SECOND

PUBLIC HEARING

before

New Jersey Legislature

ASSEMBLY JUDICIARY COMMITTEE

on

PROPOSED PENAL CODE
(Assembly Resolution No. 13)

Held:
June 27, 1972
Assembly Chamber
State House
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman William K. Dickey (Chairman)
Assemblyman Walter C. Keogh-Dwyer
Assemblywoman Ann Klein
Assemblyman Herbert C. Klein
Assemblyman David A. Wallace

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I N D E X

ASSEMBLYMAN WILLIAM K. DICKEY (Chairman): Ladies and gentlemen, this a continuation of the public hearing before the Assembly Judiciary Committee pursuant to Assembly Resolution No. 13, authorizing this Committee to make a study of the Proposed Penal Code, proposed by the Criminal Law Revision Commission.

Our first witness this morning is Mr. Stephen Nagler, Director, American Civil Liberties Union of New Jersey.

First, I would like to introduce the members of the Judiciary Committee who are present: From Morris County, Assemblywoman Ann Klein, to my right; to my left, Assemblyman David Wallace of Hudson County. My name is William Dickey, Assemblyman from Camden County, Chairman of the Judiciary Committee.

Mr. Nagler, you may proceed.

S T E P H E N N A G L E R: Thank you very much, Mr. Chairman.

My name is Stephen M. Nagler, I am Executive Director of the American Civil Liberties Union of New Jersey. We are, as I believe you know, a New Jersey membership corporation with approximately 8,000 members in the State. Our concern with the Proposed Penal Law Revision, as in other public affairs, is with those aspects which protect the freedoms protected by the Bill of Rights.

By declining to deal with such major areas of the Criminal Law as obscenity and capital punishment, which of course this Committee is dealing with separately, marijuana and narcotics, the Criminal Law Revision Commission has avoideda substantial number of significant civil liberties issues. Many of these issues demand review in the near future, we believe. Moreover, in many respects the Commission proposal codifies well-established principles long recognized in our law. Nonetheless, more than sufficient complex issues of

personal rights remain than I will be able to cover today. I, therefore, ask the indulgence of the Committee to permit us to submit a more complete analysis of the Proposed Penal Law in the near future in printed form and to cover only a few of the major issues today.

Let me begin by commending the Commission on its basic purpose of codifying and defining all offenses by statute. As the Commission correctly notes, the concept of "ignorance of the law is no excuse" is not in accord with modern requirements of notice and the system of uncodified common law.

Equally important are provisions of Section 2C:1-5d which purport to limit the powers of local government to enact penal ordinances. Our State today is plagued by a patchwork of local ordinances, variable from town to town, commonly uncodified and frequently unavailable to the citizen. Beyond the fact that this is a system of semi-secret statutes is the fact of the vagueness of dreadfully drawn penal provisions which invite abuse and breed disrespect for law, particularly among young people. Parade ordinances, permit solicitation measures, curfew ordinances, esoteric landscaping requirements and loitering laws are among the worst offenders.

Unfortunately, under Section 2C:1-5d only the last named of these provisions would clearly be eliminated by the penal law revision. The Section would bar ordinances conflicting with the Code or "with any policy of this State expressed by this Code, whether that policy be expressed by inclusion of a provision or by exclusion of that subject from the Code." It is not unlikely that the courts would hold that matters not intentionally excluded from the Code are not preempted because a silent exclusion does not constitute an expression of State policy.

We would respectfully urge that the Section be strengthened accordingly in order to expressly

exclude matters not covered by the Code.

I turn now very briefly to the provisions of Section 2C:1-12. Among the most fundamental precepts of our system of justice is the presumption of innocence and the concept of the guilt of an individual must be proved beyond a reasonable doubt.

The Commission correctly notes the duty of the State to meet this standard as to each element of the offense. Unfortunately, the Commission quickly departs from this principle when in subsection b(2) it proceeds to propose the exemption of "any defense which the Code or another statute plainly requires the defendant to prove by a preponderance of evidence."

In a number of different provisions of subtitle (1) such a burden is explicitly placed on the defendant. Thus the Code would require that the following defenses be proven by a defendant by a preponderance of the evidence: 1. belief that conduct does not legally constitute an offense - that's Section 2C:2-4c; 2. termination of complicity by renunciation - Section 2C:2-6e(3); 3. efforts by a "high managerial agent" to prevent the commission of an offense by a corporation - Section 2C:2-7c; 4. entrapment - Section 2C:2-12(6); 5. abandonment of attempt by renunciation - Section 2C:5-1d; and 6. abandonment of conspiracy by renunciation - Section 2C:5-2e.

We submit that no burden of proof may be placed on a defendant in a criminal case without doing havoc to the presumption of innocence and the standard of proof "beyond a reasonable doubt". It should be sufficient to require the defendant to come forth with evidence without requiring that the defendant prove his innocence by a high standard of proof and, in fact, the standard of proof by a preponderance of the evidence is a high standard of proof.

In too many instances, the Code defines

defenses too broadly and then utilizes affirmative defenses to pare the definitions back to where they should have started but in all of these cases with a shifted burden of proof.

Taking one of the defenses as an example, the defense of entrapment, the commentary indicates correctly that the defense of entrapment exists to deter improper police conduct. While the Commission recognizes the need to deter such conduct, to deter such activity on the part of police officers, it would weaken the deterrent effect of the defense of entrapment by shifting the burden of proof. It is entirely possible that police will be more encouraged to entrap individuals in certain circumstances if they know that the burden will later be on the defendant to prove the entrapment than they will if the burden would be on them. The commentary acknowledges the Code provision would represent a change in New Jersey Law which now places the burden upon the prosecution to prove beyond a reasonable doubt that the defendant was not entrapped. The change would be, in our opinion, most inadvisable and should not be implemented.

The Code would change the current practice further with regard to entrapment. Rather than have that issue tried by a jury, as it is now done, - Section 2C:2-12b - it would have that defense tried by a court without a jury. This raises serious question as to an abridgement of the right to a trial by jury in what is actually an issue of fact.

This and other issues with regard to the affirmative defenses posited by the proposal of the Commission we think deserve more careful reflection.

Next on my short list of today is Section 2C:3-7 which deals with the use of force in law enforcement.

I note at the outset that, with the exception of subsection c, the primary standard for judging whether

the use of force in making or assisting in making an arrest is proper, is the belief of the actor. Only in subsection c is there a specification that the belief be a reasonable belief and not merely the exercise of poor judgment. Although I note in the Commentary the opening reference indicates a reasonable belief and I would suspect - and perhaps the Chairman could clarify this matter, as a member of the Commission, - perhaps the exclusion of the word "reasonable" from other provisions of the Section may have been an oversight on the part of the Commission. Nonetheless, the exclusion, I think, is a serious one from the standpoint of the danger of judicial interpretation. When it comes to the use of deadly force particularly, the deficiency is quite serious.

The Commission rejected the requirement of the Model Penal Code, that a felony actually had been committed, in favor of a standard based on the belief of the actor using force, using deadly force. Where life is at stake, the trust in a momentary belief, and not even a reasonable one at that, is, we submit, a rather slender reed on which to rest.

As to specific crimes, let me pass very quickly through some of the provisions contained in the Proposed Penal Code.

The provision in Section 2C:5-2 with regard to conspiracy continues to provide no requirement for an overt act. We respectfully submit that that would be a mistake and that some overt act should be required even in a conspiracy situation. The danger of abuse in such situations is a very serious one. And the wide use of conspiracy statutes across our country, in circumstances where no overt act has occurred and in circumstances in which no overt act was even seriously considered, points up that abuse quite clearly today.

Turning to Section 2C:29-2, the provision

regarding resisting arrest -- and I hope I am not going too quickly for the Committee; I'm afraid I am moving very, very quickly through a number of these things, largely because there is so much to cover. I find it very difficult to pace myself at this point. But the provision with regard to resisting arrest - the mere fact that the law enforcement officer was acting under color of law, under color - in the words of the Commission - under color of his official authority, we respectfully submit is insufficient. The conduct of the officer may be for the purpose of harassment or other purpose of abuse and yet a citizen - although the conduct of the officer may be thoroughly abusive in a given situation, although we don't suggest that it is as a matter of course or that it commonly is but in certain situations it may be abusive and may be purely for purposes of harassment or for personal gain, but so long as the officer is acting under color of authority resistance to arrest, nonetheless, is made punishable by the provisions of the Commission's proposal. Far preferable, we submit, would be a provision which required a lawful arrest or at the very least probable cause for arrest prior to denominating resisting arrest as a separate offense. We indeed have question as to whether resisting arrest should be a separate offense as apart from acts of assault, acts of disorderly conduct, or other acts that disturb the public generally.

Turning to 2C:33-1, the section with regard to riot and failure to disperse, - subdivision (2) we feel raises particular problems. It deals with coercing official action by disorderly conduct. We think that the standard is not sufficient, largely because the disorderly conduct subsection, and particularly subsection b tramples directly on many areas involving freedom of speech.

ASSEMBLYMAN DICKEY: Would you speak into the microphone, please? We can't hear you.

MR, NAGLER: As I was saying, we think the provisions of the disorderly conduct section, and particularly subsection b of the disorderly conduct section, - the disorderly conduct section is the section immediately following the section on riot and failure to disperse - that particular subsection b raises serious questions involving free speech.

That subsection provides: "with purpose to cause public inconvenience, annoyance or alarm." The latter provision regarding purpose to cause alarm reminds me very vaguely of a speech made by a man named Demosthenes with regard to warnings that he gave to the people of Athens in regard to the dangers of Philip of Macedon which indeed were designed precisely for the purpose of creating alarm among the Athenians and which perhaps - and I mean this very seriously - under the provisions of this subsection might have been punishable. I believe there is no reason to indicate that they would not be.

Subdivision b makes "unreasonable noise" - which I gather would be noise at an unreasonable hour or noise under circumstances which would not be justifiable or perhaps a shout in a ballpark would not be unreasonable noise but a similar shout on a public street might be. Or the addressing of abusive language to any person present is a punishable act. Both of these raise serious questions with regard to freedom of speech, serious questions with regard to the justifiability of the speech in question. For example, I dare say Paul Revere might have been guilty of unreasonable noise as well as alarm as he rode through the streets warning of the approach of the British.

The concept of addressing abusive language to any person present also raises separate questions. The Court has noted on several occasions - most prominently in Terminiello vs. City of Chicago, Cox vs. Louisiana, that the purpose of speech may be to provoke anger and to stir controversy and debate. That is an important part of our political process and an important part even

occasionally of deliberative processes of the Legislature, a factor that I think must be taken into account.

Further, with regard to the provision referring to the use of coarse words, also contained in that subsection, coarse language, I respectfully point out to the Committee that the case of State vs. Rosenfeld, which was a conviction under the present loud and abusive language section of the Law, was yesterday reversed by the United States Supreme Court. And the term "abusive language" and the term "coarse language" are notoriously vague terms, terms which frequently abridge the right of an individual to use language which is in common usage in our society and which, nonetheless, our law continues to regard as criminal, including provisions of the proposal of the Commission.

Turning next to provisions of Section 2C:33-5, the provision on public drunkenness, let me only say very briefly as to that provision that despite the public annoyance characteristic of the provision we continue to believe that the concept of public drunkenness should not be dealt with as a criminal offense but should be dealt with in other ways by our law. And punishment of an individual who is publicly drunk or constantly drunk is not a solution to the problems created by alcoholism within our society. I think this is too well recognized at this point in our civilization, at this juncture of our development to deserve too great elaboration today.

