were groundless. There is no
5 evidence of any public injury in these juris-
6 dictions. The second basis for their determina-
7 tion, apparently, of all things, is a case back in
8 18, New York and I don't mean 18 New York Second.
9 It had to do with a murder case and a death
10 sentence. In the middle of the trial, a juror
11 becomes ill. There are no alternates and his
12 lawyer said, "Well, let's go on with the trial."
13 The court simply said that based upon Article I,
14 Section 6 and the right to a jury trial, it was
15 not permissible to waive that particular right.
16 Whether they were right or they were wrong,
17 that was a death case, and I don't think it has
18 anything to do with the situation that is
19 presented here.

20 Now, again, I can say that
21 the prudent thing may very well be to proceed by
22 way of a constitutional amendment. I know something
23 about that because while my memory needs to be
24 refreshed, there was an effort made by the New York
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2 District Attorney's Association to achieve an
3 amendment to this Article I, Section 6. I have
4 forgotten the years, but it probably was in the
5 middle fifties, we did succeed in getting a
6 bill passed the first year. The second year,
7 it came a cropper, the reason being quite simple.
8 There were already five major proposals that
9 were going up on the State-wide referendum. This
10 being of no great consequence, I suppose, was
11 simply halted in either the Assembly or the
12 State Senate. And so it is, and I am very fearful
13 in the situation that prevails in the State today,
14 it may be very unrealistic for this Commission
15 to believe that you are going to meet this
16 responsibility by saying that the only answer is
17 an amendment to the State Constitution. That
18 is one choice, but whether it is realistic or not
19 is something that I am not absolutely certain of.

20 I feel very strongly about
21 this subject, and I think we have a Court of
22 Appeals that is not bound, not bound by what
23 decisions were made in 1928, believe you me, they
24 are taking a forward look at the problems of today
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2 and the doctrine of starting decisions
3 is only as good as the reasonable prudent result
4 that it brings about today. If anyone arguing
5 in that court today believes that the beginning
6 and end of your case is the decision in 1928,
7 then you have a very new experience waiting for
8 you.

9 There is no reason at
10 all to believe that the New York State Board of
11 Appeals wouldn't re-examine the position taken
12 by the court in 1928 in the light of today's
13 problems and come to a different determination.

14 MR. DENZER: We did that and we lost
15 on it. There would certainly be chaos, wouldn't
16 there? We would have a million cases which would
17 have to be reversed, and start all over again.

18 MR. BARTLETT: In terms of our proposal,
19 we could have a question on the ballot. If the
20 Legislature responded, I have strong reason to
21 believe they would, really after the effective
22 date of this because to go on in '68 and '69 and
23 become effective January 1st.

24 MR. DE VINE: What I am afraid is from
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2 the practical point of view, if we get action
3 from this Commission and you go out of existence,
4 and this problem has not been dealt with, then it
5 is just going to live with us for the rest of
6 this century because the likelihood of somebody
7 political getting enough force behind a bill in
8 Albany is, to my mind, somewhat unrealistic.

9 Now, I have to leave it
10 up to your judgment, and I respect it, and all I
11 am endeavoring to do is to give you some of the
12 background so that you make a more perfect
13 judgment as to what you should do.

14 I think that every
15 responsible police administrator in metropolitan
16 New York is utterly appalled at the number of
17 police officers and detectives who are just waiting
18 around in grand jury proceedings. I was happy to
19 have Mr. Parcher make the initial presentation
20 because, while we are not D. A. or defense lawyers
21 in that Commission, nevertheless, it is less
22 suspect, I think when it comes from his position.

23 MR. BARTLETT: In the Constitutional
24 Convention, I don't recall any group violently
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2 in opposition to that proposal.

3 MR. DUNNE: I would like to point
4 out in my capacity not as a Commission member,
5 but as a Legislator, I have prepared a resolution
6 which would call for passage in this section of
7 the Legislature, hopefully next year, just what
8 you are calling for. I recognize we might be
9 hampered by the same problems that we had back in
10 the fifties. It might fall to such groups as
11 the Bar Association, and the D.A. to make that
12 matter of top priority to make the community, and
13 also the legislators, aware that there is going
14 to be a limited number of propositions for people
15 to vote on in '69 that this should be one of most
16 importance.

17 MR. DE VINE: You have more confidence
18 in me than I do. I have to believe that from the
19 realistic political point of view, that when you
20 consider the other problems that we have in the
21 State of New York, I just can't believe that I am
22 going to succeed where some of these other issues
23 have to be dealt with by the Legislature. I just
24 have a fear that we are just going to be going up
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2 to Albany and coming back, and we will get the
3 bill through the first year, and the second year,
4 and quite properly so, quite properly so, on
5 ballot we are probably not entitled to a priority.
6 This is the one fear that we have.

7 MR. BARTLETT: I think what you are
8 asking is that the Commission actively interest
9 itself in the matter, whether it is undertaken by
10 constitutional amendment or statute.

11 MR. DE VINE: Correct, we will be
12 rewarded if you will do that.

13 MR. BARTLETT: I am sure that is the
14 view of the Commission. We passed a resolution
15 at the Constitutional Convention on this.

16 MR. DE VINE: Now, there is one other
17 point that has been discussed by the Committee, and
18 it happens to be a pet of mine, and it has to do
19 with the problem of prior identification.

20 For some mysterious reason--
21 and it is mysterious yet to me -- if we show a
22 victim or a witness of a crime, one hundred
23 photographs and they pick out a suspect, and
24 then we have a confrontation, God forbid that we
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2 should ever let the jury know that this witness
3 looked at a photograph. This has got to be one
4 of the great mysteries of this day. I think that
5 surely, as a result of the Stovall and Wade
6 decisions in the Supreme Court, the New York State
7 Court of Appeals, however reluctant, are going to
8 have to re-examine the position which they have
9 taken in years gone by with regard to testimony
10 regarding a prior identification.

11 Now, interestingly
12 enough, whether it is 393 C or B, or whatever it
13 is in our present Code, you know that that was
14 enacted to change a decision of our New York
15 State Court of Appeals regarding the right of a
16 witness to testify initially to a prior identifica-
17 tion. It is rewarding to say that, unlike some
18 other proposals there was, in fact, genuine
19 legislative history available which demonstrated
20 beyond all reasonable doubt that it was the
21 intention of the legislature to adopt the Federal
22 rule, the Federal rule. There was clear proof
23 of a legislative intent in connecting with this
24 bill. The Federal rule, gentlemen, makes no
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2 I went over there when I was admitted to the Bar,
3 and was fingerprinted. I would not want to prove
4 indirectly what I could prove directly. I would
5 not want to give the defendant a bad character,
6 neither do I want it to be established that those
7 photographs came necessarily out of a rogues book
8 rather than from a newspaper. I don't think that
9 is necessary, and any trial judge can control that.

10 It seems to me to be
11 totally unrealistic, in my years of experience,
12 I don't think I have confronted a claim of error
13 more commonly committed by trial judges than this
14 one in relation to identification from a photo-
15 graph. It seems to me the most natural thing,
16 and the best of judges do not until they are shown
17 this New York State Court of Appeals decision.

18 So particularly, now, that
19 we have to rethink this whole problem of identi-
20 fication, really we hear so much about accomplice
21 testimony and yet, isn't it really true that all
22 of the great miscarriages, or at least seemingly
23 most of the miscarriages of justice in the past,
24 have not rested upon the testimony of an accomplice,
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2 but, rather, they have rested upon the honest
3 but mistaken identification of a witness who
4 was running.

5 So, it seems to me, that
6 was the spirit of the Stovall and the Wade
7 decisions. Anything that is going to help a trial
8 judge and ultimately a jury properly evaluate the
9 witness' testimony, that this is the man that I
10 saw driving the car, should, it seems to me, be
11 brought to their attention. We are asking for
12 nothing more than the Federal rule, and the general
13 rule throughout this Nation, and we see no great
14 miscarriages existing in these other jurisdictions.

15 MR. DENZER: Wade and Stovall apply
16 to that, too.

17 MR. DE VINE: Certainly, I think it
18 would. I think what really is important, you
19 see, is whether what we witness in the courtroom,
20 was the defendant or the individual picked out
21 of the book. Now, we just can't ignore the fact
22 that that's how these cases are being broken.
23 This is how they are being developed and to just
24 say it is a matter of law, we have got to hide
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2 this police action, keep it from a jury, seems to
3 me to be so unrealistic. I think that it is
4 very important that a judge and a jury should
5 know that really the reason we are here is not just
6 because of the crime, but because this individual
7 has looked at a picture and has made an identifica-
8 tion. Then explore what the circumstances were,
9 and then you can better evaluate the situation
10 that exists.

11 Now, I will just be
12 brief and touch upon one or two other points.
13 Judge Stark, earlier this morning, spoke to you
14 about the defendant's right to appeal from a
15 violation of probation. I know something about
16 that because in the middle fifties, we had an
17 appeal from a violation of probation and a re-
18 sentence, and it went straight through the New
19 York State Court of Appeals. It never occurred to
20 me, gentlemen, to raise the question of appeal-
21 ability. I think every man has a right to appeal
22 to another tribunal when he feels that he has
23 been aggrieved. Nevertheless, there developed,
24 some years later, a difference between the
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2 departments regarding the right to appeal from a
3 violation of probation. I was surprised in the
4 Law Journal one morning to see that one of our
5 own Nassau cases had been dismissed on motion of
6 the Appellate Division, itself. So, I was in the
7 awkward position of arguing before the Court of
8 Appeals that the order was properly dismissed and
9 that it was not appealable. That was another case,
10 happily, we lost. So, we now know in a small
11 pro-curiae decision that the defendant does have
12 a right to appeal from a violation of probation,
13 but it only consists of about five or six lines,
14 and what the average practicing lawyer may very
15 well see are some very detailed published reports
16 on the level of the Appellate Division dismissing
17 appeals from a violation of probation.

18 I would see no prejudice
19 whatsoever to anybody if you could clarify the
20 statute dealing with the defendant's right to
21 appeal so that it would be clear to the young
22 lawyer who picks up this Code, that when you say
23 you can appeal from a judgment, that would include
24 a judgment initially or a judgment imposed following
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2 the violation of probation in the hearing.

3 One other point,
4 gentlemen; then I will sit down. I think there
5 is also a section dealing with the right of the
6 people to take appeal. It has to do with the
7 demurrer to the indictment. Now, we raised the
8 point, what about a demurrer that has been
9 sustained to one or two counts of an indictment.
10 In fact, it is the case law under our old statute
11 that the District Attorney has the right to appeal
12 not only where the demurrer is to the entire
13 pleading, but to one count of the indictment.
14 We can make the authority available to you later.

15 It seems to me that the
16 same rule should apply and that a clarification
17 of the statute would probably be in order. I
18 think that if you read the statute in its present
19 form, one might honestly believe that if he had
20 a ten count indictment and the very guts of
21 his case was dismissed in the first six counts
22 because the indictment was not dismissed, he
23 would have no right to appeal. That is not the
24 law today, and I am asking only that you conform
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2 your bill to the present law as we understand it.

3 MR. DENZER: Maybe you are right. I
4 think that was our intention. Section 230.20
5 gives the people the right to appeal from an order
6 dismissing an inditement or an information. That
7 covers the demurrer entered pursuant to certain
8 other sections. What you would have would be an
9 order dismissing an inditement, or information,
10 or a count thereof?