Turning to Section 2C:33-7, the Section regarding loitering, loitering continues to be what it always was, a crime without a victim, and I am sad to see that it remains as one of the few provisions covered by the Proposed Penal Code that is in fact a crime without a victim. The gravamen rests in the provision proposed by the Commission on one who loiters "in a manner not usual for law-abiding individuals". I submit to the Committee that the provision is vague, that it

invites abuse of those who perhaps march to the rhythm of a different drummer, who simply by being unusual may submit themselves to arrest; that loitering by definition is doing nothing, and that when the law seeks to punish individuals who do nothing it commits a wrong not only against the individual but against the society at large and invites abuse of the ordinance and selective enforcement, which I think many law enforcement officials confess is actually the practice with regard to loitering ordinances; that such selective enforcement and abuse are invited by loitering ordinances as they exist today.

Turning again to another crime without a victim, we come to Section 2C:34-2, a section dealing with prostitution. Again we have a crime without a victim, again we have a situation in which the prostitute - and I must point this out separately, beyond the fact that this is a crime without a victim, somehow I can't resist noting that the prostitute, under the provision of the Proposed Penal Law Revisions, is punished more severely than her male accomplice under subdivision e; the prostitute is a disorderly person, the accomplice is a petty disorderly person; yet I would suggest equal protection requirements and perhaps ultimately, when it secures passage, the sex discrimination provision, the sex discrimination constitutional amendment might require that equal treatment be accorded to both the man and woman in this area.

I won't cover the provision with regard to solicitation in that section, solicitation for sexual offenses, because Arthur Warner, last week, on our behalf, I believe more than fully described our view in that area.

Turning briefly to Subtitle 3, the subtitle dealing with sentencing, we think there are several issues that create serious problems with regard to that subtitle.

First, the section dealing with the persistent

offender. Habitual offender statutes, we feel are a problem because they are pretty commonly selectively enforced. The accused who is looked on with disfavor, perhaps because of his political views or for other reason not relevant to a valid social purpose, may be singled out. Moreover, the Code authorizes an extended term without regard to the lapse of time from the time of last conviction.

The section with regard to professional criminals we feel also raises certain questions. A professional criminal is one who, by definition under the provision, - is one whose source of income is from criminal activity. Aside from various questions that we could raise, and I think we will raise at a later date in a more complete statement, with regard to classifying individuals as professional criminals, we think there is a serious question with regard to the question of the addict, narcotics addict, and his classification perhaps as a professional criminal under the provisions of the Proposed Penal Law. As to the addict, I think many of the people who are familiar with the area of narcotics rehabilitation recognize that the problem does not warrant prolonged incarceration in penal institutions but rather medical treatment and the development of innovative systems of rehabilitation.

We are concerned that the vague standard of professional criminal, as embodied in the proposed Penal Law revision, would sweep under its coverage problems involving narcotics addiction which should perhaps not be dealt with certainly in this section of the Penal Law at all.

The provision under Sentencing with regard to mental abnormality raises other serious problems, we submit. The sex offenders act is presumably abolished; in its place, the Code would increase punishment for abnormal behavior characterized by "a pattern of repetitive or compulsive behavior". I think it's rather

unconscionable to increase punishment of an individual due primarily to a mental defect.

I point out in addition from the commentary on page 332, - "Transfer from a penal institution to a medical one is, of course, administratively possible." I think that quote is not particularly helpful, although it points in the right direction, and I would wish that it were embodied more in terms of the terminology of the Proposed Penal Law Revision. I fear that it is not adequately embodied and that the proposal deals harshly as criminals with persons who are functioning and who are acting on the basis of some sort of mental abnormality who perhaps should be dealt with in other ways.

This is an extremely complex area and one that I believe deserves far more intensive review than I am capable of rendering here today and that I hope that the Committee will look into further and will seek further guidance upon.

Other questions with regard to multiple offenders. To understand what a multiple offender is, one must refer to Section 2C:44-5. This deals with sentencing procedures in cases of multiple sentences. For example, when a defendant who was previously sentenced is subsequently sentenced for an offense committed prior to the former sentence, or when defendant is sentenced on several convictions. I find difficulty seeing anything seriously wrong with this section. It does seem to be unnecessary, however, since one who is a multiple offender is subject to prolonged incarceration by way of consecutive sentences.

Turning very briefly to the section with regard to dangerous armed criminals. The fault with this section, in our view, lies with the fact that it authorizes increased punishment in situations where the degree of crime has previously been upgraded and hence punishment is increased because the defendant was armed.

Very briefly, what is done in the Penal Law Revision is that there is an increase in sentence for the very same reason that the crime itself was elevated. So we have a situation of double punishment, increase in sentence for dangerous armed criminals, which have already been sentenced under a higher degree of crime than they would have been because they are dangerous armed criminals - a double dose, in other words, and raises other substantial questions.

Last but perhaps not least, and again deserving fuller coverage than I am going to give it today, are the final provisions with regard to administration of the Code with regard to electronic surveillance.

THE ACLU continues to stand unequivocally opposed to wiretapping as a general form of eavesdropping by any governmental agency, for a wide variety of reasons or for any reason whatsoever. We rest our policy on the specific grounds of the 4th Amendment against - at least the principles of the 4th Amendment against the use of general warrants and searches by government officials and on the basic right of the citizen to the protection of his privacy.

We hold, with Mr. Justice Brandeis, that privacy is "the right most valued by civilized men". Wiretap, because it picks up both sides of all conversations of all calls made by or to all persons using the telephone under surveillance, by definition constitutes a general search committed not only against the person under suspicion but also against countless other callers connected with the suspect only remotely or not at all. We think that the Penal Law Proposals, insofar as they have substantially adopted the law as it now stands, and perhaps rearranged them somewhat, should again be reconsidered, and that the use of wiretapping as a shorthand device of law enforcement too should be reviewed by the Committee quite seriously before the practice is continued.

I apologize for this rather haphazard presentation today. I have tried to cover far too many things than the format, which I've been able to prepare, permits. I again ask your leave to submit a more complete written statement which I hope will more intelligently than I have today review the many issues that we believe touch on individual liberties raised by the Penal Law provisions. And in the meantime, I would like to thank you for the opportunity to be heard before you today and for your patience in listening to me drone on for such an extensive period of time.

ASSEMBLYMAN DICKEY: Thank you, Mr. Nagler.

How much time will you require to prepare your formal written statement to the Committee?

MR. NAGLER: It will take several weeks, Mr. Chairman. I would, of course, wish to know if the Committee had any suggestions with regard to a time by which it would wish to receive a more complete statement.

ASSEMBLYMAN DICKEY: The Attorney General has requested time, as well as another group, so that we are hoping to have them in by the end of the summer and we would perhaps say Labor Day or thereabouts. Would that give you enough time?

MR. NAGLER: I think it would. I would certainly hope so.

ASSEMBLYMAN DICKEY: We would be very appreciative to receive your report.

MR. NAGLER: Thank you very much.

ASSEMBLYMAN DICKEY: Now, do any members of the Committee wish to ask Mr. Nagler any questions? First of all, to my right, Mrs. Klein?

ASSEMBLYWOMAN KLEIN: Mr. Nagler, I would ask you to please just tell me briefly what was that you said in the beginning about local ordinances? Did you say that they should not have criminal ordinances, locally? I know the part about how vague they are and hidden and unknown, but did you say that the State

should have jurisdiction over defining crime and not the local communities?

MR. NAGLER: I think we're just about at the point where we should say that, that such matters as appropriately covered by ordinances, by penal ordinances, should now be covered by State statute. And I don't think that the Penal Law Revision quite comes up to that point. The language, I think, is rather uncertain. Where a policy is expressed either by inclusion or exclusion from the Penal Law, municipalities would be preempted under the doctrine of State vs. Ulesky, which deals with state preemption of the power of municipalities to enact penal ordinances.

But what happens when there is no specific exclusion, when the Penal Law Revision totally fails to deal with the subject? This, I think, could be interpreted as allowing local municipalities to enact a variety of penal ordinances.

Again I suggest this is an extremely serious problem. When an individual travels from one municipality to another, perhaps he's a commercial solicitor, perhaps he's a magazine vendor - the magazine vending industry, incidentally, is plagued by this sort of thing; - they find licensing provisions in some towns and not in others; they find that in one town they must submit photographs, fingerprints, and a variety of other things, and in other towns they must submit nothing at all. In some towns they've got to pay a licensing fee perhaps of several hundred dollars per solicitor; in other towns there is no licensing fee but merely a requirement to register with the police; in still other towns there is no requirement whatsoever.

The loitering provisions in different towns are a patchwork that constitutes an absolute and complete mess.

Parade ordinances, again are quite similar.

These ordinances, moreover, are frequently commonly not codified, there is simply no codification of the ordinances of most municipalities in this State. If an individual goes down to City Hall in his town and wants to obtain a copy of an ordinance, he frequently must pay a fee for copying the ordinance and then, more often than not will receive a xerox copy of a newspaper clipping which frequently may be undeciperhable. There is no codification, there is no concept of how the ordinance fits into a body of law in that municipality, much less into a state pattern. So what we have is a basic patchwork today which again I submit is an absolute and complete mess. I would have been much happier with the provision in the Penal Law if it expressly excluded the power of municipalities to deal with penal ordinances. My only reservation is that there may be some circumstance that somehow I've not thought of, or that we as an organization have not thought of, in which there may be some justification for municipalities dealing specially with special problems.

Unfortunately, what municipalities deal with as special problems, very often, is nothing more than a quick response to what they regard as an instant problem which often is approved with a display of far more heat than light, which is not satisfactory at all in terms of enduring law. So I am just about at the point where I would suggest that perhaps the Legislature might just wish to take matters into its own hand and begin to comprehensively examine the area of penal ordinances and begin to enact state statutes.

ASSEMBLYWOMAN KLEIN: Are you aware or has there been any Supreme Court decision this week with regard to the use of coarse language and also in regard to wiretapping?

MR. NAGLER: The loud and obscene language decision was just handed down yesterday by the Supreme

Court in the case of State vs. Rosenfeld arising in Hightstown, and I have not seen the decision yet; I've seen it reported in this morning's newspapers. But I would suggest that that in conjunction with other decisions that have come down from the courts recently narrowly limit the ability of legislatures across the Country to deal with so-called obscene language, particularly in terms of the fact that such language is used in what we may characterize, for want of a better phrase, as socially redeeming context very often; and, in fact, David Rosenfeld's speech was, it was in the course of some angry words before a public meeting in the Town of Highstown that David Rosenfeld used his supposed abusive language. And the term "coarse words" specifically is even more unclear than the present standard. I think what is coarse to one individual may be - what is coarse to perhaps a debutante may, in fact, be the common language of the truck driver. And coarseness certainly seems to me to be an extremely vague standard. It's a fairly novel standard from my experience in terms of the Penal Law's effort to deal with this supposed problem.

ASSEMBLYMAN DICKEY: Any other questions? Mr. Keogh-Dwyer, any questions?

ASSEMBLYMAN KEOGH-DWYER: Yes. Mr. Nagler, in discussing the wiretapping, does your organization object to wiretapping, as such, completely?

MR. NAGLER: Yes, we do, Mr. Keogh-Dwyer.

ASSEMBLYMAN KEOGH-DWYER: Do they consider, for instance, that wiretapping might be in the interest of the public or for protection of the public or State or the national defense, let's say, or any other such thing?

MR. NAGLER: There is no question that the wiretapping statutes, wherever they've been enacted, have been enacted for the purpose of facilitating the

the solution of crime, solution particularly in certain categories of crime. We do recognize that. But we think that wiretapping, because of its general nature, because it's not a specifically aimed kind of device it cannot by its nature be specifically aimed, raises serious problems.