11 MR. DE VINE: Yes.

12 MR. DENZER: That's what we really
13 intended.

14 MR. BARTLETT: I see it is a quarter of
15 three now. I thought I was going to be back in
16 New York at three this afternoon. We do want to
17 hear everyone. I would like to ask that witnesses
18 who have written statements submit them and limit
19 their oral testimony as much as they are able to,
20 understanding that any written statements submitted
21 will be made a part of the record and will be
22 reviewed by the Commission.

23 Deputy Police Commissioner,
24 Gene Kelley.
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2 MR. KELLEY: Good afternoon. I would
3 just like to state for the record I am Eugene R.
4 Kelley. I am the Deputy Police Commissioner
5 for the Legal Affairs, former District Attorney of
6 Suffolk County, and presently appearing before
7 this Commission as Police Commissioner John L.
8 Barry could not be present. Much of what has been
9 said today, perhaps, might be referred to in the
10 report. Much of what I have heard I particularly
11 agree with as a representative of a law enforcement
12 agency. I think the most pressing or the most
13 difficult problem that I observe in this proposed
14 new law is that which affects wire tapping or the
15 use of eavesdropping equipment, and I would just
16 like to refer to that very briefly. It is covered
17 on Page 12.

18 I think that, in essence,
19 pretty much states the position of our County.
20 Basically, what bothers us is this, that under the
21 present proposed Code -- as a matter of fact,
22 under much of the case law, defendants are
23 entitled to have such things as Huntley Hearings,
24 Wade Hearings -- you name it, they are entitled
25 to it.

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2 Now, many of the cases
3 that have come down from the United States Supreme
4 Court dealing with wire tapping, like the Berger
5 case, other cases in our own State, Kaiser,
6 et cetera, nowhere in these cases do any of the
7 courts indicate that this right of the police
8 or police agency to wire tap or to use eavesdropping
9 equipment -- nowhere in any of these decisions
10 do the courts indicate this right should be taken
11 away from a police agency. Now, the Commission
12 has seen fit, for one reason or another, to
13 extend the mandates of the New York State Supreme
14 Court to deprive us of what we feel is a very
15 valuable weapon in law enforcement. We wonder,
16 is there not some way in which the Commission
17 would re-consider this particular area to the
18 end that, perhaps, the present law can be followed;
19 but if the Commission feels that in some way it
20 is being abused, they would wish to raise the
21 qualification or the rank of the officer who would
22 make application to the court. For example,
23 someone above the rank of sergeant, if the
24 Commission felt, and is a law enforcement
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2 representative. I know we could live with this
3 type of procedure if you want to elevate the rank,
4 above the rank of captain, perhaps.

5 I heard Commissioner
6 Looney talk this morning, and I agree pretty
7 much with what he said about the ability to work
8 with the District Attorney, but the way one
9 enforcement looks at this, in my opinion, and I
10 have been with the New York City Police for eight
11 and a half years. I have had my share of
12 sitting on wire taps, just like many of the
13 police officers in the Department. The way we
14 look at it is that, for no apparent reason, the
15 Commission has deprived us of this aid. It is
16 almost like you are taking away our night stick
17 even though the comparison would not necessarily
18 ring true. This is a valuable weapon. If the
19 Supreme Court said the police officers should not
20 have that right, perhaps we can console ourselves
21 along that line.

22 MR. BARTLETT: Our rationale, very
23 simply, was we felt that while Berger did not
24 address itself officially to what public officials
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2 should be able to apply to the ordinance, it was
3 astounded in this being a grave decision of public
4 policy to use eavesdropping. We have determined
5 that one of the ways to have that decision made
6 on a policy basis was to repose the responsibility
7 or the authority, rather, for making applications
8 in the hand of the policy making officer in the
9 criminal justice process, and he is the prosecutor.
10 Now, there is no precise language in Berger that
11 points to this, but we felt that the police are
12 working on a case where they deem wire tapping
13 to be appropriate or eavesdropping, they clearly
14 can go to the prosecutor and he can make a policy
15 decision. He is the one that has to prosecute
16 the case after you make your arrest. We did provide,
17 of course, the Attorney General had that right
18 and I can tell you that the bill which will be
19 given to the Legislature on Monday, also includes
20 the Chairman of the S.I.C., but it does again
21 limit it to the prosecutor, the Attorney General,
22 the Chairman of the S.I.C.

23 This was our reason,
24 whether right or wrong, which is not to say we
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2 wouldn't be glad to consider again your proposition.

3 MR. KELLEY: If I left with that
4 thought that you would at least reconsider, I am
5 pleased to hear that the bill -- that there is a
6 bill in to allow the Chairman of the S.I.C.,
7 because if you can allow the Chairman of an in-
8 vestigative agency such as that, then why not,
9 perhaps, a ranking officer of a duly authorized
10 police department. We are congested enough in
11 this area so that we can, along with the D. A.,
12 retain control. We are not only talking of wire
13 taps, although this is primarily what we are
14 talking about, but there are other eavesdropping
15 techniques which you are well aware of that can
16 be utilized with, of course, the proper court
17 supervision. As I said earlier --

18 MR. BARTLETT: (Interposing) The
19 Commission will discuss that again.

20 MR. KELLEY: I think, if the members
21 of the Commission will read the report, we make
22 certain recommendations in areas such as appearance
23 tickets. Maybe that can be tightened up a little
24 in certain areas. We don't like to be mandated
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2 to release a particular individual who might
3 have been involved in an assault situation only
4 to be faced with the prospect when he leaves,
5 he will go home and attack his wife.

6 MR. DENZER: You have that situation
7 today under the present Code. Within that, you
8 must set fixed bail at least there, if there is
9 no court available. You know how those sections
10 are worded, "Between certain hours." If you
11 couldn't get him to a court between certain hours,
12 you have to get him to fix bail.

13 MR. KELLEY: For example, intoxicated
14 persons. Nowhere does the present Code say that
15 a police officer can deny bail, police house bail,
16 to an intoxicated person. Yet, we do that.

17 Arrest warrants. We
18 know there seems to be no procedure in the present
19 law. What do we do with someone who is picked
20 up on arrest warrant? Must we hold them for court,
21 or can we pick them up on station house warrant?

22 MR. DENZER: On a warrant of arrest,
23 you must take them on to court.

24 MR. KELLEY: Presently, we give them
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2 station house bail. It says "Or bail," and then
3 they generally write a figure on it. Then, because
4 of the rules of the Code, no matter what the
5 rules states, we fix a maximum of two hundred. As
6 I said, most of them are in there.

7 I recognize there are
8 a lot of people waiting to testify, so thank you
9 very much for your attention.

10 MR. BARTLETT: Thank you, and our best
11 to Mr. Commissioner Barry.

12 MR. KELLEY: Thank you.

13 (AT WHICH TIME DEPUTY COMMISSIONER KELLEY SUB-
14 MITTED A SIXTEEN PAGE REPORT WHICH IS MADE A
15 PART OF THIS RECORD.)

16 MR. BARTLETT: Mr. Cahn?

17 MR. CAHN: Mr. Chairman, gentlemen
18 of the Commission, thank you for allowing me to
19 leave the press table and address this body. For
20 the record, my name is Ira L. Cahn. I am editor
21 and publisher of the Massapequa Post. Unlike most
22 of you who you have heard or will hear today, I
23 do not represent a law enforcement body. I am
24 not a member of the Bar. I am here in the role
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2 of public defender.

3 MR. BARTLETT: We know you to be an
4 interested citizen, Mr. Cahn.

5 MR. CAHN: Thank you, Mr. Bartlett.
6 I have no vested interest except that of the
7 interest of the public at large. I will attempt
8 today to speak in more general terms than, perhaps,
9 those others that you have heard or will hear,
10 and discuss the philosophy of society and the
11 criminal with particular reference to youthful
12 offender treatment.

13 I believe that society
14 today is looking for a stronger and stronger leader-
15 ship from the Legislators and from the Bar, of its
16 courts in attempting to protect society from the
17 onslaught of increasing criminals. We have seen
18 the statistics climb year after year, and the more
19 that bodies such as this meet and the more that
20 the courts sit and rule, so are the guardians of
21 our society handcuffed with more and more rules
22 with the result that society is becoming the
23 loser while the felon is becoming the winner in
24 this war between society and crime. There is a
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2 hold onto it solely because it is there. You
3 have the opportunity, this Commission, to allow
4 us to return to a Code that would protect society
5 without violating the right of the individual.
6 It can be done.

7 MR. BARTLETT: What do you recommend in
8 connection with youthful offenders, Mr. Cahn?

9 MR. CAHN: I would recommend that if
10 a person is accused of a crime that would be a
11 felony, if he were over the age of nineteen, that
12 he be treated in such a manner, open court, the
13 right to publish his name, the right to have this
14 record, if you will, follow him where necessary.
15 Now, I know this is --

16 MR. DENZER: (Interposing) You would
17 eliminate youthful offender treatment for anyone
18 charged with a felony?

19 MR. CAHN: I would qualify it to
20 say that every dog is entitled to one bite.

21 MR. BARTLETT: That's our view, too.

22 MR. CAHN: It is quite possible that
23 if it were a misdemeanor and not a felony -- I
24 am not an attorney. I can't find these very fine
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2 distinctions in law -- I might go along with it.
3 If it was a felony of high degree, a rape,
4 felonious assault or something like that, I might
5 not even want to give him the one time bite.

6 MR. DENZER: In judiciary, the judges
7 have the power to refuse Y.O. treatment when a
8 person is charged with a felony. I take it you
9 don't trust their judgment on this?

10 MR. CAHN: I wouldn't be so bold in
11 this building to make such a statement.

12 MR. BARTLETT: Do you want to meet us
13 outside, Mr. Cahn?

14 MR. CAHN: I would say this, that
15 while they do have the power, it is so rarely
16 exercised as to be almost not there. It is so
17 very, very rare that a judge will refuse youthful
18 offender treatment.

19 MR. DENZER: Mr. McQuillan's statement
20 tells me that State-wide about fifty percent of
21 them are rejected.

22 MR. CAHN: I can't dispute that, sir.
23 I will say this, that in my own experience in
24 covering as much as I can of such proceedings, I
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2 have found very little of it here in Nassau
3 County. I will say this, too, that certainly the
4 discretion should be taken out of the hands of
5 the judge after at least the first bite, and I
6 would make it mandatory that no more than one
7 youthful offender treatment be given.

8 Now, under Article 400,
9 if I recall, it is not mandatory. I would make
10 it mandatory that a person seeking youthful
11 offender treatment should not be given twice
12 around, or three times around, or four times
13 around. Let us re-establish in the minds of the
14 public -- and that goes for the youth as well --
15 that they cannot violate those rules and regula-
16 tions which society has imposed with complete
17 immunity, and that is what is happening today.

18 You have made a philosophy--
19 I don't mean you, gentlemen -- but society has
20 created a philosophy that enables the youthful
21 offender to literally thumb its nose at the law
22 enforcement. I resent this as a citizen and I
23 resent it as a member of the press. We will do
24 all we can to secure the name of those persons,
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2 and we publish them. And what happens under the
3 guise of equity in the law, before the accused is
4 given Y.O. treatment, I have the privilege, as a
5 reporter, of securing his name and the charge.
6 Once he receives Y.O. treatment, these records
7 are closed to me.