To me, wiretapping has always conjured the image that George Orwell paints in his book 1984. Certainly the ultimate solution to crime is the all-seeing eye placed judiciously in the individual's home and in other areas where people tend to move about freely. Yet I think all of us would agree that that sort of thing is far too great an invasion of privacy, far too great an invasion of the individual's freedom of movement. Certainly we will have no more crime if all individuals are required to report to such an eye their thoughts, their purposes, their intents. But I think we would all agree that the price of that kind of intrusion is far too great. As an organization, we believe that wiretapping too exacts too great a price and that too frequently it is used as a substitute for law enforcement, that although less efficient, and efficiency is certainly the standard, - although less efficient it would involve less of an intrusion into the individual's privacy as well as the individual's Fourth and First Amendments rights.

ASSEMBLYMAN KEOGH-DWYER: Is it possible for you to draw a line between the invasion of privacy and say protection of the public or for the public good, because obviously there are certain informations that the government cannot obtain without these wiretappings and certainly those who would be suspected certainly know what wiretapping is and certainly have made as much provision as possible for the cancelling out or the discovery of such attempt. It seems to me that you must have some form of wiretapping either for underworld activity or, as I say, for governmental agencies. Certainly the invasion

of privacy I, too, would object to, such as divorce matters and things of that kind, but it seems to me that it's pretty hard to wipe out completely or ask that the use of wiretapping be eliminated.

MR. NAGLER: The difficulty of drawing lines in this area, Mr. Keogh-Dwyer, is an extremely great one; I recognize that. But we approach the subject with a prejudice in favor of personal liberty and the right of privacy, and because of the gross nature of wiretapping, because of the danger of abuse of wiretapping. Wiretapping has in certain instances in the past - not in our State perhaps but elsewhere - commonly in private circumstances, has been used as a basis for blackmail. The abuse of wiretapping, the invitation to abuse that wiretapping suggests literally boggles the imagination. If there was some way of training a wiretapping device to leave out any information that was not expressly criminal and expressly within the purpose of the wiretap, certainly the problem would not be that great. But I am reminded of - if I may touch on it very briefly - what happened in terms of our former Attorney General, our former Governor, and other significant officials in this State, what happened when the DeCalvacante tapes were released in the Federal Court several years ago, at least it seems like several years now.

There are people in this State, many citizens in this State who never again will believe in the honesty of many governmental officials whose reputations have been absolutely and unjustifiably tarnished by many of the comments made on those tapes. And this, I think, is an inherent kind of abuse of wiretapping as well. And here it was in the area of supposed organized crime.

ASSEMBLYMAN DICKEY: Any other questions, Mr. Keogh-Dwyer?

ASSEMBLYMAN KEOGH-DWYER: No.

ASSEMBLYMAN DICKEY: Mr. Kline?

ASSEMBLYMAN KLEIN: Yes. First of all, Mr. Nagler, let me compliment you on the general quality of your comments. I realize that you did have a great deal to cover but within the limits of your time I thought you handled it very well.

MR. NAGLER: Thank you.

ASSEMBLYMAN KLEIN: With regard to 2C:1-5, which is the provision dealing with preemption of criminal jurisdiction or criminal law by the State, when I first heard your comments I though you were objecting to the clarity of this section but it seems to me that, in answer to Mrs. Klein"s question, you really go considerably beyond that and basically want to go into an entirely different area and go a good deal further than the section goes. Which impression is correct?

MR. NAGLER: I think both, Mr. Klein.

ASSEMBLYMAN KLEIN: Well, let's deal with the question of clarity first.

It seems to me that if you're talking about clarity there does seem to be a rather definite intention here that if the statute or prohibitive activity that the municipality wants to deal with is contrary to the policy of the State that the municipality has no authority to deal with it.

If your objection is simply one of clarity, I wonder if you could, in your formal presentation, give us a suggestion as to language which might be more clear. To me it seems to be fairly clear but I certainly would appreciate any suggestions you might have in the area of clarity.

MR. NAGLER: Our problem with regard to clarity is directly this, that several lawyers with whom I've discussed this in preparing my presentation today have come to different conclusions as to what the subsection means. Some have felt that it is entirely possible that local penal ordinances might actually be totally excluded

by this section; others have felt that this is not the case, that in order for there to be an exclusion or a bar to local ordinances or a preemption to local ordinances there must be some sort of policy expressed, either in the Code or in the Commentary, indicating that it was the intention of the Legislature not to cover that specific subject.

Let me point out one example, if I may. The section on adultery. Here the Commission specifically recommends against - and we agree, by the way, most heartily -- against the criminal adultery provision. That suggestion is contained in the Commentary. It could be inferred beyond the Commentary from the fact that the Penal Law Revision would be a repealer of the existing Penal Code, including a repealer of the adultery provisions.

In other areas, there might be a question. What if the Commission did not comment? Would the fact that the existence of a provision in the old Penal Code and its nonexistence in the new Penal Code be an exclusion? Are the courts to be guided by the comments of the Commission or by the exclusion from the new Penal Code?

Now, in answer to the second part of the question with regard to how it could be clarified, it could be clarified purely and simply by saying that there may be no local penal ordinances. And I think we tend toward the view that that should be the route of the Legislature.

ASSEMBLYMAN KLEIN: Fine. Well that, of course, is really more than the clarification.

MR. NAGLER: It certainly is.

ASSEMBLYMAN KLEIN: In my view the section means, I think, essentially that with certain exceptions and the exceptions would be in those areas where the State either expressly or by implication has delegated that authority to the municipalities.

And if I may turn my attention to the two examples

that you gave in answer to Mrs. Klein's question - one, the licensing of itinerant vendors and the other the loitering provision. As far as loitering is concerned it would seem to me that a municipality under this Section would be prohibited from dealing with the subject of loitering since it is already covered by the State Code.

MR. NAGLER: That's correct.

ASSEMBLYMAN KLEIN: Insofar as the licensing of itinerant vendors is concerned, since there are other statutes that permit municipalities, at their discretion, to license such vendors, I think that inherent in that delegation of authority is also the authority to pass ordinances which in some degree have penal sanctions if you violate the ordinance. And to that extent, dealing with the question of itinerant vendors, for example, if we have - and I know we do have such statutes which say that a municipality may license or not certain activities, should not the municipality have the right to say, "Well, if you don't get a license you can be fined fifteen or twenty-five or fifty dollars"?

MR. NAGLER: I think the State should have that power but I submit that what has arisen, specifically in that area, is such a patchwork of ordinances as to virtually create chaos because the disparity in these ordinances is so great.

As to the first part of your comment, if I may respond to that, the problem seems to be with the first sentence of subdivision (d) "Notwithstanding any other provision of law, the local governmental units of this State may neither enact nor enforce any ordinance conflicting" etc.

ASSEMBLYMAN KLEIN: All right, I get you.

MR. NAGLER: And I would not like at all to see the conflict resolved by removing the "Notwithstanding any other provision of law" provision because that would certainly, I think, broaden the scope of local ordinances,

and I think that scope is already far too broad today. But an inherent part of the vagary is that first clause.

ASSEMBLYMAN KLEIN: May I ask you one question in one other area and that is dealing with the general subject of riot and disorderly conduct, and directing your attention particularly to your comments about excessive noise.

Is your objection thereto, to the question of the vagueness? In other words, be more specific. If right here in the middle of the State House somebody came in and spewed forth a long stream of loud words, four-letter words, a constant harangue that had really no intelligible purpose to it, should there not be some penal sanction to prevent that kind of activity?

MR. NAGLER: It perhaps might be covered in the assault provisions of the Penal Code in terms of justifiable assault by a Legislator or a Sergeant-at-Arms on the ground of assaulting the sensibilities of a Legislator. But, more seriously, I think that the problem of standards is an extremely serious one, is extremely difficult to deal with. I tend to like the thought of a flexible standard which the Code suggests in terms not of justifiable noise - I forget the exact provision for the moment - here we are, unreasonable noise. I think the concept of reasonableness is an interesting concept and an interesting approach to the problem, albeit a rather unusual one. What is reasonable noise in a ball park is certainly not reasonable noise in the halls of the Legislature. But the problem exists that reasonableness is a standard that tends to be somewhat vague and tends to be somewhat subject to interpretation. In one case decided by the Supreme Court about eight years ago, Edwards vs. South Carolina, a group of students was arrested on a similar provision, a loud and abusive language type of statute, for a demonstration conducted on the State House grounds. And the purpose

of that demonstration was specifically to express views, to express views in a manner in which they could be heard and in a manner in which it was designed to reach their intended audience, and the Supreme Court expressly declared the statute unconstitutional.

What is reasonable is something that I think may provide a problem of being too open to interpretation by what the Supreme Court has called the moment to moment whims of the law enforcement officer. And one person's sense of reasonableness under many circumstances may be to another totally and completely unreasonable. So reasonableness too tends to provide problems of vagueness. the same kind of problems, in fact, that the coordinate provision of the subsection raises and that is in regard to offensiveness. What is offensive to one or coarse to one is neither offensive nor coarse to another. And a loud free speech demonstration certainly might create unreasonable noise by many standards but not by many others.

ASSEMBLYMAN KLEIN: I think we perceive what the problem is, the question is what is the solution. If you have some solution, other than simply to eliminate the offense, we would appreciate it. At least, I would.

MR. NAGLER: I think we will deal with that more completely in the statement that we submit.

ASSEMBLYMAN KLEIN: Good.

MR. NAGLER: My one thought at the moment is in Karp vs. Collins, a three-judge Federal Court dealt with the issue of the loud and abusive language section and did provide certain limitations on that section. Karp, of course, was subsequently reversed by the U. S. Supreme Court on other grounds, on procedural grounds. But I think some of the suggestions in Karp, from the three-judge Federal Court, may ultimately provide guidance for the Committee, and I hope to include some of them in the more complete statement that we will submit.

ASSEMBLYMAN DICKEY: Any other questions, Mr. Klein?

ASSEMBLYMAN KLEIN: No, Mr. Chairman.

ASSEMBLYMAN DICKEY: Mr. Wallace, any questions?

ASSEMBLYMAN WALLACE: No.

ASSEMBLYMAN DICKEY: Mr. Nagler, on behalf of the Committee, I want to thank you very much for appearing today. We will look forward to receiving your memorandum concerning the Code. And would you be willing to come again if we require a further public hearing to discuss your recommendations?

MR. NAGLER: I would be more than happy to, Mr. Chairman.

ASSEMBLYMAN DICKEY: Thank you very much.

ASSEMBLYWOMAN KLEIN: Mr. Chairman, may I ask another question?

ASSEMBLYMAN DICKEY: Oh, yes. Mrs. Klein has another question.

ASSEMBLYWOMAN KLEIN: Mr. Nagler, in regard to the last question about noise and how to deal with it. Considering, perhaps, the victim as part of this, do you think it would be reasonable to have in the Code something to the effect of providing that people were unable to escape from the abuses. In other words, if a person can walk away from the situation and not hear it, is it then a crime to be uttering this, or is it only if it is inflicted upon a captive audience or a person in some way restricted from leaving the scene?

MR. NAGLER: I think that your suggestion may provide a substantial part of the answer, Mrs. Klein. I think that the ability of an individual to move away from the noise may be --

ASSEMBLYWOMAN KLEIN: Some towns do have ordinances against loudspeakers and that sort of thing because, you know, you can't escape them, they go down your street and you have to hear it.

MR. NAGLER: I think essentially you can escape a loudspeaker and there is some case law to the effect, that ordinances forbidding the use of loudspeakers are

unconstitutional; many of them have been declared unconstitutional, one in the City of Philadelphia several years ago was.

The purpose, in part, of the free speech provision is in fact identical with the use of a loudspeaker, the purpose being to allow an individual to reach his intended audience and to transmit some sort of a message, commonly a political message. And unless an individual can reach his intended audience, his right to freedom of speech isn't worth very much.

ASSEMBLYWOMAN KLEIN: If he cruises through your neighborhood and wakes up your baby, he has definitely impinged upon your privacy.

MR. NAGLER: And in fact he may be injuring his purpose.

ASSEMBLYWOMAN KLEIN: That's true.

MR. NAGLER: His political purpose. But I think the ability to escape may not necessarily be attached to the use of voice assisting devices.

ASSEMBLYWOMAN KLEIN: Does your organization have any stand on the question of voting for prisoners? In Section 2C:51-3 the one proviso against voting is while incarcerated, while under sentence.

MR. NAGLER: Yes. As I recall, that provision is, in our view, better than the present law. And, as I believe you know, several years ago we filed a suit entitled Stephens vs. Yedmans in which a three-judge Federal Court declared unconstitutional the then existing law disqualifying ex-prisoners from voting in certain categories of offenses. I would suggest that while I would be happier, as an organization I think we would be happier to see the franchise open even to prisoners, as radical a suggestion as that might seem, in all honesty I can't suggest to the Committee that the provision, as proposed in the section which you've noted, would be regarded as unconstitutional by any court. I think that restoring a franchise or giving a franchise to

prisoners, encouraging them to participate, even while in prison, in the political process may in some ways have a rehabilitative effect. And I don't believe that exclusion of prisoners from the voting process is necessarily an extremely rational one, very rationally based. In fact, one thing which we've noted in the past and which many commentators on our social scene have noted is that the movement to penal reform has been slowed by the fact that there exists no natural constituency. Aid to hospitals has its constituency; increased aid in various areas of public endeavor; construction of new highways, construction of various types of public facilities; - each has its advocates among the public but prisons do not, prisons traditionally have not. That kind of constituency is only beginning to emerge. And interestingly enough, I think that giving the franchise to prisoners or ex-prisoners certainly might give perhaps to Trenton and Rahway Legislators a constituency to which they might wish to appeal. I mean that, I do mean that seriously. And I think that it might help to spur the movement to penal reform if we did extend the franchise to present prisoners. But I can't suggest to the Committee - I think I would be deceiving the Committee if I suggested that it is in prospect that a court would declare a provision as contained in this Penal Law unconstitutional. In all honesty I can't suggest that.

ASSEMBLYMAN DICKEY: Thank you, Mr. Nagler. I think Mrs. Klein might have asked another question, whether we have a freedom to be left alone as far as noise is concerned. You might deal with that in your memo too.

MR. NAGLER: I thought you were perhaps referring to the wiretapping section.

ASSEMBLYMAN DICKEY: Well, that might be an extension of it.

Mr. Keogh-Dwyer I think has another question to ask.

ASSEMBLYMAN KEOGH-DWYER: An interesting side question, Mr. Nagler. How does your organization feel about curfews? who shall control it? who shall state the Penal Code for it? should there be different curfew regulations for different occasions?

MR. NAGLER: I am very happy that you raised that, Mr. Keogh-Dwyer. I think that perhaps is another example, perhaps even a better example than the permit solicitation type of situation, in which a patchwork of ordinances is creating havoc. Young people today are extremely mobile. They may in the evening congregate in certain places of public entertainment - ice cream parlors, hamburger joints, what-have-you, - in different communities, yet our communities today remain, because of their patchwork of local ordinances, to be very much like 19th century Germany walled cities, you know, each with its own laws, each with its own standards. A juvenile living in one community, or any individual, many other individuals in certain cases living in one community traveling to another community - Community A not having a curfew ordinance and Community B having a curfew ordinance - the individual being a resident of Community A is expected to know not only the laws of Community A but the laws of Community B. He may be arrested in Community B for simply being on the street.

I think the justification for the wide variety of curfew ordinances that exists today, that there simply is no justification. Some curfew ordinances punish parents for allowing their children to be on the street beyond a certain hour, knowingly allowing their children to be on the street; others even unknowingly allowing their children on the street in the wrong town at the wrong hour; others punish juveniles for being on the street at perhaps 9 o'clock, some 10 o'clock. The situation is literally and completely a mess.

We would certainly be happiest in that area with

a specific exclusion of the power of municipalities to enact curfew ordinances. And in fact, there may be grounds under the State Constitution for believing that the ordinances are in fact invalid. The State Constitution provides circumstances where by a proclamation of the Governor curfews may be invoked, involving a state of emergency. In fact, under a doctrine of preemption all of the curfew ordinances that exist today may in fact be invalid. The matter simply has not been adequately tested by the courts by that standard; the issue has not been decided.

But I very much regret that at the point at which one ordinance has been tested and one ordinance has been decided, even if that ordinance is declared unconstitutional, either in violation of the Federal Constitution or in violation of the State Constitutional provision, which I mentioned a moment ago, that the situation will not be changed very much.

We found in the loitering area, as well as in other areas of the law, that bringing one law suit to challenge a particular ordinance is not enough. For example, two years ago we became involved in 30 different cases involving loitering ordinances of which 27 were successfully concluded - 27 out of 30 - yet if you succeed in winning a declaratory judgment that an ordinance is unconstitutional in Community A, well Community B may have an ordinance that differs only slightly or even differs not at all, and you go to Community B and say, "You know you can't really enforce that ordinance any more, it isn't proper under our system of law, there is stare decisis, there are decisions which declare this type of ordinance unconstitutional even from our highest courts, both of our State and our Nation." and Community B, more likely than not will tell you, "Well, we weren't a party to that case; we didn't have the opportunity to defend it." or

"There is a comma placed differently in our ordinance" without regard to the actual substance of the decision. So we find that we must go into municipality after municipality to challenge these things. And I submit to you that this kind of pattern creates a tremendous problem of disrespect for the law among young people. They are aware of decisions of the courts today. When the U. S. Supreme Court hands down a decision announcing a right, most of the kids in our communities today know about that decision. And when they're told that that decision doesn't apply, or that decision somehow is irrelevant, for a reason that's clearly erroneous, I submit to you that we create disrespect for law within our society and most specifically among our young people. And the curfew area is one precise area in which that sort of thing occurs.

ASSEMBLYMAN DICKEY: Mr. Nagler, I hate to cut you off but we have several other witnesses.

MR. NAGLER: I apologize for the extensive answer to that last question but I think Mr. Keogh-Dwyer touched on what to me is a very sore point.

ASSEMBLYMAN DICKEY: Yes. Thank you very much.

MR. NAGLER: Thank you again.

ASSEMBLYMAN DICKEY: We will call as our next witness Dr. Thomas Cox, Professor of Criminology, Glassboro State College. Is Dr. Cox going to testify first or Dr. Johnson?

MR. JOHNSON: I have a paper prepared and Dr. Cox, myself --

ASSEMBLYMAN DICKEY: You're Mr. Johnson, are you?

MR. JOHNSON: That's correct. I am Professor of Criminology at Glassboro --

ASSEMBLYMAN DICKEY: Are you going to testify, sir, or is Dr. Cox? I just want to know which one.

Would you state your full name and address, please.

T H O M A S C O X: My name is Dr. Thomas Cox, 330 Oakwood Avenue, Glassboro, New Jersey. I am a Professor at Glassboro State College.

ASSEMBLYMAN DICKEY: You may proceed, Dr. Cox.

DR. COX: I would just like to direct a few comments in support of our position paper which is to lend weight to the argument that there should be a new Penal Code for the State of New Jersey. I am simply going to address myself to the problem of responsibility to citizens of New Jersey and I would like to include all people in the State of New Jersey as citizens.

ASSEMBLYMAN DICKEY: Do you have a prepared statement?

DR. COX: No, sir.

ASSEMBLYMAN DICKEY: You mentioned a position paper, do you have that?

DR. COX: Yes, I do.

ASSEMBLYMAN DICKEY: Are you going to submit that to us?

DR. COX: Would you like it read?

ASSEMBLYMAN DICKEY: No, we don't particularly want it read but would you like to give that to me?

DR. COX: Yes, sir. I will submit to you then formally position paper in support of the proposed Penal Code as presented in the final report of the New Jersey Criminal Law Revision Commission, October, 1971. The paper is presented by the Law/Justice Studies Program, Glassboro State College, Glassboro, New Jersey, prepared by Dr. Theodore M. Zink, Coordinator; Dr. Thomas H. Cox, Assistant Professor, Corrections; Professor Edwin C. S. Johnson, Assistant Professor. (See page 74)

I am afraid I am not too familiar with these proceedings.

ASSEMBLYMAN DICKEY: Well, we will include your position paper in our transcript, Dr. Cox. Is there any comment you wish to make in support of your paper?

DR. COX: I would like to mention just this one

point: if we can bear in mind that we're dealing with citizens. I notice that we use terms like "convicts", "prisoners" and people who are being punished by the Penal Code. I appreciate the one stand that the new Penal Code is taking, and that is they are making a priviso for distinction in the degree of crime and they are establishing some form of equity in the sentencing procedure and beginning to incorporate correctional procedures through what would be called mandatory application of parole and probation arrangements, and treatment and correction are certainly apparent in this new Penal Code as opposed to punishment which is apparent in the old Penal Code, and specifically the inequity of sentencing and the lack of treatment for the offenders who are presently in the correction system.

ASSEMBLYMAN DICKEY: Thank you very much, Dr. Cox.

Do you believe the proposed Penal Code is better than the present statutary law on criminal activity in this State?

DR. COX: As you know, I only received the Code a very short time ago, the proposed Penal Code, and I can say, having looked it over, that my initial impression is that it does remove some of the inequities. I think we are trying to establish the difference between law and justice in this case, the more equitable distribution of the law to all citizens of the State of New Jersey, and I do find that evident in the new Penal Code as compared to the old Code. There is not an equitable application of the law to all citizens in the old Penal Code.

ASSEMBLYMAN DICKEY: Thank you.

Any questions, Mr. Keogh-Dwyer?

ASSEMBLYMAN KEOGH-DWYER: No.

ASSEMBLYMAN DICKEY: Mr. Wallace?

ASSEMBLYMAN WALLACE: No.

ASSEMBLYMAN DICKEY: Mrs. Klein?

ASSEMBLYWOMAN KLEIN: No.

ASSEMBLYMAN DICKEY: All right. Does Dr. Johnson wish to testify?

Would you state your full name, please, Doctor?

E D W I N C. S. J O H N S O N: My full name is Professor Edwin C. S. Johnson, and I instruct in Criminology at Glassboro State College.

As a matter of fact it's just a few weeks back that I was testifying before the California Senate Judiciary Committee on the indeterminate code, about five weeks ago, so I feel that I am somewhat leap-frogging across the Country.

Our position is basically as Dr. Cox has stated. However, he has left a very important point which I would like to make and that is that we feel, in the present Code, the major point has been left out, that the preparers of the Code have not sufficiently seen the consequences of their actions. And because of their shifting emphasis from prisonization to treatment, they fail to see the consequences in the prisons themselves. What we are saying is, by modernizing the legal procedure, bringing it into line with contemporary socio-legal thought, we will no longer provide the recruitment grounds for members of organized crime in the prisons themselves. In other words, if men serve less time in prison, their chances of recruitment for organized crime also become considerably less, and if the shift is from punishment to treatment, you will suddenly find that you are dealing with a new kind of inmate, you will no longer be subjecting him to the harsh penalties which result in the bitterness, the frustration, the anger and the rage that is vented on society in the form of organized crime.