8 Let us assume that the
9 accused is found innocent, I can't even follow it
10 up after I have published that boy's name and I
11 have published the charge. I can't even follow it
12 up to give him the fair and equal treatment in the
13 press he is entitled to, and point out the boy
14 has been let go. This is silly. At one hand you
15 are asking for fair treatment, on the other hand
16 you are taking away my privilege and my obligation,
17 my responsibility to use equitable treatment; and
18 I am completely blocked by a very archaic --
19 after twenty-five years I guess you can call it
20 archaic -- law.

21 MR. RANGEL: What contribution do you
22 think you are making to society by publishing the
23 name? How does this resolve the criminal aspect
24 of it?
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2 MR. CAHN: I believe there is
3 several aspects. We are re-establishing and
4 reinforcing in the minds not only of the criminal,
5 but of society, that when you violate society's
6 rules and regulations you cannot do so, that you
7 face the obligation of your peers --

8 MR. RANGEL: (Interposing) You mean
9 when an accused has been selected, when someone
10 has allegedly been charged with a crime? I want
11 to know what service you are giving the public
12 when you publish the name?

13 MR. CAHN: Is there any difference
14 between an accused of nineteen and a day, or
15 twenty-one or eighteen and three-quarters? If
16 that is their age, I can publish their name. This
17 is part of the people's rights to know and the
18 right to protect themselves.

19 There was an attempt about
20 two years ago to extend it to age twenty-one. Now,
21 here you have a man married, a job, a member of
22 society at age twenty-one, twenty-two, twenty-three
23 or twenty-five, and they attempt to put a curtain
24 in front of him. What is the difference between
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2 a man of eighteen and three-quarters who is,
3 perhaps, married, a member of society, a member
4 of the armed forces, an adult in all terms except
5 in front of the court? Now, where do you draw
6 the line? Where does society protect itself?
7 Sixteen and nineteen?

8 MR. DENZER: You have to draw it
9 somewhere. Of course, it is arbitrary, but you
10 pick the best spot you can find.

11 MR. CAHN: Well, this is part of a
12 debate between the Bar and the press at all times.

13 MR. BARTLETT: You do believe then, that
14 there are cases in which youthful offender treat-
15 ment is appropriate?

16 MR. CAHN: May be appropriate. I
17 wouldn't become that definite, sir.

18 MR. BARTLETT: You mean you don't know
19 of one where you are sure of?

20 MR. CAHN: That is correct. We
21 had an attempt, not too long ago, to lowering the
22 voting age to eighteen, which I heartily approve
23 of. Yet, we are faced with the paradox of having
24 a man of eighteen able to vote, but not able to
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2 stand trial.

3 MR. BARTLETT: That is one of the
4 arguments I made against lowering the voting age.

5 MR. CAHN: You and I don't agree
6 on many things. It seems to me, also, there is
7 a determination on the part of the accused. Let us
8 assume for the minute that he has a right to
9 self determination. He has deliberately assaulted
10 someone, deliberately broken in and stolen,
11 deliberately taken a car, deliberately raped.
12 Shouldn't this deliberate attempt be made a
13 matter for society to measure? Why should he be
14 given the secrecy of a closed trial? There are
15 other abusers that could be held there.

16 Let us assume that a
17 young man is the victim of an incompetent attorney
18 or a prejudiced judge. Let us be very practical.
19 It is not inconceivable that his attorney is in-
20 competent, it is not inconceivable that a judge
21 didn't do his homework. Yet, this young man is
22 in front of a judge. Nobody is there to protect
23 his rights except an attorney who may or may not
24 know, who may or may not be able to defend him.
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2 The press is barred, the public is barred and I,
3 for one, will struggle against any attempt to
4 what amounts to a Kangaroo court. I will continue
5 to fight against this.

6 Now, I don't mean that
7 all youthful offender treatment is subjected to
8 this sort of treatment, but what I am saying,
9 there is this possibility and we are dealing here,
10 in the entire procedure, with possibilities. There
11 is always the possibility. It is also unfair to
12 others if there are three or four boys involved
13 in a crime and you have two of them of sixteen,
14 one of eighteen, one of nineteen. You publish
15 the names and you have seen it; John Jones, age
16 nineteen -- the other names are withheld. Yet
17 everybody knows that Johnny and Jimmy and Sam
18 all go together. You haven't fooled anyone.
19 Everybody in town knows who it is and yet, you
20 have allowed the miscreant to get away, not be
21 responsible to his peers, to society or to himself.
22 Perhaps, a short term in jail might save this
23 kid from doing something wrong or, perhaps, even
24 having his name in the paper. I have heard people
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2 say you are going to make heroes out of these
3 miscreants. They are going to go back and say,
4 "Oh boy, I was in the paper." Don't you believe
5 it, gentlemen. Society's rights are fully pro-
6 tected when the criminal is exposed. For the
7 first few times when this happens, someone might
8 say "Johnny, I see you were in court. What
9 happened?" No one can consistently stand up
10 against society and shun them. You take away
11 the right of the people to protect themselves.

12 How would you like it if
13 your son was going out with a boy who has had under
14 his belt two or three auto thefts, or a rapist?
15 You have no way of protecting yourself, and aren't
16 you entitled to the same protection, as a member
17 of society, as you are offering to the miscreant?

18 There must be some way
19 that society or the victim can protect themselves.
20 I am asking that there be some method of returning
21 to society some rights and privileges that were
22 delegated to youth.

23 I will leave Y. O. for a
24 moment. I don't know if this is rightfully in
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2 front of this body; that is, for the need of
3 privileges to the press. This State is one of
4 those that do not allow the press the rights and
5 privileges. If someone comes to me and gives
6 me information concerning a crime, and I pass it
7 on to the duly constituted authority, I can be
8 called as a witness. This is not right, sir.
9 The press should have the right of privilege.
10 Otherwise, our source of information dries up
11 very rapidly, and we are facing a similar situation
12 when the police are being asked to divulge the
13 name of their informant. I ask that in some
14 manner --

15 MR. DENZER: (Interposing) That
16 bill has been before the Legislature many times
17 and rejected every time.

18 MR. CAHN: And we fight for it
19 every time. There is still a need for it. I keep
20 thinking of the ~~Miranda~~ trial case as a perfect
21 example. There is a great need of privilege for
22 the press. I don't know if this is rightfully
23 before this body, but certainly, it should be
24 brought out.

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2 One or two other
3 matters which I, as a newspaper reporter has
4 come across, the need to limit the number of
5 adjournments in the courts. I, myself, have
6 been a witness and I have been called back
7 again, and again and again, to the point where
8 I have gotten fed up and disgusted and wished
9 I had never come forth and volunteered as a
10 witness. It seems to me that there should be a
11 certain amount of mandate where the defense and
12 the prosecutor are allowed one or two adjournments
13 and that's it. Mandate that it go to trial.

14 Again, I don't know how
15 much of this -- and I am not an attorney -- comes
16 before this body, but it would seem to me --

17 MR. BARTLETT: (Interposing) The
18 difficulty in mandate, of course, you might well
19 have a situation where a prosecutor -- let's
20 assume we have no more than two adjournments --
21 the prosecutor takes two adjournments for a good
22 cause, and then he is faced with the obligation
23 of going to court. On Monday morning he finds
24 out that his key witness is out of the jurisdiction,
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2 and he won't be able to reach him for another
3 two or three weeks. This is the difficulty with
4 inflexible rules.

5 MR. CAHN: Perhaps, I made those
6 rules too inflexible. I am willing to bend a
7 little, but when you and I have seen adjournment
8 after adjournment with the hope that the witness'
9 memory will fail, that the expense will be so
10 great. I am talking for the public. There must
11 be some stage where you say, "by golly, you go
12 to trial."

13 MR. BARTLETT: Judges do that.

14 MR. CAHN: Again, so rarely. I
15 realize I am getting into a rough area here, but
16 again we worry so much about the defendant and,
17 perhaps, in this case, about the plaintiff, but
18 how about the poor witness who has no vested
19 interested in this thing, who is neither a
20 plaintiff or defendant, but is giving up his time
21 from his work or job to do his job as a citizen.

22 MR. RANGEL: I have introduced a bill
23 to give compensation to the defendants' witnesses
24 as well.
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2 MR. CHAN: It might make the situa-
3 tion a little more tolerable, but it doesn't ease
4 the situation.

5 I am not going to speak
6 much longer except to remind you that Article 35,
7 though it is not up to date -- as you know, sir,
8 I am so violently opposed to Article 35. I do
9 compliment you for easing the situation a little
10 bit over the past few weeks. I am still not
11 satisfied with a two hundred fifty dollar
12 determination by a cop in the course of chasing
13 a suspected felon. At least we have made a
14 step forward, I believe in returning some of the
15 rights to the cops. I will continue to press for
16 more and more --

17 MR. BARTLETT: (Interposing) Under
18 that, the Commission's proposal goes back to the
19 fleeing felon rule with one exception, property
20 crime.

21 MR. CAHN: That's where you and I
22 disagree, sir. That's what makes our democracy.
23 Thank you very much for having me here today.

24 MR. BARTLETT: Happy to have you, Mr. Cahn.
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Joseph Goldstein.

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3 MR. GOLDSTEIN: Mr. Chairman, gentlemen
4 of the Commission, I will attempt, since that
5 portion on which I had planned to spend the
6 greatest amount of time on will be dealt with
7 by the Governor tomorrow, I understand, limit
8 my remarks to several questions which I have of
9 the Commission. I would like, particularly, to
10 start with that portion of the proposed Code
11 which deals with search warrants. I am not sure,
12 in having been involved in the County Court of
13 the County of Nassau as the Chief Law Assistant
14 for the past number of years, that vague terms
15 or general terms in statutes will help the court.
16 I would prefer, I think, that the Commission,
17 wherever possible, express exactly who they have
18 in mind. I am not sure under 365.05, Subdivision 1,
19 what the Commission intends by that phrase "other
20 public servants acting in the course of his
21 official duties."

22 MR. BARTLETT: Agents and marshalls.

23 MR. GOLDSTEIN: That may well be. I am
24 sure you would also include an inspector or a
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2 fire marshall.

3 MR. BARTLETT: Yes.

4 MR. GOLDSTEIN: It would seem to me that
5 that phrase might be more definite.

6 MR. BARTLETT: We state specifically,
7 "other public servants having --

8 MR. GOLDSTEIN: (Interposing) Somewhere
9 else you say "other public servants of law
10 enforcement capacities," I think is the phrase
11 you use, "law enforcement functions," under
12 375.20 I believe it is.

13 MR. BARTLETT: You are talking about
14 search warrants now?

15 MR. GOLDSTEIN: Yes, I am.

16 MR. BARTLETT: 365.

17 MR. GOLDSTEIN: Right, Subdivision 1, you
18 say initially, "That upon the application of a
19 police officer, a District Attorney or other
20 public servant acting in the course of his official
21 duty." There is no definition in the beginning
22 of the Code as to what you mean by public servant.
23 I am sure that you do not have in mind, at least
24 I hope you do not have in mind, a dog warden or
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2 someone along those lines. Obviously, people do not.