We, therefore, propose that in the adoption of this Code, the Committee and the Legislature itself will be making a frontal attack on organized crime in the State of New Jersey. With our combined experience both inside the prisons, working outside the prisons,

with the law enforcement agencies, we believe this to be a fact which will become self-evident probably within one year of the adoption of the Code.

As Professors at Glassboro State College - and I am very sorry that Dr. Zink can't be here because of a pressing engagement, but he supports us throughout our whole position -- as Professors, we feel that this Code should be adopted immediately. The logic of the Code is overpowering. And when we hear of people opposed to this, nitpicking, picking at sections, when this is the problem of the courts to adjudicate, we are amazed. The Code itself is a legislative function. The uniformity of the Code is so far in advance that no other state in the Union can offer a code like this. It's way in advance of California, for example. And I know the California code intimately. There is absolutely no reason in my mind, speaking from years of experience, why this Code should not be immediately adopted.

Thank you.

ASSEMBLYMAN DICKEY: Thank you, Dr. Johnson.

Any questions, Mrs. Klein?

ASSEMBLYWOMAN KLEIN: Dr. Johnson, do you mean to --

MR. JOHNSON: I would like to be "Dr." Johnson; I'm only an accepted candidate at the moment.

ASSEMBLYWOMAN KLEIN: Professor Johnson, do you mean to imply, then, that there should be no amendments to the Code?

MR. JOHNSON: I'm not implying that there should be no amendments but what I am saying is, if this Code is adopted, which is basically a legislative procedure, then the adjudication of minor points would come through the courts themselves, which is a much more natural procedure. And any other errors would be seen in administration beyond the courts.

ASSEMBLYWOMAN KLEIN: Thank you.

ASSEMBLYMAN DICKEY: Mr. Keogh-Dwyer, any questions?

ASSEMBLYMAN KEOGH-DWYER: Yes, Mr. Chairman.

Professor, in what way is this proposed Penal Code superior, basically, to the California Code?

MR. JOHNSON: Well, in the California Code you have no grading of sentences and certainly there is no degree of culpability. I will give you an example. For example, in sex offenses - incidentally, which this Code proposes to eliminate between consenting adults - in California, basically, under sex offense the offender would normally receive the maximum which is the indeterminate sentence which could be anywhere from one to life. Under this Code not only would there be no penalty for consent but also if there is a sex crime involved, as such, there would be a degree of culpability and a scale of punishment to match that degree of involvement. This is unheard of in any penal code. It is so far advanced and so acceptable to modern legal socio thought that I see no reason why this State should not go ahead. This is the avant-garde thinking of our time. It proposes fairness, justice, equity and uniformity; and surely this is the basis for justice, this is a basis for any legal code.

ASSEMBLYMAN KEOGH-DWYER: Thank you.

ASSEMBLYMAN DICKEY: Mr. Klein, any questions?

ASSEMBLYMAN KLEIN: No, I have no questions.

ASSEMBLYMAN DICKEY: Mr. Wallace?

ASSEMBLYMAN WALLACE: Professor, I just have one question that bothers me a little bit. Did I gather from your remarks that your feeling is that sentencing now is too severe and that a person convicted of a crime, that the sentence meted out to him or her is too severe in the belief that if a person is not incarcerated too long they would have a better chance of rehabilitation. Did I gather that from your remarks?

MR. JOHNSON: Yes, sir, because in my observations I have noticed a rapid deterioration of the incarcerated individual sets in after about three years. After ten

years - I would agree with the authorities on this point that there is practically no return for the rehabilitated man, that his mental psyche has deteriorated beyond hope of return. Therefore, in this Code, which offers a minimum of imprisonment with a maximum of supervised parole, we do have hope to return these men back into the society from which they came, and they surely must go back some time.

ASSEMBLYMAN WALLACE: Would you suggest, Professor, then that there be a limit placed on any sentence for any crime?

MR. JOHNSON: Yes, sir. I would agree with the scale of provisions which is presently proposed. They have a ten to twenty year maximum with an extended term. Now that, of course, is adjustable within itself, depending on the offender, if he's a repeat offender or if there is a very bizarre crime involved, a notorious type crime. Now, while I say that ten years should be a maximum, I think that this is maybe a distant thought. I am hoping that one day we will arrive at the conclusion that ten years in prison is indeed the point of no return, that after that time the man is literally mentally dead. I think that a ten year sentence is far more inhumane than the death penalty.

ASSEMBLYMAN DICKEY: Thank you very much, Professor Johnson and Dr. Cox.

Do I understand that Dr. Theodore Zink will not be with us today?

MR. JOHNSON: Dr. Zink is unable to be here because of tremendous pressure of business in Glassboro. We have so many programs going. As you know, we have the four-year degree program going at Leesburg State Prison which takes up a great deal of our time. He is presently with the Narco Organization which is attempting the rehabilitation for drug offenders at Leesburg. That's his present commitment, at the moment.

ASSEMBLYMAN DICKEY: We want to thank both of you gentlemen for coming today and submitting your brief to us. We appreciate your being here.

MR. JOHNSON: Thank you very much, gentlemen.

ASSEMBLYMAN DICKEY: The next witness is Mr. Bruce Schragger, Prosecutor of Mercer County.

B R U C E M. S C H R A G G E R: Mr. Chairman, I am Bruce Shragger, Mercer County Prosecutor and also the President of New Jersey State Prosecutors Association and I am here in both capacities today.

As you know, Director Jahos, Division of Criminal Justice, advised you at your hearing last week that the Attorney General's Office and the Prosecutors Association have a Committee which will submit a fully analyzed report to this group hopefully before the summer is over. We purposely avoided doing it until we had some judges on vacation and could free Prosecutors for the task because we had understood the Code - it still hasn't been introduced but we were not aware of the hearings either.

Briefly, I would like to point out and agree that the codification of the Criminal Laws is and will be an asset to the Prosecutor, to the people of the State and, obviously, to the defendants themselves. But I would just briefly want to point out several of the problems that we've seen, at this point, with the hope that you, as the Committee, and others who are studying it would be aware of some of those problems prior to anyone making any final determinations.

One of the most severe difficulties that the Prosecutors see, for example, is in the de minimis provisions of the Code where a judge, on his own motion, may say that a situation is so de minimis that it does not warrant prosecution. I question whether that authority should be in the judge; as a matter of fact, I say it should not be in the court. It seems to me that the Prosecutor as that person entrusted with the

enforcement of the criminal laws has a great deal of discretion and that discretion should remain in the Prosecutor. The Judge is certainly no better trained to make that decision than is the Prosecutor.

I question some of the sentencing provisions. I do not feel we will get the uniformity in sentence by limiting the degree of sentencing and by changing to crimes of various degrees, particularly where the court, on its own motion, can reduce the crime in effect to fit the sentence. I do not feel, for example, a person charged with armed robbery may in all cases need a ten-year sentence. On the other hand, he may not be entitled to immediate parole but should serve some time. I don't think giving the Court or the Prosecutor the authority to recommend to the Court that it be treated as a crime of the third degree, for example, answers that particular question, nor do I feel that authority will bring uniformity. Obviously, what is going to happen is, each judge, with the same discretion he has today, is going to reduce the particular crime so that he can give the particular sentence that he feels is warranted. And I would further say that the Prosecutor, at least I as a Prosecutor, would also recommend a reduction in the particular crime. So I don't think we're going to get that uniformity that everyone discussed.

I question again the immediate parole after six months or the immediate right to parole review after six months. There are many elements of the criminal law, of penalties that have to be considered, and I question whether there is anyone in our society who is intelligent enough, has enough foresight and hindsight, a combination of all, to say whether or not someone should be out on the streets.

Is the only element the Parole Board is going to consider going to be rehabilitation or is it going to

be retribution and is it going to be deterrents?

There are many people who you are not going to rehabilitate or, for example, may be rehabilitated. The white collar crimes, public officials who are convicted of corruption, of crimes, they are being sent to jail I don't think for rehabilitation but for a deterrent and for punishment and I think it should stay the same. And I question whether or not the Parole Board will view their role in the same light that we, as Prosecutors, attempting to protect all the public, view ours.

The change, for example, in the elements of culpability, while good, because of definitions may create additional problems - something that we all should take a good hard look at. As difficult as definitions are, certainly old definitions interpreted by the Court are somewhat easier to follow than new definitions without court interpretation.

I think the reliance - some of the defense sections have concern -- the reliance on a prior decision. Does a County Court Judge in Newark who makes a decision, and that decision is written in the paper and is read by someone in Camden - should that person have a right to rely on that decision? Are we going to make ignorance of the law an excuse for criminal behavior? I don't think so. I think one of the major functions of the Criminal Law is to protect the public and obvious knowledge of all the law by every person does not protect the public.

I would only make one more comment at this time and that is the need, under the Code, to charge the jury in each case with every element of every crime from the first degree down to and including disorderly persons offenses. The State has a tremendous burden, as well it should, to prove beyond a reasonable doubt every element of the crime. It is difficult to obtain convictions, and it should be difficult to obtain convictions. On the other hand, the State has an obligation to all of its

citizens to convict those persons who are guilty and the State can prove all the elements beyond a reasonable doubt.

I think we are going to find it more difficult to obtain convictions when you are going to instruct a jury on four or five separate, lesser included offenses each time a case goes to trial. I think the Prosecutor has a right, in certain instances, to determine which one of those lesser included offenses, if any, he wishes to proceed on. Perhaps in a felony murder situation the Prosecutor only wishes to proceed on felony murder where the jury can only return a verdict of guilty of first degree murder or not guilty, and does not want to give the option of second degree murder when the Prosecutor feels the facts do not meet or warrant such a compromise or lesser included offense.

Basically, these are some of the things that concern us. These are some of the things that we would hope to fully outline to you in our report, a report which we would hope would have the blessing of all the Prosecutors and the Office of the Attorney General. And any one of us who, of course, has objection to any part of it - we will also file our own minority reports. So we would hope that we can come up with what we feel is a sensible and unanimous decision based on those of us who deal with the criminal law and with the criminal element every day of the week, seven days a week.

Thank you.

ASSEMBLYMAN DICKEY: Thank you, Prosecutor.

Have you seen the report of the Essex County Prosecutor's Office on the Code?

MR. SCHRAGGER: Mr. Chairman, I think that Dave Baime has done an excellent job. The report sets forth many of the difficulties that we foresee. Dave is here today, I see, and that's going to be the basis for our study. We have the advantage of Joe Lordi's excellent appellate section.

ASSEMBLYMAN DICKEY: Fine.

Any questions, Mrs. Klein?

ASSEMBLYWOMAN KLEIN: No.

ASSEMBLYMAN DICKEY: Mr. Keogh-Dwyer?

ASSEMBLYMAN KEOGH-DWYER: Yes, Mr. Chairman.

Sir, you're saying, in effect, that before it reaches a judicial level, before the jury is charged, that the crime should be singled out as a specific crime and a specific punishment rather than confuse a jury with several propositions, let's say. Are you saying also that the Prosecutor should decide what the crime should be, what is to be charged, and then submit that to the judge?

MR. SCHRAGGER: There are going to be certain factual situations, Mr. Keogh-Dwyer, where the jury may be able to find more than one charge. And I am not saying in all instances that that obligation would be the Prosecutor's. I am saying that the general rule should not be that in every indictment every lesser included offense must be given to the jury. I think there must be a reasonable basis, as the law is today, before the court will charge a lesser included offense. Under this, the easy way out is for the judge in each instance to charge all the lesser included offenses so that he does not have to be concerned about a reversal on appeal by an Appellate Court saying he should have given this defendant the additional benefit of charging a lesser included offense. Now this is extremely disturbing to those of us in law enforcement.

ASSEMBLYMAN KEOGH-DWYER: Do you think it would give too much power to the Prosecutor's Office? Do you think it would be trespassing too much on the judicial area?

MR. SCHRAGGER: I don't think they're trespassing on the judicial area. First of all, if the Prosecutor elects, for example, in the first degree murder case I

have mentioned, and the proofs fail to set forth the jury question, the judge has not only a right but an obligation to refuse to send the matter to the jury, or reserve decision on that motion and set aside the verdict if the jury does convict.

ASSEMBLYMAN KEOGH-DWYER: Thank you.

ASSEMBLYMAN DICKEY: Mr. Klein?

ASSEMBLYMAN KLEIN: Mr. Schragger, turning to your comments about the parole provisions, is it your view that a prisoner who has in the view of the appropriate authorities been rehabilitated that that prisoner should not be entitled to parole if he was originally sentenced under a sentence that was a long term one?

MR. SCHRAGGER: Well, to the extent that I do not think that rehabilitation is the only purpose of confining an inmate. And, regrettably, certainly the discussions, the articles you read today talk only in terms of rehabilitation and forgets retribution, forgets deterrents.

Now I am taking for example, and I think the best example I can give is the example I gave earlier, the white collar crime figure, the white collar defendant, the organized crime figure. Rehabilitation is really irrelevant.

Another thing that I think we ought to point out is that most individuals reaching the State Prison system, certainly, have had several prior convictions before being sent to the State Prison. So that this whole theory of rehabilitation, I think, is angled in the wrong direction. By the time they reach the Prison system we've lost them already, in most instances. If we want to talk about rehabilitation, we ought to talk about rehabilitation when a youngster is picked up on his first offense, is a 9 or 10 year old juvenile, and then he's picked up again at 12 and 13 and 14 and then at 18 he's in Yardville for ten or eleven months. But by the time

they reach the State Prison, in most instances, rehabilitation is, I think, a nice goal to talk about but I think a practical impossibility. And that's what concerns me about this system. Possibly there could be changes where if it's a first offense, he's eligible for parole at six months. Today, of course, as you know, your eligibility for parole depends on the number of prior times in an adult institution. So, even though you may have four or five prior offenses where you've been given probation, if you're in the State Prison for the first time you are now eligible to one-third time. And it seems to me we are going to have a great deal of difficulty and it seems to me that we just don't have, as dedicated as people are who are in this area - we don't yet have the answer to predict and that the six month period may be too slight.

There is a difficulty where you have a judge or two judges in the same Court House on the same type of offense and one gives ten years and one gives two years. That problem has got to be resolved. But everyone talks about excessive jail sentences, most of us in the prosecutorial business feel that most courts are not giving even minimal jail sentences. One of the reasons, of course, is that the conditions in the prisons are so bad that it really takes a difficult situation to convince a court that an individual should be incarcerated.

ASSEMBLYMAN KLEIN: Of course the six month provision is not mandatory, it's simply optional with the Parole Board. And as I understand it, what they are to consider in determining whether or not parole should be granted is whether or not the prisoner has in fact been rehabilitated and whether he is able to return to society and make some useful contribution.

Now, assuming that you have an individual who has been rehabilitated and is able to return to society and make a useful contribution, should not that individual have an opportunity to return to society? Or is it your view that notwithstanding you have that particular kind

of situation, if he has committed a particular offense that calls for a more serious and longer term sentence, he should not be eligible for parole?

MR. SCHRAGGER: I don't think you can individualize or generalize that particular thing. It seems to me that there are certain crimes that have been committed by certain individuals that notwithstanding their rehabilitation they should not be immediately released. A severe mugging of an old lady on a street at night by a person who has a prior criminal record, let's say, - it's not his first offense, - certainly should not be released in six months even if he had suddenly become rehabilitated during that period of time.

ASSEMBLYMAN DICKEY: Any other questions?

ASSEMBLYMAN KLEIN: No, I have no other questions.

ASSEMBLYMAN DICKEY: Mr. Wallace?

ASSEMBLYMAN WALLACE: No.

ASSEMBLYMAN DICKEY: Prosecutor, you touched on the subject of knowledge of the law. I am not sure I followed what your recommendation was. Do you think there should be a presumption that everyone has a knowledge of what the law is?

MR. SCHRAGGER: I think we really have to have that. First of all, we can't prove whether or not a defendant did have knowledge of the law, assuming we had to. Secondly, the purpose of the criminal law is to protect society as a whole. And a person ought to be obligated or inferred, as you would say, to have such a knowledge.

ASSEMBLYMAN DICKEY: Now you mentioned something about reading an article in the Newark paper about a county court decision, whether it's applicable in Camden?

MR. SCHRAGGER: Well, one of the provisions in the Code states, a defendant may rely on a published decision. Whether or not that is really the state of the law - and I think if you ask your Essex County group they can give you actual facts in a situation

involving a knife case where apparently a judge in Essex County has held a knife is not a concealed, dangerous weapon, while every other judge and I think most of us in this field feel that, depending on the knife, obviously, - a folded penknife in your pocket may not be - is. Now if this judge's opinion is reported in the newspaper and someone reads it down at the corner tavern - let's not even go out of the county - and says, "Heck, it's okay to carry a shiv now." And I don't think that ought to be a defense.

ASSEMBLYMAN DICKEY: Well, isn't he, nonetheless, entitled to rely on that if it is a decision of a court of record?

MR. SCHRAGGER: Well, how about if the decision is on appeal, and it's reversed below? This happens everyday. And then we have the question of whether or not the decision is retrospective or just prospective, and the court decides these every day of the week.

ASSEMBLYMAN DICKEY: Well, as I understand what you've said, you couldn't even cite it as what your contention of the law is in defense of a crime.

MR. SCHRAGGER: I don't think that is a defense, and I don't think it ought to be.

ASSEMBLYMAN DICKEY: All right. Now, you've mentioned de minimus and you felt, as I understood your testimony, that that decision should not be left to the court alone but rather to the prosecutor. As I understand your testimony.

MR. SCHRAGGER: That's the present state of the law. The prosecutor has that authority, that discretion. The prosecutor, if there has been an indictment, may move to dismiss the indictment with the court's approval. But certainly I do not think the court, on its own motion, should have that authority. One, you're dealing with many individuals as judges, all of whom have their own thoughts regarding the law. For example, gambling. There are

many of us who feel that gambling ought to be legalized; there are also many of us who feel that gambling is the major source of funds for organized crime and even with legalized gambling you may limit some of the funds but you are not going to exclude totally organized crime in the gambling area. There are judges, for example, that do not feel this way, or judges who feel that gamblers should not be sentenced. Should the judge have that authority or is it the prosecutor, who is in charge with an oath to uphold the criminal law and who represents the citizens of the community, who should have that authority? I feel it should remain in the prosecutor. The judge certainly has no more ability to make that decision than the prosecutor.

ASSEMBLYMAN DICKEY: That leads me to the question of plea bargaining. Do you feel that the judge should be involved in plea bargaining?

MR. SCHRAGGER: Notwithstanding the Supreme Court's memorandum indicating that the judge should not be involved in plea bargaining, I personally have no philosophical objections to the judge being involved in plea bargaining. My concern is that the total advantage, of course, is given to the defendant, which it ought to be, because the State makes a recommendation as a result of plea bargaining - and recommendation is the term used, it's really an agreement but we talk in terms of recommendation - if the court wishes to give a greater penalty then the defendant has a right to withdraw or retract the plea; if the court gives a lesser penalty, the prosecutor has no choice but to refuse to dismiss other charges, if that was part of it. Obviously, if a defendant pleads to all the charges, the prosecutor can only recommend and the court is free to do what it feels is correct.

ASSEMBLYMAN DICKEY: Now you've indicated that you would like to have some time to present a prepared statement on behalf of the Prosecutors in New Jersey?

MR. SCHRAGGER: And the Attorney General, yes.

ASSEMBLYMAN DICKEY: How much time will you need to prepare your memorandum?

MR. SCHRAGGER: I would hope, the end of July we could present that to the Committee.

ASSEMBLYMAN DICKEY: Fine. We have told other groups that we would hope they could have them in by at least Labor Day, the end of the summer, so that will give you a little more leeway.

MR. SCHRAGGER: That's even better. Thank you.

ASSEMBLYMAN DICKEY: Thank you for coming, Prosecutor.

Mr. Andrew Zazzali, First Assistant, Essex County Prosecutors Office.

A N D R E W F. Z A Z Z A L I: Good afternoon, gentlemen. My name is Andrew F. Zazzali, First Assistant Prosecutor, Essex County Prosecutor's Office.

I gather, from the questioning of Prosecutor Schragger, that you have already received the treatise or the report on the Penal Code authored by Dave Baime of our Appellate Section.

ASSEMBLYMAN DICKEY: I think I am the only one that's received it; I don't believe the other members of the Committee have received it.

MR. ZAZZALI: Did you receive several copies, sir?

ASSEMBLYMAN DICKEY: No, just one.

MR. ZAZZALI: Well, there are more coming.

Not because it originated in our office, but I submit that it's an excellent report; it's in great detail; it takes into consideration the legal problems as well as the practical problems that the new Penal Code would present to prosecutors and to the courts.

I don't intend to go into each section; I would just like to make a few comments, which are included in Mr. Baime's report. First of all, I would agree with Prosecutor Schragger. I think all prosecutors are

concerned about placing too much authority or power in the courts, with all due respect to the court. The fact of the matter is, the prosecutor and the law enforcement people working for him or with him have the best and most detailed knowledge of the particular circumstances surrounding the crime and they know a little bit more about the defendant.

I think Essex County is a unique county because of the problems we have, and I can see the same problems that we have in Essex spreading to other areas as they become more populated.

Insofar as this Code is concerned, I think it would completely destroy the plea bargaining leverage we have now. The average individual who is a recidivist in Essex County, once he has spent some time in the Essex County Jail, pending trial, it may only take a few days - they are some of the most savvy individuals when it comes to defenses and the tricks of the trade, so to speak. And I doubt very much whether we would get anywhere near the percentage of pleas that we get now as a result of plea bargaining if that provision in the Code, which permits a judge to mold a verdict or change it or do whatever he wants to it, - if that is enacted. The average defendant would take his chance and go to trial on it. He would figure he had nothing to lose. Some defendants still do that in Essex County, notwithstanding the plea bargaining. Although in the past several months, because of a new program we've initiated with the sponsorship and co-operation and approval of the assignment judge, we have greatly diminished the backlog of criminal cases. We're getting more and more pleas because of plea bargaining.

There is adequate court supervision under the present system. If we want to downgrade a case, if we want to change a case from an atrocious assault and

battery to a simple assault and battery, it's of course subject to the approval of the trial court, the trial judge to whom the case is assigned for trial, as well as the criminal assignment judge. This system has worked well. Everything is in writing; everything is placed on the record.

Under the Code, there would be no necessity for this. The Prosecutor wouldn't have anything to say about it, as I have already indicated.

I don't want to be misinterpreted as being in a position where we're critical of the entire Code, we think it has a lot of good points to it and we just want to bring certain things to your attention.