3 MR. DENZER: Public servant is defined
4 in the Penal Law, and the definition is carried
5 over into this proposal.

6 MR. BARTLETT: If a dog warden were
7 after a rabid dog which the owner was harboring
8 and refused to turn over to him, I am not so sure
9 I wouldn't want to give him a search warrant.

10 MR. PANZARELLA: A recent case held that
11 a health department inspector couldn't enter a
12 building.

13 MR. GOLDSTEIN: That's why I suggest
14 that, if at all possible, we, in some fashion,
15 define the term "public servant," as it is used.
16 I know, also, the distinction which the Commission
17 has drawn regarding the issuance after execution --
18 the area of execution of search warrants, and
19 that is, that if a Village Justice were to issue
20 a warrant to a Village police officer, that
21 officer might only be able to execute that
22 warrant in the county of issuance or in one of the
23 adjoining counties. However, if the warrant
24 were issued to a different type or classification
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2 of officers by a different judge, the same
3 warrant extends and can be executed anywhere in
4 the State.

5 I have read the staff
6 comments in the Proposed Code, and I find that
7 the distinction, at least to myself, as an
8 attorney, is not quite clear and, again, I would
9 ask the Commission to indicate the reason that
10 there are -- and I am sure there are specific
11 reasons that the Commission has in mind, to
12 delineate why the distinction now.

13 MR. DENZER: Well, as far as the courts
14 are concerned, we will say yes, a Supreme Court
15 Judge here in Nassau County may issue a search
16 warrant that is executable up in Buffalo, but we
17 don't want a Village Judge --

18 MR. GOLDSTEIN: (Interposing) Let us
19 assume, sir, if you will for a moment, that a
20 Village Judge has a case before him where evidence
21 of crime may be obtained in the defendant's
22 residence or hunting lodge upstate somewhere. He
23 could not issue a police officer of his a warrant
24 to go upstate and obtain the evidence.
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2 MR. DENZER: The applicant would have
3 to go to a Supreme Court Judge or a County Judge.

4 MR. GOLDSTEIN: May I ask then why we
5 have the distinction between the adjoining county.
6 I could see if you said he would be limited to
7 issue a warrant within the county.

8 MR. DENZER: That depends on the
9 New York Constitution in which there is a funny
10 little clause that limits the process of not
11 only Town Courts and Village Courts, but City
12 Courts to the particular county and the adjoining
13 county.

14 MR. GOLDSTEIN: I recall the case where
15 we found that Westchester was adjoined to Nassau.
16 The reason was land that adjoined under the water.

17 MR. DENZER: Yes.

18 MR. GOLDSTEIN: I think, if we could get
19 something on this, we would appreciate it.

20 Under 365.35 2C dealing
21 with the application of a search warrant. While
22 it is implied that a court or judge issuing the
23 warrant must be satisfied as to existence of
24 sufficient grounds or probable grounds, nowhere
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2 in the statute does it so state. It does state
3 that the application must contain an allegation
4 of reasonable cause and that there must be facts
5 supporting this.

6 It would seem to me that
7 the language presently used in 796 might be
8 included in this particular section of the
9 Proposed Code so as to clarify that, as regards
10 the sufficient probable cause being satisfactory
11 to the judge, himself, and not to anyone else.

12 I would also like to just
13 point out, I assume, this is a typographical
14 error, in Subdivision C, the third line, the
15 word should be applicant, I assume, not application.
16 Just note that for the record.

17 MR. BARTLETT: In the question of
18 probable cause in the questions of whether or
19 not the warrant was properly issued in the first
20 place, is reviewed on motion to suppress. Sub-
21 sequently, you didn't mean to suggest that we
22 apply a subjective test to find out whether or
23 not there was a just cause.

24 MR. GOLDSTEIN: No. I am suggesting that,
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2 regarding the fact that the facts -- the allegation
3 is a fact referred to in subparagraph C -- must be
4 satisfactory to the judge who issues the warrant.
5 The language is not in this particular subpara-
6 graph and, as a person who is quite often involved
7 in trying to interpret these things, I raise the
8 question so the Commission might consider insert-
9 ing the sentence which is used in 796 to clarify
10 the issue. I would also like to ask the Commission
11 as to whether they have something specific in
12 mind in 365.40 by the phrase "In determining an
13 application for a search warrant, the court may
14 examine, under oath or otherwise --" at the
15 present time, I believe there are several --
16 in the recent cases considered by the Court of
17 Appeals in the Sarisohn matter and People versus
18 Kaiser, there is language in the decision which,
19 I believe, would seem to indicate that any state-
20 ments given to a judge upon the application for a
21 search warrant or a wire tap must be on the
22 record and under oath. The language of 794 uses
23 the word "on," and I don't know, therefore, what
24 is intended.
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2 MR. BARTLETT: The application has to
3 be under oath.

4 MR. DENZER: We didn't want to over
5 formalize it if the judge wants to get other
6 people up there and ask some questions.

7 MR. GOLDSTEIN: That is his right
8 presently.

9 MR. DENZER: He has a right, but
10 under this it says he doesn't have to. If he
11 wants to speak to some persons at the bench or
12 where he chooses, let him do it that way.

13 MR. GOLDSTEIN: I take exception with
14 that in relationship with the present laws as it
15 sits and as it is handed down by the Court of
16 Appeals then. It seems that for a search warrant
17 to be proper and properly reviewable, everything
18 which the judge considered, particularly on the
19 issue of probable cause, must be on the record
20 whether it be by affidavit in a formalized
21 application or whether it be by testimony in the
22 judge's chambers or before the bench. It
23 certainly should be reviewable, and it cannot be
24 reviewable unless it were under oath or if it
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2 were sworn, not by just a summary of what was
3 said or by a telephone call or some way else.

4 MR. BARTLETT: The issue would be
5 upon it being tested out on a motion to suppress
6 whether or not the sworn application, together
7 with any sworn testimony, supported the finding
8 of reasonable cause.

9 MR. GOLDSTEIN: Absolutely.

10 MR. BARTLETT: That does not mean we do
11 not want the judge to be able to say "Who is
12 the police officer that saw this take place?" You
13 know, some collateral question, and since he is
14 here in the courtroom, your honor, he can go up
15 and talk to him. The issue still is determined
16 on sworn statements.

17 MR. GOLDSTEIN: I raise the issue because
18 upon review everything which was considered by the
19 jurors in signing this warrant must be available
20 to counsel to review on the question of sufficiency
21 and, of course, should be available to the Appellant
22 Courts. I suggest the language which might be
23 included would be the last sentence of 794 as it
24 presently exists.
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2 There is another issue
3 which I would like to see clarified, and that is
4 in 365.50, the execution of search warrants, and
5 Subdivision 5 talks about filing the warrant
6 without an unreasonable delay and the return. The
7 present statute also talks about filing, but nowhere
8 does the statute indicate where that document must
9 be filed nor whether that document must be filed
10 with a public court record, such as the County
11 Clerk's office, or whether in the court's own
12 files with its own clerk where it would be kept
13 under seal. I think the Commission should take
14 some consideration of that when it completes the
15 revision of this Proposed Code. It would seem
16 to me that, certainly, a filing to memorize the
17 document, to have it available for future use, is
18 important. In the event there be a loss of
19 documents or death of a judge, it should not be
20 retained in the judge's own files, and that whether
21 it be in the County Clerk's office or the Court
22 Clerk's office under seal is something I would
23 leave to you gentlemen, but I think the statute
24 should clearly indicate the period of time after
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2 making the return where the search warrant and
3 the return should be filed.

4 I raise one other
5 question, gentlemen, under the review of a motion
6 to suppress evidence and, with that, I will close.

7 We have found, quite
8 often, that search warrants and wire tap orders
9 are granted, and as far as the probable cause,
10 which is in the application, we find ourselves
11 faced with a situation where a prior wire tap or
12 possibly prior wire taps and the information
13 obtained therefrom are used to support the finding
14 of probable cause in the present application for
15 a wire tap or a search warrant. Under 375.20
16 of the Proposed Code, there are two sections, and
17 I submit to you, gentlemen, that on their face
18 they may be interpreted to be mutually exclusive
19 and inconsistent. You say that upon the motion
20 of a defendant claiming to be aggrieved by
21 unlawful or improper acquisition of evidence and
22 having reasonable cause to believe that such
23 evidence may be offered against them in a criminal
24 action, he may accept. Then, quite appropriately,
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2 let us assume that upon the basis of the search
3 warrant, itself, and on its face, the police
4 officers have spelled out sufficient probable
5 cause for the search warrant. However, part of
6 that probable cause came from the conversation
7 taped over my telephone. Mr. Bartlett was not
8 a party to that conversation; it was not on his
9 telephone in his office. He was a subscriber to
10 that telephone conversation or the telephone, and
11 he, therefore, would not have standing in the
12 technical sense, as Mr. Justice Shapiro would
13 find it, to object or challenge the wire tap on
14 my telephone.

15 Let us assume even
16 further that the court said, "Well, because my
17 telephone conversation was mentioned as probable
18 cause, we would find standing." However, I
19 submit that only by stretching the question of
20 standing or changing its intent would the court
21 find that Mr. Bartlett would have had standing
22 to challenge the wire tap upon which my telephone
23 was tapped, and I go back --

24 MR. BARTLETT: (Interposing) What do you
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think the rule should be in this case?

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MR. GOLDSTEIN: Quite frankly, we have

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had a diversified opinion in my court. I say

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that somewhat possessively, but proudly. The

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judges have had a different opinion not only on

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our bench, but throughout the State. My own

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personal opinion is that if a defendant is to

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be truly given a right to challenge fruits of

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the poison tree, as it were, and if that document

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is to mean anything, then we must permit a

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defendant to go all the way back, right down the

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pyramid.

14

MR. BARTLETT: Without regard to any

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standing problem?

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MR. GOLDSTEIN: Without the question of

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standing coming into play at all because if we

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don't somewhere along the line, an improper wire

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tap or improperly obtained evidence could have

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been used and made available to police officers for

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subsequently -- proper on its face -- applications

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for wire taps or search warrants, and I submit

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to this Commission that this is a serious problem

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and one which, in the review of 375.20, the

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2 Commission should seriously consider and try to
3 dispose either one way or the other, as a guide
4 to the courts and as advice to counsel.

5 Thank you.

6 MR. BARTLETT: Thank you, Mr. Goldstein.

7 We know you have representatives from the Nassau
8 County Probation Department and the Suffolk
9 County Probation people. We will take the home
10 team first. Mr. Kent Lewis.

11 MR. LEWIS: Before I get into my
12 prepared text, this is one of the rare opportunities
13 which I am going to have to top a Nassau County
14 Court Judge. I am only sorry that Judge Kelley
15 has left. We have an exhibit of our own resulting
16 from what Mr. McDonough would undoubtedly call
17 our harassment of defenseless probationers which
18 we would like to dump on the table before you.
19 Yes, this was confiscated by probation officers
20 during the performance of their duties. Narcotics
21 instruments, knives, chains, CO₂ pistol.

22 MR. BARTLETT: Off the record.

23 (DISCUSSION OFF THE RECORD)

24 MR. LEWIS: I am appearing here today
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1
2 as President of the Nassau County Probation
3 Officers Benevolent Association principally to
4 clarify certain points of confusion brought about
5 by the proposed Criminal Procedure Law's elimina-
6 tion of the Peace Officer status. I hope to
7 raise some new questions which merit your con-
8 sideration, point out some of the more nebulous
9 areas, and make a proposal in regard to the
10 status of Probation Officers.

11 I am well aware that
12 this is your seventh public hearing, held at
13 various locations throughout the state, and
14 keeping this in mind, will try not to go over
15 ground already covered. I need not dwell long
16 on the difficult, unique and hazardous profession
17 which Probation is, nor do more than point out
18 to you that Probation offers a most successful
19 and economical method of rehabilitation of the
20 offender against society. You gentlemen are well
21 aware that Probation Officers conduct pre-sentence
22 investigations on convicted felons and misdemeanants,
23 making recommendations as to the nature of the
24 sentence which is used as a guide by the Judiciary
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2 and supervise persons placed on Probation by
3 the Courts, including making home visits of a
4 surveillance nature, which necessarily brings us
5 into the probationers' homes and communities,
6 most frequently the highest crime rate areas in
7 our county. As Officers of the Court, however,
8 when rehabilitative processes prove ineffective
9 in maintaining a probationer in the community so
10 that he does not pose a threat either to himself
11 or society, it is our direct responsibility to
12 bring about Violation of Probation proceedings.
13 In so doing, we must ask the Courts to issue
14 warrants of arrest and must frequently execute
15 these warrants ourselves, bringing the probationer
16 before the Court if in session or transporting
17 him to jail to await arraignment. Out of one
18 hundred fifty-four warrants issued in 1967 for
19 Violation of Probation, seventy-five were executed
20 by Probation Officers, thirty-nine mostly involving
21 the filing of detainers in other counties, were
22 executed by the Police Department warrant squad
23 and forty remaining outstanding. There have
24 further been isolated instances, in which Probation
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2 Officers have made arrests of probationers or
3 non-probationers and have filed criminal informa-
4 tions. In other cases, the intercession of a
5 Probation Officer has caused wanted individuals
6 to surrender to the police authorities. We
7 submit that the very nature of the functions
8 ascribed to the Probation Officer makes his job
9 a dangerous and hazardous one.

10 In Nassau County, all
11 Probation Officers are college graduates. In
12 order to carry firearms, they must take an
13 orientation course on the use and handling of
14 firearms at the Nassau County Police Academy
15 and demonstrate their proficiency through qualify-
16 ing at the Police Range. Also, by the very
17 nature of their job and as a result of in-service
18 training programs offered by our department and
19 approved by the State Division of Probation and
20 Judicial Conference, Probation Officers are
21 familiar with the Penal Law and Code of Criminal
22 Procedure.

23 Probation Officers
24 presently are considered to be on duty as Peace
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2 Officers twenty-four hours a day, but are not
3 supplied even when in the field, with radio
4 equipped cars with which to call in immediate
5 police assistance. We work closely with the
6 F.B.I. and State and City police as well as with
7 all local police authorities in performing the
8 law enforcement components of our jobs. This
9 includes the sharing of information and prompt
10 access to Police and District Attorney's files.
11 Often, Probation Officers in the field ride with
12 a detective in an official police car to apprehend
13 Violators and make visits to informants and other
14 parties to elicit information as to their where-
15 abouts. We feel that these relationships would
16 be seriously endangered by the proposed Criminal
17 Procedure Law. Our role as authority figures and
18 symbols of law and order would also be emasculated
19 and our relationship with the probationers would
20 lose an important aspect of its crime deterrent
21 potential. We would become to these people just
22 another caseworker, a welfare aide, neither to be
23 respected nor heeded. The Federal Government
24 apparently recognizing this, considers its
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2 Criminal Procedure Law, as we feel this can
3 increase our effectiveness in the field and in
4 protecting the community. This section, however,
5 leads to several of our questions. For instance,
6 the Probation Officer will be empowered to arrest
7 on the spot and without a warrant a probationer
8 whom he has good reason to believe has violated
9 the Conditions of his Probation, and to search
10 the premises where he is apprehended. In what
11 manner is he to treat accomplices or consorts if
12 the Violation consists of a crap game, a narcotics
13 party, disorderly conduct, assault, or a number
14 of other such offenses? In what manner is he to
15 act if a search of the premises where the
16 probationer is apprehended, but does not reside,
17 uncovers a cache of narcotics or burglar's in-
18 struments? Is he to make arrests under these
19 circumstances as a private citizen? Can he make
20 arrests in the latter case as a private citizen,
21 when as a private citizen he has no right of
22 access to the premises? We submit that this would
23 be impractical and unrealistic and raises serious
24 questions of law as to propriety of arrest, search
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2 and seizure and admissability of evidence. This
3 also carries serious implications in regard to
4 tort liability of the Probation Officer so acting.
5 In the same general vein, we would request the
6 authority to stop and frisk a probationer, only
7 to a probationer, upon reasonable belief of a
8 Violation of Probation and as a valuable adjunct
9 to our law enforcement responsibilities and the
10 rehabilitative process, without having to
11 necessarily effect an arrest. Another area of
12 concern to us is the apparent ambiguity which
13 exists in stipulating who may execute a warrant
14 of arrest, as exists between Section 60.40 and
15 60.60, which reserves this power to those
16 defined as Police Officers under Section 1.20,
17 Subdivision 15 and Section 210.30, which states
18 that warrants for Violations of Probation may be
19 issued by the Court and executed by Probation
20 Officers. We feel that this confusion can be
21 easily removed by the inclusion of an additional
22 phrase in Article 60, clearly specifying the
23 arrest powers of the Probation Officer.

24 I will not quote from the
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1
2 text the complete statement of Commissioner
3 McGrath in regard to police officer status, but
4 just advise you that we also do oppose, with you,
5 the retention of the list presently contained in
6 Section 154 of the Code of Criminal Procedure.
7 We, too, gentlemen, are opposed to the retention
8 of the unnecessary "laundry list" presently con-
9 tained in Section 154 of the Code of Criminal
10 Procedure. We have heard other groups come before
11 you, citing that they face convicted felons and
12 other criminals in the performance of their
13 jobs -- in jail, in detention, in transit, in
14 court -- and request Police Officer status. These
15 are the very same criminals whom we see in their
16 homes, in their communities, in the ghettos, in
17 transient hotels, in the streets at night. Yet, we
18 do not ask for full and unlimited police powers
19 accompanied by full and unlimited police respon-
20 sibilities, nor do we ask for nothing more than
21 exemption from the firearms laws. We do not see
22 ourselves as a group of "junior G-men" running
23 around the streets at night looking for criminals
24 to arrest, or being called out to quell riots and
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2 civil disorders. We do not see our female Officers
3 being required to overpower a 6'2" two hundred
4 pound rapist or burglar, while using only justifi-
5 fiable force. What we do ask for is a status
6 commensurate with the authority and responsibilities
7 which you have seen fit to ascribe to us directly
8 in the proposed Criminal Procedure Law -- something
9 which you have done with very few of the present
10 groups of Peace Officers. We do ask for expanded
11 powers to perform the expanded responsibilities
12 which you have given us. We require these addition-
13 al powers not for the sake of being able to act as
14 Police Officers during our so-called "off hours,"
15 but for the specific purpose of being able to
16 perform our "on duty" functions effectively.

17 We feel that in view of
18 the points which we have raised here today, it
19 becomes apparent that some status in between
20 Police Officer and "Private Citizen With A Gun"
21 need be established for Probation Officers.
22 Toward this end, we respectfully suggest that a
23 "Special Designation" could be established,
24 applicable during regular duty hours and other such
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2 times that we are performing official functions,
3 which could grant to the Probation Officer certain
4 special police powers or certify him as a fully
5 empowered auxiliary to the regular local police
6 authorities.

7 Now, before I close,
8 there are a couple of questions which have been
9 brought to me by some of our members during the
10 lunch recess, one of which, I think, is a
11 semantic question referring to Section 210.30,
12 Subdivision 3, which indicates that a probation
13 officer can arrest a probationer under his
14 supervision.

15 Now, the question is
16 that if I, as an officer in the field, see a
17 probationer not directly under my supervision
18 violating the conditions of his probation, would
19 I be empowered to make an arrest? This would be
20 a man who is under the supervision of my depart-
21 ment.

22 MR. DENZER: Arrest for what?

23 MR. LEWIS: Violation of probation.

24 This is a semantic question. It says, "Under his
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2 supervision."

3 MR. BARTLETT: I take it you would ask
4 that you certainly have that authority as to
5 anybody being supervised on probation in the
6 county?

7 MR. LEWIS: It would be our feeling
8 anyone who is under the jurisdiction of the
9 probation office of Nassau County. Also, what
10 coverage or protection would there be for a
11 probation officer who was attacked while off
12 duty by a probationer waiting for him down in
13 the garage of his apartment building, or outside
14 of his home?

15 MR. DENZER: 35.15 of the Penal Law.
16 That permits anyone to use deadly physical force
17 to repel any physical force against him by
18 anybody else; police officer, probation officers,
19 private citizens.

20 MR. LEWIS: If he were injured, would
21 he have any form of coverage since this is, in
22 actuality, a job related injury which we would
23 be suffering on a job off duty?

24 MR. DENZER: I can't answer that
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2 physical problem.

3 MR. LEWIS: I would like to thank you
4 gentlemen on behalf of the Nassau County Probation
5 Officers.

6 MR. BARTLETT: Thank you. We will try
7 to resolve the difficulties in some fashion.

8 Now, we will hear from
9 Suffolk County. We have two. Do you both intend
10 speaking, Mr. Morris and Mr. McGrath?

11 MR. MORRIS: Yes, sir.

12 Mr. Chairman, Mr.
13 Commissioners, I want to submit the prepared
14 text of my statement in the interest of time
15 consumption and in the interest of avoiding
16 redundancy.

17 MR. BARTLETT: We appreciate it, and
18 this will be part of the record supplemented by
19 whatever you say.

20 MR. MORRIS: I endorse the statements
21 made by Mr. Kent Lewis, my colleague in Nassau
22 County, and also my counterpart.

23 I appear before the
24 New York State Commission on Revision of the
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2 Penal Law and Criminal Code today in something
3 of a fragmented role. On the one hand, I appear
4 to represent my colleagues, the members of the
5 Suffolk County Probation Officers Association,
6 as their President and to serve as spokesman for
7 their views. At the same time, however, the
8 opinions I intend to express are my own produc-
9 tions; and thus I speak also as an individual
10 Probation Officer and as a private individual
11 who will be governed, I presume, for a long time
12 in the future by the Commission's proposed
13 Criminal Procedure Law. Finally, I appear before
14 the Commission today as a teaching Sociologist,
15 with a research interest in Crime and Delinquency;
16 and I am grateful for this opportunity to express
17 my thoughts on the proposed Criminal Procedure
18 Law.