We are concerned about the wholesale rewriting of certain statutes. Now some of the authors of the Code - I believe Professor Knowlton indicated that many of the sections of the Code are the same or in substance the same as the preexisting law, which is all well and good but it does raise a problem of interpretation. What do we do with the body of law that has resulted from the fine and judicial decisions that we've had, decisions on self-defence, decisions on various other defenses? These are going to be held, of course, according to the Code. Anything that's not specifically changed by the Code, such defenses will still be available to a defendant. But I think we are still going to be in a period of uncertainty as to what the various language means - for instance, in murder, the deletion of the standard premeditated, wilful, deliberate; now we go into the use of the word "purposeful".

In murder and in assault cases, the law now on self-defense - we've got a fine body of law coming from our Supreme Court on down, dealing with the various elements of self-defense, what is a legitimate claim of self-defense, the issues of retreat and everything else. Are we going to change that and just put that to the side?

I point out felony murder. The statutes or the Code - its exclusions from liability as a felony murderer would seem to give immunity to that person who participated with another person in the mugging of an old woman. Supposing two young men decide to mug a woman and they use no weapon but one fellow knocks her to the ground in the course of a robbery and she dies. Apparently, the Code would give immunity to the second individual, as I read that section under defense to the felony murder section. I don't think that would be the intent of any prosecutor; I don't think the Legislature would want anything like that.

As far as charging lessor included offenses to a jury, as Mr. Schragger pointed out, there are many times when the prosecutor takes an all-or-nothing approach and he does it in good conscience, feels it's something he has to do. For instance, suppose we have a man who is picked up with 2,000 decks of narcotics. We can charge that man with possession with intent to distribute. We may decide to charge him with that and nothing else, not charge him with mere possession because of the disparity between two sentences and we may feel that, based upon our information on the individual, he should be subjected, if he's found guilty, to a more serious penalty. Under this statute you throw in the straight possession and it would be easy for the jury to compromise and say, well, we'll just charge him with possession, it's easier and they don't get into the more sophisticated finding of fact as to whether or not the man intended to distribute it.

One thing we would like to stress, and this would be a fairly simple matter, I would think, is that we feel that for every indictable offense that we have on the books in the State of New Jersey we should have a comparable disorderly persons statute. This would pave the way for, where warranted, lenient treatment of the

first offender. A boy may get in trouble for burglary or something like that, it may be a rather innocuous type of offense, it might be an innocuous type of possession of some weapon, whether it be a knife or what, it may be something that he uses on his job or something like that but the circumstances are such that a complaint is made and the man is indicted. We should have a parallel disorderly persons statute for every criminal offense. Where warranted, where it's indicated, where you want to be lenient, at least now you can say, we'll recommend a non-custodial punishment for this individual. That may not be enough for a young man. Why give him a criminal record when his offense is a rather innocuous one. If you have a disorderly persons offense paralleling each and every indictable crime, then you could show this leniency, of course subject to the judicial supervision.

Lastly, I didn't intend to go into the question of punishment but Bruce Schragger raised it and I couldn't agree more wholeheartedly with him. It's something that's been bothering me in all the articles we read about our prison system. True, prison conditions could be improved. Most of the people who go to State Prison are people who are recidivists, they've been through the mill, they have had many opportunities. The possible exception would be gamblers, of course. They get a pretty stiff sentence right off the bat.

I wonder whether or not there is too much emphasis being placed on rehabilitation. I think some consideration should be given to the deterrent aspects of punishment as well as retribution. This is hornbook law. A first year law student is taught this. It's something that's deeply imbedded in our criminal law. It's a valid consideration when imposing punishment.

I wonder whether the emphasis on rehabilitation which I think has been taking place for several years - I wonder if it's misplaced. To wit, we have a rise in

crime rate; we get more and more tolerant, more and more lenient, and at least in Essex County we have more and more crime. Our annual report just came out and I believe it showed a startling increase in robberies in Essex County in the past year.

As indicated, that's about all I have to say other than what's in this book here. I strongly endorse it.

ASSEMBLYMAN DICKEY: Thank you very much.

Your office has prepared this report. Would you make sure that Mr. John Graham gets a copy of it, who was Secretary of the Criminal Law Revision Commission?

MR. ZAZZALI: Yes, sir.

ASSEMBLYMAN DICKEY: He is going to be assisting our Committee in reviewing the recommendations.

Mrs. Klein, any questions?

ASSEMBLYWOMAN KLEIN: Yes. I would like to ask about that final statement that you have made on punishment as a deterrent and as a punishment.

MR. ZAZZALI: I knew that would provoke a question.

ASSEMBLYWOMAN KLEIN: Do you feel under our present system the emphasis is upon rehabilitation?

MR. ZAZZALI: I can't speak for the penal system. All I'm going by is what I read. It seems to be that all the people who are concerned with our prison system - and I would assume this would apply to those persons who sit on the Parole Board - their emphasis seems to be on rehabilitation. Well, do they look at a person just to see whether he has been rehabilitated, as Mr. Schragger pointed out, or do they look to see what happened, how do we deter someone else from doing the same thing. I don't know what your exposure has been down here but I can think of some pretty vicious crimes that have occurred in Essex County where it would just be a mockery on justice, even if a man was rehabilitated, to release that man from prison after six months. True, it's not

mandatory; it's discretionary; but I submit that there is a practical consideration and that is that sometimes the Parole Board is faced with an overcrowded condition in their jails and they may be more concerned with numbers and they may not be that objective about whether or not a man has been rehabilitated.

ASSEMBLYWOMAN KLEIN: I'm afraid I didn't make myself clear. You are objecting to recommendations in the new Penal Code that would entitle a person to a parole review after six months because you feel that places too much emphasis upon rehabilitation and not enough emphasis upon the other involvements of punishment and retribution.

Then you related that we have had a soaring crime rate which you said you felt was partly due or perhaps due to this growing emphasis upon rehabilitation. So I am just asking whether - not with this new Penal Code but under our present system - our law places emphasis upon rehabilitation which would, in your view, account for the rise in crime rate.

MR. ZAZZALI: I would assume it does from what I read in the papers. But I would say this, I can't say that the emphasis on rehabilitation in and of itself can account for the rise in crime rate but I think that perhaps the emphasis is misplaced, that we have people being released after a short period of time and back on the streets committing the same crime over and over again.

ASSEMBLYWOMAN KLEIN: But you would not believe that they were rehabilitated?

MR. ZAZZALI: No, they weren't. I ask you this, supposing a man has been involved in crimes for a period of five years, off and on, and now he goes down to State Prison. I question seriously and I think it's vulnerable on its face for a Parole Board, after the man has been there for six months, to say that this man has been rehabilitated. I say it's a section of the Code

that must be carefully scrutinized. I questions whether anybody can say after six months of contact with an individual that this man is rehabilitated when you look at his background and see that he had a period of five years of vicious crimes. It doesn't apply in every case.

ASSEMBLYWOMAN KLEIN: But you are saying that at the present time they are being released too soon.

MR. ZAZZALI: Yes.

ASSEMBLYWOMAN KLEIN: On what basis are they released?

MR. ZAZZALI: I don't know. I don't know what the basis is. I would assume there must be some consideration of rehabilitation.

ASSEMBLYWOMAN KLEIN: Well,are they allowed to have a parole after six months, at present?

MR. ZAZZALI: I don't know when they get out. I wouldn't be surprised if they do get out after six months.

ASSEMBLYWOMAN KLEIN: People convicted of serious crimes who are sent to State Prison?

MR. ZAZZALI: It depends upon - there is a formula that they apply and, I'm sorry, you would have to contact somebody from the parole authorities on this but they have good credit time and various considerations when they are releasing a man. It's possible that the man would get out in six months on an offense. Suppose a man was only sentenced to one to two years? You know, you don't really have that much control over an individual once he goes down to State Prison, as far as we're concerned, as far as prosecutors are concerned. It's bad enough that we don't have control over the judge who must pass sentence. But then, after he passes sentence and he goes down there we figure at least he got one to two years, he's going to be away from the streets for one or two years. And then maybe the parole board is going to let him out in

six months.

ASSEMBLYWOMAN KLEIN: Mr. Attorney, do you have any data to support that there is a relationship between the severity of punishment and the deterrent of crime?

MR. ZAZZALI: I might be able to get some for you. I don't know about, you know, each and every crime. I don't want to get into the area of capital punishment but I know that there are some statistics available that indicate that where they have abolished capital punishment in certain states they ended up with a higher rate of armed robbery after the abolition; that deterrent of the possible death penalty; and I would assume the same would hold true in areas where there is more serious punishment for particular crimes.

ASSEMBLYWOMAN KLEIN: Thank you.

ASSEMBLYMAN DICKEY: Mr. Keogh-Dwyer, do you have any questions?

ASSEMBLYMAN KEOGH-DWYER: No.

ASSEMBLYMAN DICKEY: Mr. Klein?

ASSEMBLYMAN KLEIN: Yes, just one question.

You mentioned that there is a provision of the Code that in your opinion would impede your ability to engage in plea bargaining?

MR. ZAZZALI: Yes.

ASSEMBLYMAN KLEIN: Why is that?

MR. ZAZZALI: Well, let's take - I'm citing my experience in Essex County. You have an individual who is charged with a crime and let's say the exposure is five years under the more serious crime. Now we can engage in plea bargaining with the individual. We can say, well, we're going to reduce the charge, we're going to recommend a ceiling of punishment of three years or whatever it might be. We can dispose of that case under the program we have in Essex County now. A lot of cases are disposed of in this way without the necessity of going to the Grand Jury. In other words,

the cases are reviewed --

ASSEMBLYMAN KLEIN: I understand that but what is there about this Code that would prevent you from doing the same thing? That's my question.

MR. ZAZZALI: The defendant is not going to go along with it. The defendant won't go along with it, or a good majority of them won't go along with it. They know they have two bites of the apple under this Code. They could still go to trial. In most cases they have a public defender so there is no money out of their pockets, they're not undergoing any expense, and they are going to take their chances and go to trial knowing that even if they are found guilty of the more serious offense they have a good shot at having the judge mold a verdict and mold it downward to the disorderly persons offense.

ASSEMBLYMAN KLEIN: Well, why would a judge do that if he's dealing with a recidivist who went ahead and had a trial and was convicted of an offense which would be a first or second degree crime under the law - why would the judge downgrade it? Don't the judges - well, essentially, they're concerned with the same factors you are.

MR. ZAZZILA: Well, supposing he's not a recidivist? Suppose a guy commits a more serious offense but it's his first criminal, you know, first indictable offense. The judge may decide to mold it. I can't tell you what runs through the minds of the judges. Most of our judges are quite liberal, to begin with, in sentencing. I think they have an onerous task passing judgment on their fellowman. But I think the tendency is, or I think it's easier for a judge to impose a more lenient sentence on somebody than a more severe sentence. And they are human beings and I think they may seek the path of least resistance. They have to make this, you know, terrific decision.

ASSEMBLYMAN KLEIN: Thank you.

ASSEMBLYMAN DICKEY: Any questions, Mr. Wallace?

ASSEMBLYMAN WALLACE: Yes, I have one question.

The question that I have, Mr. Attorney, is the feeling that you indicated that paroles are being granted more quickly today because we have no place to keep criminals. Is that what I gather from your remarks? The feeling was that the institutions are overcrowded and perhaps inadequate and that the parole system is being geared to allow these criminals to go out on the street again just because there is no place to keep them?

MR. ZAZZALI: I don't know. I submit that as one possible reason for somebody convicted of a serious offense being let out rather prematurely, from a prosecutor's point of view. I don't know what the reason is. If they decided that he was rehabilitated, if that was the reason for letting him out - query, their credibility insofar as judging rehabilitation, isn't it somewhat impeached by the fact that you pick the guy up one year later committing the same offense?