19 Just as my personality
20 and identity today are somewhat divided, so, too,
21 my purposes for appearing before the Commission
22 are somewhat fragmented. I do not take to this
23 speaker's platform to condemn or to criticize the
24 work and efforts of the Commission in drafting
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2 this proposed Criminal Procedure Law. On the
3 contrary, I wish to acclaim publicly the Commis-
4 sion's tireless labors in drafting the Revised
5 Penal Law, which went into effect on September 1,
6 1967, and for its monumental efforts in drafting
7 this proposed Criminal Procedure Law to bring
8 this Code into conformity with the present
9 Revised Penal Law. As well, the holding of
10 these public hearings to permit those interested
11 to respond to the proposed new Criminal Code
12 deserves great accolades, for it is no easy task
13 to assimilate, evaluate, and incorporate those
14 ideas brought to the Commission's attention at
15 these meetings.

16 At the same time, I
17 feel there is much to be grateful for, from a
18 Probation perspective, in the sections of the
19 proposed Criminal Procedure Law that deal
20 specifically with the Probation function. It
21 is reassuring to take notice of the increased
22 powers and responsibilities the Commission has
23 delegated to those in the field of Probation. It
24 is also comforting to observe the recognition
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1
2 paid to the field of Probation as an integral
3 part of the New York State Law Enforcement Net-
4 work by the Commission. Even a casual reading
5 of the paragraphs dealing with Probation shows
6 that they are well prepared by those with a
7 deep understanding of the procedures and
8 practices of the field of Probation and who
9 closely perceive the role of the Probation
10 function in combating Crime and Delinquency.

11 My chief purpose in
12 appearing here today, however, is to take
13 exception to one particular aspect of the pro-
14 posed Criminal Procedure Law, viz., the deletion
15 of the status of Peace Officer which now applies
16 to Probation Officers under Section 937 of the
17 Code of Criminal Procedure. I wish to consider
18 the implications to the field of Probation
19 deriving from the Commission's conscious and
20 deliberate deletion of this term, "peace officer,"
21 from the current Code of Criminal Procedure.

22 Before sounding too
23 critical of the Commission, however, let me
24 hasten to add that I am in full accord with the
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2 Commission's purposes in deleting this designation
3 of "peace officer" from the proposed Law. There
4 are presently multifarious agencies shrouded
5 under the umbrella of this rubric, thereby re-
6 ceiving the right to make "reasonable cause"
7 arrests, when in actuality they seek only exemption
8 from the criminal sanctions against possession of
9 firearms. I am also in agreement with the
10 Commission that the same purpose might be served
11 simply by granting appropriate non-police groups
12 immunity to the firearms sanctions by passing
13 special amendment (s) to the Penal Law.

14 I differ with the
15 Commission on this issue, however, to the
16 extent that I believe the classification of
17 peace officer should be retained for Probation
18 Officers and Probation Administrators, and not
19 alone in order to exempt them from the firearms
20 sanctions found in the Penal Law, although
21 arguments advanced on those grounds also have
22 considerable merit. For the remainder of the
23 time allotted to me, I should like to review
24 the basis for my position in recommending to
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2 the Commission that this designation or some other
3 appropriate appellation be embodied in the new
4 Criminal Procedure Law.

5 Since the argument
6 concerning the carrying of weapons has been the
7 one that has been sounded most frequently, I
8 would like to consider it first, as rapidly as
9 possible, remembering that it is not the only
10 argument in defense of being labeled peace
11 officers nor is it the most compelling argument,
12 as the Commission is aware. Nonetheless, I am
13 sure the Commission recognizes the sincerity and
14 validity of Probation Officers in their request
15 to safeguard their safety and preserve their
16 self-protection.

17 MR. BARTLETT: Mr. Price considers
18 himself to be one of you, as you know.

19 MR. MORRIS: I do differ with the
20 Commission on the position of the peace officer
21 status, and this is my main point of contention
22 here today. I do feel that of peace officers.
23 I see one of the primary arguments which is
24 sometimes overclouded by the argument of
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2 overprotection, the result and the failure of the
3 probation officer in carrying out his sworn duties.

4 At every moment, in the
5 performance of his duties, the Probation Officer
6 comes into contact with convicted or adjudicated
7 criminals. Many hours of his working day are
8 spent in the homes of criminals, with the families
9 of criminals, in the neighborhoods and ghettos
10 of criminals; and it is impossible to do this job
11 adequately without some protection. There is
12 clear and present danger for any Probation Officer
13 who is doing his duty properly, for to do the job
14 properly, he must not only be a social worker
15 for those probationers who can benefit from
16 casework principles; but he must also be a law
17 enforcement officer dedicated to the protection
18 of the community for those probationers who will
19 not respond to casework principles and, therefore,
20 must be removed as a danger to society. To
21 perform totally one function or totally the other
22 is to perform only half the job. He usually
23 works in high-crime-rate areas where recent history
24 has shown there is an increasing disregard and
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2 restrictions of the Penal Law, he would also be
3 responsible for supplying his own lawyer, at his
4 own expense, for his defense, should a civil
5 suit arise concerning the use of that weapon or
6 the exercising of the arrest power. Such a
7 situation would result in the possibility of
8 serious out-of-pocket loss for the Probation
9 Officer every time he carried out the duties of
10 his office. In such a situation, it is not in-
11 conceivable that he would curtail and avoid the
12 use of those powers which might result in his
13 being tried for civil damages.

14
15 Probably the most
16 compelling reason for Probation Officers and
17 Probation Administrators retaining the status of
18 peace officer is one that is overlooked in the
19 echoes of those surrounding the possession of a
20 firearm. At issue here is the relationship
21 between Probation and other agencies of law
22 enforcement. Unequivocally, the primary function
23 of Probation is to acquire information for the
24 courts. Proper sentencing and disposition of
25 cases is predicated on the ability of Probation

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2 Officers to gather accurate information as
3 rapidly as possible. One of the unfortunate
4 possibilities flowing from the loss of our
5 identity as peace officers is the jeopardizing
6 of this vital function. If the Probation Officer
7 is no longer classified as a Peace Officer, he
8 has no legal standing nor right to entitle him
9 to be considered a Law Enforcement Officer of
10 the State. If he is not recognized as part of
11 the Law Enforcement Network, he has no right to
12 the confidential and privileged information, which
13 is transmitted only between bona fide Law Enforce-
14 ment Agencies. Such a loss would seriously
15 impair his effectiveness in gathering the in-
16 formation essential to pre-sentence investigations
17 and would also greatly hinder his value in super-
18 vision of those sentenced to probation. The
19 cooperation that now exists between the Probation
20 Departments and the other Law Enforcement Agencies
21 throughout the State and, indeed, throughout the
22 Nation, would, slowly but surely, disintegrate
23 since there would no longer be a common bond or
24 tie between them. The Probation Departments would
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2 then simply become just another county or city
3 agency requesting information to which they are
4 not entitled. We enjoy the close cooperation with
5 law enforcement agencies now because of our Peace
6 Officer status. Once we lose it, it would be
7 similar to a member of the Suffolk County
8 Mosquito Control Commission asking the Suffolk
9 County Police Department for pertinent data re-
10 garding one of their cases or the Sanitary
11 Engineer for the City of New York asking per-
12 tinent questions of the Police Department of the
13 City of New York. The answer in both cases would,
14 I am sure, be a very loud and vociferous "No,"
15 or at the very least a demand to submit the
16 request in writing so that somebody of higher
17 authority could review the request and make the
18 decision on whether or not to release the in-
19 formation to an "outside agency."

20 MR. BARTLETT: You would still be
21 entitled to it, but you still have the feeling
22 that you might not be treated as cooperatively?

23 MR. MORRIS: Yes, sir; I do. In
24 fact, if I can cite a facetious example, it would
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2 be equivalent to the Suffolk County Mosquito
3 Control Commission requesting information from
4 the criminal force.

5 MR. BARTLETT: Not quite. We see
6 your point.

7 MR. MORRIS: With the elimination of
8 the Peace Officer Status and thus the elimination
9 of the Probation Officer from the Law Enforcement
10 team, the Probation Officer would also not be
11 eligible to belong to many of the Law Enforcement
12 organizations in which he now holds membership
13 and which serve a very important purpose in the
14 performance of his duties. These organizations
15 foster the development and maintenance of friend-
16 ships and contacts with members of other Law
17 Enforcement Agencies with whom the Probation
18 Officer is dealing on a constant or occasional
19 basis, and the contacts made in these departments
20 through these organizations facilitate the proper
21 supervision of a probationer and/or the rapid
22 dissemination of information to a Judge who is
23 awaiting a report to make an equitable and just
24 disposition of a case. Deprivation of these
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2 under the Code of Criminal Procedures. And,
3 most importantly, he must be permitted to retain
4 his identity as a Law Enforcement Officer, for
5 the nature of his occupation has prevented him
6 from ever being a complete social worker in the
7 orthodox sense of the term. Thus, he must be
8 allowed to retain the title that earns him the
9 respect and confidence of other Law Enforcement
10 groups and that now permits him access to informa-
11 tion for the court. To devoid him of this is to
12 emasculate the chief function assigned to him.

13 At this juncture, I
14 would like to make a concrete proposal to the
15 Commission to rectify the loss that I have have
16 been so laboriously pointing out. Obviously, I
17 would be remiss if I did not present a recommenda-
18 tion to the Commission at this time short of re-
19 introducing the obliterated term of peace
20 officer to the Criminal Procedure Law. Section
21 1.20 contains definitions of terms in general
22 use throughout the law. I respectfully recommend
23 that a definition of Probation Officer be included
24 within this section, specifying that Probation
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2 Officers shall have all the rights of Police
3 Officers when acting in their official capacity.

4 I thank you for letting
5 me call this information to the attention of the
6 Commission.

7 MR. BARTLETT: Thank you, Mr. Morris.
8 Mr. Draffin.

9 MR. DRAFFIN: My name is Edward N.
10 Draffin. I am Assistant Director of Probation
11 for the County of Suffolk. I am here today
12 representing the administration of that department
13 which, incidentally, is the third largest
14 Probation Department in the State of New York,
15 exceeded only by Nassau County and the New York
16 City Office of Probation.

17 I am here today to give
18 the wholehearted and complete endorsement of our
19 administration to the positions taken by the
20 Suffolk County Probation Officers Association, as
21 represented by its president, Mr. Martin Morris.
22 We feel that each and every point made in that
23 statement is valid and deserves the utmost
24 consideration by this Commission.
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2 Here I would like to
3 depart from my prepared text at the request of
4 Judge Stark who asked me to make several points
5 for him after he made his presentation. One is
6 regarding the admissibility.

7 In this regard, Judge
8 Stark asked that the Commission consider that if
9 it is the Commission's position that probation
10 violation shall be appealable that some pro-
11 cedure be included whereby the appellants are
12 released in bail pending the outcome of that
13 appeal, be placed under probation supervision,
14 again, by a judge, when he reaches that suspect
15 so he may be placed under their supervision during
16 a period of time.

17 MR. BARTLETT: Wouldn't that violate
18 the rights? After all, he was given a sentencing
19 probation and during the period in which the
20 question of the revocation of probation and the
21 issuance of a new sentence would be litigated,
22 he would still be in that position. We will
23 make that clear. I think you are right.

24 MR. DRAFFIN: Also, 210.20 concerning
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2 modifications of the conditions of probation.
3 This section requires that a defendant appear
4 before the court in person when his conditions
5 are modified. This may cause some procedural
6 problems on an already overcrowded court calendar.
7 What we would suggest, in lieu of this and what
8 is being done currently, that is that the
9 defendant be notified by the Probation Department
10 that a change has occurred that he be called in
11 and notified and sworn in a modifying condition
12 of probation agreeing to abide by these, and if
13 he refuses to do this at that time, he be
14 required to go to court and discuss it with the
15 judge. We feel this would tend to alleviate the
16 court calendar set-back and take some of the
17 burden off the judges.

18 Having attended the
19 Commission hearings on Thursday, February 15,
20 1968, it is my understanding that the Committee
21 has stipulated as to the fact that Probation
22 Officers will be exempted from the Firearms and
23 Dangerous Weapons Sections of the Penal Law, and
24 it is also my understanding that these exemptions
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2 Indeed, it would seem that with removal of the
3 Peace Officer status, a Probation Officer would
4 be relegated to the position of a civilian in
5 performing some arrests and to the position of
6 just another municipal employee, requesting in-
7 formation from a law enforcement agency. Allow
8 me to pose several questions pertinent to these
9 points.

10 MR. BENTLEY: It is a very severe
11 violation of the defendant's right to do that.
12 He has to be present in all stages of the
13 proceeding against him.

14 MR. BARTLETT: I see your point.
15 We will look into it.

16 MR. DRAFFIN: I was interested in
17 hearing that.

18 What happens if a
19 Probation Officer, with the extended powers
20 authorized in the new C.P.L., comes upon a
21 probationer as he is purchasing a package of
22 heroin from a pusher, or comes upon a probationer
23 running a numbers bank in his apartment with
24 three other individuals? The Probation Officer
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2 can arrest the probationer for violating his
3 Probation, in that he has failed to avoid harmful
4 or injurious habits, or he has consorted with
5 disreputable persons. But what does he do with
6 the pusher, or with the other operators of the
7 numbers bank? If he arrests them, does he do so
8 as a civilian, and incur the liability that goes
9 with that arrest. If he had the powers and
10 immunities that he now enjoys as a Peace Officer,
11 there would be no question at all.

12 Can a Probation Officer,
13 who is constantly in and out of homes of convicted
14 criminals, and who, while in the home of a
15 probationer, recognizing a visitor in that home
16 as a wanted criminal, go ahead and arrest that
17 man with anything other than the protection
18 afforded in a citizen's arrest? He can now as
19 a Peace Officer.

20 Can a probationer be
21 arrested by a Probation Officer for the
22 commission of a new offense, or only for the
23 conviction of a new offense; i.e., in searching
24 a probationer relative to special conditions of
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2 Probation on narcotics cases, granting this
3 permission to this Probation Officer; if the
4 Probation Officer turns up a revolver, is the
5 probationer arrested as a Probation Violator
6 for the commission of a new offense, or is he to
7 be arrested by the Probation Officer in his
8 capacity as a civilian for the new offense?

9 Under the present Peace Officer's status, there
10 is no question as to the course of action taken,
11 since there is no liability involved.

12 With the imposed limita-
13 tions as to jurisdiction covering Police Officers,
14 would these also apply to Probation Officers in
15 the execution of warrants. This would apply to
16 Probation Officers (a) in the execution of
17 warrants where an absconder is found to be
18 residing in another county within the State of
19 New York and (b) for a probation officer from
20 Suffolk County who happens to come across one of
21 his probationers violating the condition of his
22 Probation while both are in a county outside of
23 Suffolk. If he had the same status and powers
24 that he now enjoys as a Peace Officer, there would
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2 be no question as to the course of action.

3 Article 210.70 limits
4 the transportation power between counties. It
5 is stipulated in there that it is only between
6 County Courts and the Supreme Court in the City
7 of New York. We request that has to do with
8 probationers being placed on probation in District
9 Courts and peace courts.

10 Now, we transfer district
11 court to the office of probation.

12 MR. BARTLETT: We will look into that.

13 MR. DRAFFIN: Otherwise, what you are
14 saying is that all probation transfers must go
15 through a county court judge when the county court
16 judge didn't place the person on probation; a
17 district court judge did that.

18 I will go into the
19 opposition of Mr. McDonough's statement today
20 regarding the proposed search of probationers.
21 It was suggested that, perhaps, it could be
22 amended to read "Has" instead of what it is now.
23 I submit to you that in order to have a definite
24 interest --
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2 MR. BARTLETT: (Interposing) I
3 just asked if that would meet with his objections.

4 MR. MC DONOUGH: I think you would have
5 to have a trial, a hearing for that. We have a
6 reasonable reason to believe that it is the job
7 of the probationer to help the individuals and not
8 to harass them, and we take exception to any
9 suggestions that we would harass people.

10 MR. DRAFFIN: Can the Commission cite
11 any statute mandating the cooperation of other
12 law enforcement agencies in the State of New York,
13 the Federal Government, and the other forty-nine
14 States of this Nation, with the Probation Depart-
15 ments of this State. As it is now, we have
16 excellent cooperation and liaison with other law
17 enforcement agencies in these aforementioned
18 areas, because we are considered part of the law
19 enforcement group. To relieve us of our Peace
20 Officer status, and to supply us with nothing to
21 replace it, is to take away our membership card
22 in this group and to relegate us to the position
23 of just another municipal department as far as
24 these agencies are concerned. We would then
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2 become on a par as far as law enforcement agencies
3 are concerned, with the Highway Department, the
4 Department of Social Services, and the Mosquito
5 Control Commission, and would have no right to
6 expect the cooperation and information which is
7 now made available to us by law enforcement
8 agencies throughout the Country. A collateral but
9 important adjunct to this point is that we would
10 lose our eligibility for membership in all of
11 the law enforcement agency organizations to which
12 so many of us belong, and from which we have
13 derived the many excellent contacts which have
14 enabled us to perform our functions so admirably
15 up to the present date.

16 I seriously believe that
17 taking away Peace Officer status without re-
18 placing it with something as equally protective
19 to our powers and as exemplary of our status,
20 would do a great injustice to the Probation
21 system in this State and to the field personnel
22 that make it work.

23 MR. BARTLETT: Are you subscribing to
24 the request of the Nassau County group as
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2 expressed by Mr. Lewis, you are seeking full
3 peace officer status while on duty?

4 MR. DRAFFIN: In my last paragraph,
5 I include a simple sentence as to what we are
6 seeking.

7 MR. BARTLETT: You are not seeking,
8 as they pointed out, police officer status when
9 you are off duty?

10 MR. DRAFFIN: Right.

11 I do, however, gentlemen,
12 offer you a solution for your perusal, considera-
13 tion, and hopefully for your acceptance, which
14 would take care of both of the areas I have
15 outlined. That is, the addition of a single
16 sentence which would read, "A Probation Officer
17 shall be deemed to have the same powers as a
18 police officer, while in the performance of his
19 official duties". If the Commission will adopt
20 this suggestion, it will provide answers to all
21 the above questions, in that it will provide
22 protection for the Probation Officer at the time
23 of arrest of a probationer or any collateral
24 arrests stemming therefrom, and will also afford
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2 us status as a law enforcement agency, which we
3 maintain is necessary for the proper performance
4 of our duties. You have agreed to provide the
5 Probation Officer with the means of protecting
6 his life. We are asking that you provide him
7 with the means of protecting his pocketbook and
8 his professional identity. Without those
9 additional protections, the Probation Officer
10 cannot reasonably be expected to perform his
11 duties as outlined in the proposed C.P.L.

12 We are not trying to
13 shun any duties. If you want us to be full
14 time police officers and if this is the way we
15 can get the coverage that we need, we will
16 accept. We think this is a much more realistic
17 approach to our problem. We don't want to be
18 police officers routinely twenty-four hours a
19 day. If I, as a probationer went up to get a
20 pack of cigarettes, there is no problem there.

21 Thank you very much for
22 your kindness and consideration.

23 MR. BARTLETT:

Thank you.

24 Murray Miller, who is the
25 Administrator of the Assigned Counsel Plan in

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2 Nassau County, I believe.

3 MR. MILLER: That is it exactly. May
4 I start off first, Senator, by saying we are
5 functioning well under the highly inspired bill
6 which gave life to our organization.

7 MR. BARTLETT: Pleased to hear it.

8 MR. MILLER: Mr. Chairman, gentlemen,
9 and I would like to include the gentlemen of the
10 press in this brief peroration.

11 I appear as the Chairman
12 of the Legislative Committee of the recently
13 organized, but functioning, New York State
14 Defender Association, which is made up of the
15 three divisions of Public Defense, Legal Aid
16 and Administrators of Assigned Counsel. We have
17 met many times, we are now flooded, and mature.
18 Recently, at the Hilton, in conjunction with the
19 New York State Bar Association, we met, first as
20 committees, then as board of directors and, then
21 as a organization per se.

22 We arrived, unanimously,
23 at the conclusion, first, that there was very
24 little that we could quarrel with in the proposed
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2 recommendations of this dedicated body of which
3 I am a Director. We believe conscientiously, and
4 we do wish that in these days, when we have to do
5 much soul searching and try to exercise wizardry
6 in balancing our duties as public officers,
7 between the rights of the public and our consti-
8 tutional guarantees to those who fought in the
9 toils of the law, that first there is a most
10 refreshing atmosphere in which your organization
11 is operating. Representatives of my organization
12 have appeared at all previous meetings, and they
13 have covered the textual material to date, which
14 it was my job, as the last one at the last meeting
15 to cover if none of them -- as if any of them
16 had not been covered before. Nothing has been
17 left unsaid.

18 MR. BARTLETT: We have very extensive
19 testimony, especially from Mr. Becker, as you
20 know.

21 MR. MILLER: Mr. Becker on Friday
22 morning, yes. He has reported to me. It is my
23 belief that there should emanate from your body
24 something which will be time honored and memorable.
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2 I hope I am not embarrassing you by saying these
3 things because there are members present who
4 know "I calls them as I sees them."

5 MR. BARTLETT: You are very kind.

6 MR. MILLER: It is unfortunate in
7 these days when the less skillful and less expert
8 and dedicated and unslanted opinions of the
9 public officials reach the mass media at which
10 this meeting has been conducted with a large
11 attendance of the public present.

12 MR. BARTLETT: I do have to say this
13 for Nassau County and Suffolk, that this has been,
14 especially this morning, the best attended hearing
15 we have held anywhere in the State of New York.

16 MR. MILLER: I trust that the press
17 is taking due notice of this, (Applause) and
18 notwithstanding a running battle with the
19 gentlemen who will report, the statement will
20 never be resolved. Fair trials, freedom of the
21 press will never be resolved, just hand outs and
22 let them smell of roses when they should.

23 Gentlemen, it has been
24 a pleasure to spend this time with you on behalf
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2 of the organization I represent. I wish you well
3 and Godspeed, and thank you for this tremendously
4 public and dedicated task which you have under-
5 taken.

6 MR. BARTLETT: Thank you very much. You
7 are very kind.

8 We will now hear from
9 the Court Officers Association. I believe there
10 are two who want to be heard from.

11 We have Mr. Bracken
12 appearing from the Nassau County Court Officers
13 Association. Is that a different organization
14 from the Supreme Court Officers Association?

15 MR. BRACKEN: Yes, it is, sir. I am
16 counsel to the Nassau County Court Officers
17 Association which is composed of the Court Officers
18 of the Family Court, County Court and District
19 Court. At the outset, I would like to say I am
20 very grateful for several reasons. One, for your
21 patience. It has been a long day and one which
22 you will well remember.

23 MR. BARTLETT: I am beginning to wonder
24 about Mrs. Bartlett's patience. (Laughter)
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2 MR. BRACKEN: Secondly, as a practicing
3 member of the Criminal Bar of this County, I
4 think I can say we are all grateful for the
5 revised Criminal Law and the proposed Revised
6 Criminal Law. I think the decimal system of
7 codification is one that is a good one, especially
8 when there will be, undoubtedly, revisions in the
9 future. When people aren't used to dealing with
10 the old Penal and old Code, it takes a little
11 while to get used to it.

12 MR. BARTLETT: You were not unanimous
13 at the outset in stating that.

14 MR. BRACKEN: I, of course, did not
15 bring with me any razors, any knives, as did
16 Judge Kelley or the probation department.
17 Essentially, I read your notes and I don't dis-
18 agree that the present section of the Code is as
19 Kent Lewis said, a longer list, and I know you
20 don't want to make a night watchman at a State
21 park at night a peace officer. Ostensibly,
22 however, we do have a bad situation in the lack
23 of police officers.

24 MR. BARTLETT: Do you say, Mr. Bracken,
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2 that we should, without question -- will have to
3 confer, at least this much, on court officers
4 operating in the criminal courts, the equivalent of
5 police officer function in and about the court-
6 house? I think the real question -- I don't mean
7 to cut you short, but it seems to me that
8 clearly has developed out of the meetings and out
9 of the discussions we have had with the court
10 officers. I think the question now is whether
11 or not the court officer ought to have twenty-
12 four hour police officer status, and any comment
13 you have on that, we would be most interested in.

14 MR. BRACKEN:

I would say this:

15 Number one, your proposal under the Sullivan Law,
16 I believe, is only half a step. In finality I
17 think what should be done here, there should be
18 specific provisions in your Code spelling out
19 the duties, the obligations, the rights, the
20 privileges and immunities of court personnel in
21 spelling out the scope of their employment and
22 their immunity from civil and penal prosecution
23 for exercising their limited power.

24 MR. DENZER:

Probably not in the Code,
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2 probably in the judiciary law.

3 MR. BRACKEN: Whatever it is. For
4 example, the danger aspect that was expressed
5 here this morning. However, I may point out to
6 you and, I think, anybody realizes one of the
7 duties of a court officer is to accompany jurists.
8 Conceivably, somebody could try to tamper with
9 the jury and the court officer might arrest him
10 on the reasonable ground to believe, and at a
11 later date it may be found out not to be so.
12 He should be protected. It is his duty to
13 uphold the law. I think under those circumstances,
14 he should be exempted from penal and civil
15 prosecution.

16 I thank you very much
17 for the opportunity to be heard.

18 MR. BARTLETT: Thank you. Mr. Brady,
19 for the Supreme Court Officers Association.

20 MR. BRADY: Mr. Chairman, Senator
21 Dunne, Senator Bartlett and members of the
22 Commission, I am a Senior Court Officer and I
23 am speaking here on behalf of the Supreme Court
24 Officers in Nassau County. As you must have
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2 surmised, I am addressing myself also to
3 Section 120. I am not going to belabor this
4 point. It is evident by now you fellows have
5 heard it many times before. I probably will be
6 one of the last.

7 MR. BARTLETT: The very last.

8 MR. BRADY: I am going to open
9 myself up to a little extent and try to answer or
10 clarify any reservations that the Commission
11 seems to have.

12 MR. BARTLETT: Again, as I indicated
13 to Mr. Bracken, the requirement or the propriety
14 of Court Officers having police officer powers
15 in and about the courthouse, at least speaking
16 for myself, individually, it makes sense. I
17 think the real question is: do the Court Officers
18 believe that they ought to have twenty-four hour
19 police officer status? We have heard varying
20 opinions on this question from personnel, them-
21 selves, as a matter of fact.

22 MR. BRADY: Yes, sir, Mr. Chairman,
23 and on that I believe one of the reservations
24 here would seem to be whether we have the proper
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2 knowledge and the proper training. I could go
3 into a discussion on the question of examination
4 and so forth. We are familiar with the latest
5 rules in the court under Penal Criminal Law
6 procedure because we come across it in the course
7 of our work. It would be very simple for us to
8 say we will work on the job and when five o'clock
9 comes, that's it.

10 I think one of the
11 points here is this, it would seem to be a
12 waste of talent and some sort of a dis-service
13 to the community, not only in Nassau, but
14 throughout the State. You have a certain group
15 of Court Officers here who, apparently, you feel
16 are half-trained, semi-trained, untrained. These
17 men are willing to take the obligation of peace
18 officers on their own time and give to the
19 community, no matter how limited, some sort of
20 added protection, if you want to call it supple-
21 menting the police if and when a policeman is not
22 around in a situation, they would take the
23 obligation.

24 MR. BARTLETT:

Don't you agree that the

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2 training required of any group to which police
3 officer status is accorded are to be measured
4 against the minimum standards now required of
5 police in New York?

6 MR. BRADY: I do, and I will get to
7 that in one second.

8 The only thing on this
9 other point here, you have that and room to go
10 all the way. They are willing to give up their
11 own time to take this in off hours, this course in
12 off hours so they wouldn't be taken away from
13 their job. This goes for myself and other court
14 officers in my court and other courts. The
15 public is going to gain a certain amount of
16 court officers, added protection without a single
17 increase, without one penny increase in taxes.

18 Nassau County is not
19 New York City. We are all property owners out
20 here. These men are willing to do it.

21 MR. BARTLETT: If they had the
22 authority, Mr. Brady, I assume that the county
23 commitment upon that is the responsibility to
24 act, and would it not follow that a court officer
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2 who had twenty-four hour status as that police
3 officer and failed to act within his capacity of
4 a police officer, would be subject to charges.

5 MR. BRADY: Correct. We are willing
6 to accept this. The training would not be
7 desired, but absolutely necessary, not only for
8 court officers. I think all police officers
9 in the State are going to be prepared, to some
10 extent, on this new law. This could be by
11 community programs. I think, basically, you are
12 losing men who are half-trained, willing to take
13 it, willing to afford extra protection without
14 any expense to the taxpayers.

15 I could go into a lot
16 of other things, penal law, and as I say, you
17 have heard them all. I wish you would interrupt
18 me if I could clear up anything else. There is
19 just one other point I would like to make and
20 that is, where do we stand if this goes through
21 as presently constituted? There are a lot of
22 other laws that you gentlemen are well familiar
23 with that provides the status of people of other
24 public status throughout the State. We are not
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2 covered by any of these laws at all. We are not
3 covered by any law which outlines our duties
4 and obligations and so forth. We feel that,
5 first of all, to drop us from the Criminal Code
6 it would have, of necessity, to be picked up in
7 the judiciary law or some other statute. It
8 would be much simpler to just include it in the
9 present Criminal Code when it goes through.

10 MR. BARTLETT: The point was made that
11 no way do you find a real flushing out of the
12 responsibilities of a court officer. If you
13 attempted to deal with that in any way, it would
14 be inappropriate, I would feel, to have that in
15 the Code.

16 MR. BRADY: That is true because, as
17 you know, we are now on the Judicial Conference
18 who got their powers from the State Constitution,
19 and our duties and obligations are outlined
20 pursuant to Sections of the Judiciary Law. Now,
21 one point I want to bring up, if we are not
22 included in the present Criminal Code and it is,
23 of necessity, taken up into judiciary law, I
24 think it would have to be taken up in the
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2 Article 10 of the Judiciary Law. There seems
3 to be some question, the most recent one, 275,
4 Sub-second, where the powers of the Board of
5 Justices seems to have subsidized to the date
6 that the Constitution became effective, even
7 though the Judiciary Law has not been voided.
8 I would suggest that it be covered under the
9 Judicial Conference Article in the Judiciary Law.
10 However, as I said before, I strongly urge that
11 it be continued instead of being picked up some-
12 place else.

13 Now, if there aren't any
14 other questions on behalf of the gentlemen on
15 the Commission, I want to thank you for making it
16 convenient to us for coming out here. If there is
17 anything else I could answer to you --

18 MR. BARTLETT: (Interposing) You are
19 an employee of the County of Nassau?

20 MR. BRADY: No, sir; the State of
21 New York.

22 MR. BARTLETT: I asked this question
23 in New York. It seems to me that the Commission
24 ought to hear from the Board of Supervisors of
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2 Nassau County and from County Executive Nickerson
3 as to what they are willing to undertake by way
4 of an extension of court liability and the
5 municipality in granting off duty police officer
6 status to a group such as the County Court
7 Officers, and the same question could be asked as
8 to the State of New York and to you fellows.

9 MR. BRADY: This is true, and what-
10 ever cost it would cost them, it would have to
11 be a lot cheaper.

12 MR. BARTLETT: This has been the very
13 heart of the bailiwick question here in New York
14 for many years. It has been in existence since
15 1963, that we are wrestling with this problem,
16 and, to my knowledge, they haven't made a report
17 yet. It is a tough one.

18 MR. BRADY: There is one thing I
19 would request, and I hope you don't take it that
20 I acquiesced on it, but in the interest of saving
21 time, Justice Gulotta, the administrative judge
22 out here, has forwarded a letter to the Commission
23 and I request that be made part of the record.

24 MR. BARTLETT: Yes, we received the
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2 letter from Justice Gulotta just the other day.

3 MR. BRADY: Justice Gulotta and
4 Judge Kelley.

5 MR. BARTLETT: Extend our best to
6 Judge Gulotta.

7 MR. BRADY: I would like to tell
8 Judge Gulotta that you are familiar with his
9 viewpoint. Thank you very much.

10 MR. BARTLETT: Yes, sir?

11 MR. SCHNEIDER: My name is Philip G.
12 Schneider, for the State of New York. I speak on
13 behalf of the District Court.

14 You say the peace officer
15 status should be limited to court hours and
16 around the court. It should be from one court
17 building to the other. We do carry sums of money
18 and coins from one court to another.

19 MR. BARTLETT: Take juries out to eat.

20 MR. SCHNEIDER: I am talking about money.
21 We also have instructions by judges to follow a
22 defendant and see if he drives a car and if he
23 does so, arrest him and bring him back. We had the
24 time when a judge found a bomb in his car and
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2 other things. I think this should be considered
3 too, in and about and around the court building.

4 MR. BARTLETT: Perhaps, instead of
5 trying to deal with it geographically, we should
6 deal with it in the course of your duties.

7 MR. SCHNEIDER: That's right. That's
8 what I wanted to bring out. I want to thank you
9 very much for your extensive work in this new
10 revision and I appreciate being here today.

11 MR. BARTLETT: I want to thank you all
12 for having borne with us through a long day. We
13 have been delighted with the comments we have
14 received, whether they were critical or other-
15 wise because it is only by our getting expressions
16 of this kind that we can do our job as it ought
17 to be done. Again, my thanks to all of you for
18 coming today.

19 The hearing is adjourned.

20 (WHEREUPON THE HEARING WAS ADJOURNED AT
21 4:30 P. M.)
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I N D E X O F S P E A K E R S1
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