I think maybe what they should consider, if they enact certain sections of this Penal Code there should be some real hard statistics, by name and some type of report indicating how many people they have released because they thought they were rehabilitated, how many of them, who are they, were convicted again in such and such a period of time.

ASSEMBLYMAN WALLACE: The other feeling I had about this was that if a person is convicted and they are sentences to one year or two years and they're eligible to be considered for parole in about six months, if this were a first offense then you would have no objection to that but if this is a criminal who has repeated and has come back in once, twice or three times more, that six months parole opportunity should not be his.

MR. ZAZZALI: Yes.

ASSEMBLYMAN WALLACE: Thank you.

ASSEMBLYMAN DICKEY: Prosecutor, thank you very much for coming today.

MR. ZAZZALI: Thank you.

ASSEMBLYMAN DICKEY: Mr. John Graham, Secretary of the Criminal Law Revision Commission.

J O H N G. G R A H A M: Mr. Dickey and members of the Committee, I would, first of all, like to join with Professor Knowlton in thanking the Legislature and thanking this Committee for making available to us the opportunity to do our work and present the report of the Commission.

I would like to say, on my own behalf, that I imagine I was retained as the Secretary to the Commission because of the thought that I have some background and some expertise in the field. As I went on working on the Commission's Report, working on drafting the proposed Code, I found that this was perhaps the most educational experience of my life, that I found that digging into all of this that we now have on the books, trying to replace it with something new, is something that is a great learning process and I would simply like to say that I am very thankful for the opportunity to have been able to do it.

I think that I would like to say that as I listened to the witnesses who spoke both last week and today, I think every witness agreed that this Code is better than what we now have. I think every witness was addressing him or herself to particular provisions, some of which I believe to be of great concern, but that everyone agreed that the present hodgepodge of anachronistic statutes that now appear in Title 2A should be replaced with something new.

My feeling, and that of the Commission, is that our Code is a balanced, rational approach to criminal law

that will not solve the problem of crime in the streets in and of itself but that will go a long way toward making the administration of the criminal law easier for the persons involved in the system, more rational, fairer, and in every way better than what we have today.

I would like to point out some things that concerned me as a listened, but I would like to say that I asked to be the last witness in order that I could answer the questions that you have from the points that were raised by the many witnesses who have appeared. So I would like to go through some of the things that I felt to be of significance and that seemed to be of concern to the Committee members as the witnesses were testifying.

I would like to refer first of all to Prosecutor Schragger's and Prosecutor Zazzali's statement that this Code is one that is perhaps overly directed at rehabilitation to the detriment of some other goals of the criminal law.

On page 2 of our Report, in Section 2C:1-2, we state what we see as being the general purposes of this Code and as being the principles of construction by which it is to be construed by the courts in applying and in interpreting the Code.

The general purposes are stated to be, among others, (1) "to forbid, prevent and condemn conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interest;" and (2) "to insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interests of public protection."

I submit to you, first, that that is not an overemphasis of rehabilitation in our principles as we saw them, in our purposes as we saw them. And,

second of all, I think that we have faithfully drafted the Code in accord with those principles. I don't think that this is in any way a code that is going to end up turning people back to the streets that do not belong there. I disagree, I think I can say fairly completely, with the view expressed that we overemphasized rehabilitation. That notion, I think, became centered on the parole eligibility provision and on the provision that allows downgrading of a conviction by the court.

I would like to address myself to them because I think that particularly the parole eligibility provision is one that is of great importance to our code.

We provide that for every person sentenced to State Prison he should be immediately eligible for parole. And we provide that within six months of the time when he arrives at State Prison, or within any of the other State penal institutions, the Parole Board should review the question of whether he should be released on parole. We do not change the standard for release on parole; we change only the date for eligibility. The standard which has been considered by the Supreme Court of this State and which is set forth in the statutes of this State says that the Parole Board shall not release anyone from State Prison or from any other penal institution unless he is ready to rejoin society. So all we do, we say that there should not be circumstances under which a person can be submitted to State Prison and stay there for long periods of years before anyone asks the question of whether that person should be released. We do not say that people should be released simply because they have been in State Prison for six months.

I think it's very important to distinguish between the standard for release on parole and the time when the person will be eligible to be considered for release on parole.

The other provision that the Prosecutors addressed

themselves to, with regard to the so-called rehabilitative aspects of the Code, was the provision that allows the Court to consider whether a charge should be downgraded by the Court after conviction. That is Section 2C:43-11.

That provision allows the Court, after conviction, both to downgrade the conviction itself and to sentence for a lessor offense.

Now, in the first place, Mr. Zazzali said that he felt that was going to interfere with plea bargaining. I suggest to you that the court will simply not employ that provision in a case where the person has pleaded guilty. What that provision is addressed to is a situation where a man is charged with a crime, he is convicted by the jury, and the Court, reviewing the case and before imposing sentence, believes that even though the conviction was proper under the law, that because of the circumstances of the crime and the circumstances of the particular defendant that it would not be appropriate to sentence him to prison for as long as he would have to do if he followed the exact letter of what the law provides. Therefore, we give him discretion to downgrade the offense.

At the meeting of the Prosecutors Association, I sensed that the concern was much more about downgrading the conviction than downgrading the sentence. I suggested to the Prosecutors that the Commission would be willing to reconsider whether the conviction should not stay at the higher level and give the Court discretion to sentence for a lesser offense. The Prosecutors seemed to be satisfied with that suggestion. I am worried that that provision is being suggested as one that will interfere with plea bargaining. My suggestion to you is that it will have nothing whatever to do with plea bargaining.

Then I would like to turn to the general topic of plea bargaining. As we state in our Report, in the

covering report to the Penal Code, one of the things that we have done or tried to do is to create a penal code that will encourage and facilitate plea bargaining.

I suggest to you that by having gradations of offenses that will do exactly that; that by having for assaults, for instance, levels of crimes, from the crime of the second degree, which carries up to ten years, crime of third degree which carries up to five years, the crime of the fourth degree which carries up to 18 months, a disorderly persons offense which carries six months, and a petty disorderly persons offense which carries 30 days, that the Prosecutor and the Defense Attorney will be able to review that file and be able to match what this person did and what he's willing to admit to the level of the offense.

Under today's law, all we have for that whole area that I've just described is an atrocious assault and battery that carries seven years and a disorderly persons offense that carries six months.

I think, as a person who has practiced on both sides of the Criminal Law, that it will facilitate plea bargaining to have a gradated level of offenses; that it will make it much easier to plea bargain a case than in a situation which we have today where we have wide areas of sentencing authority between the various levels of offenses.

I would like to turn to the area of sex offenses which has been the subject of quite a bit of the testimony before the Commission.

In the first place, I would like to say that one of the things that we propose is that consensual acts between adults should not be the subject of the Criminal Law. With that in mind, we have eliminated the crimes of adultery, fornication, consensual sodomy, seduction, and we have no illicit cohabitation provision. We do, however, continue in the area of sex offenses a solicitation

law and a prostitution law. I suggest to you that that's an appropriate balance to develop for today's world and New Jersey at this point in its development.

Turning to the law of prostitution, the Public Defender, when he testified, suggested that it was inappropriate to have that law because this is a morals question. I suggest to you that this is not a morals question alone but it's rather a health question and it's an aesthetics question. It's a health question because there is a serious problem of infection possible. Today in New Jersey we have a very serious problem with venereal disease. And I suggest to you that it's a problem of aesthetics because if one goes to the upper westside of New York and sees what has happened without legalizing prostitution, it would be terribly inappropriate for New Jersey to copy that or to create an atmosphere in which that was possible.

I think that the element of hire distinguishes prostitution from the other consensual sex acts which we've proposed eliminating. I think that it's clear that when one turns it into pandering, when one turns it into a business or a profession it's a different thing.

I also suggest to you that this is not a crime without a victim, that the health problem that's involved, contrary to what the gentleman from the American Civil Liberties Union said, - the health problem that's involved makes this a crime that does potentially not only have a victim but a very large number of victims.

As to solicitation, I think that in the opinion of the Commission a solicitation law is appropriate in New Jersey. In the first place, a large number of the problems that were addressed by Mr. Warner in his testimony have not been a problem in New Jersey; they've been a problem in California where there have been overreaching vice squads. To my knowledge and to the knowledge of the

Commission, that simply has not happened in New Jersey.

I would like to reconsider, with the Commission, the suggestion of there being an actual solicitation, which was one of the changes that Mr. Warner suggested. I think that might well be appropriate. My own feeling and I think the feeling of the Commission - although again I think we should reconsider it - is that it would not be appropriate to have the second sentence which eliminates a complaint by a police officer in that offense. I think that that would be an undue slap at law enforcement officials who simply, in that area in New Jersey, up until today, have not been overreaching.

I also feel that in eliminating consensual sex acts among adults we should consider the whole area of sex offenses and keep prostitution and solicitation in mind as perhaps an appropriate balance or appropriate counterweight to go with the elimination of the other offenses.

Finally, there was the question raised about the corroboration and the time limit in sex offense cases. I would like to address several remarks to that problem.

In the first place, in my view, the place where the need for corroboration is great is in charges of sex offenses addressed against an adult by a minor. I would like to suggest to you that my own experience has been that those are not purely female charges against males, that the charge by young men against adults is one that happens fairly frequently and with enough frequency that we cannot say that this provision is necessarily a male chauvinist imposition upon the adult woman who is raped.

I would like to also suggest to you that in my opinion there is a serious problem about the need for some kind of corroboration as to that class of offense, namely the charge by a young person without any additional physical evidence, made frequently a long period

of time after the offense is alleged to have occurred, which I think can be a very serious problem. I think that there is a serious question as to whether the word of that young person alone should be sufficient to support a conviction in that circumstance.

I would like to say that corroboration is required in New Jersey today for seduction, not required today in New Jersey for rape nor for the kind of offense that I've talked about as the sexual assault upon minors. I think we should reconsider that question. I think that it may be that it would be appropriate to eliminate forcible rape as one of the crimes that needs corroboration. I would also like to say, very clearly and very specifically, that it's unfair and wrong to compare our corroboration statute which we propose with that found in the New York Penal Code. That found in the New York Penal Code is much stronger, requires a physical kind of corroboration rather than a circumstantial kind of corroboration. I happen to think that the New York Penal Code provision is a bad one; I happen to think that this one is nothing like that and that, at least as to some classes of offenses, this kind of a provision might well be appropriate.

I would like to also turn to the question of the limitation on local government laws. I think this is one of the hardest provisions we had to draft, one of the hardest provisions that faces the Legislature in enacting a new Penal Code.

I would like to turn to something that happened in California to produce a little bit of background for why we've included this provision and the way that we have drafted it.

In California, the Legislature, several years ago, the State Legislature, abolished the illicit cohabitation crime. That's kind of like our adultery crime only it requires a living together openly rather than a single act.

The Legislature decided simply that illicit cohabitation should not be a crime. The reaction to that was that several local governments enacted almost identical ordinances that made illicit cohabitation a crime. The courts of that State were faced with the problem of whether the local governments could enact legislation, ordinances, that directly conflicted with the intent of the Legislature in abolishing something as being an offense. The courts struggled with that and one of the things that they were worried about was a lack of legislative guidance as to when the State has told the local governments that they cannot any longer enact laws in that area. We have tried to address ourselves to that by precluding any place where there is a direct conflict - that's the Ulesky Case which is cited in our notes - and any place where there is a conflict by an intentional elimination from the State Penal Code.

Now, I happen to think that it's a serious question as to whether local governments in New Jersey today should be enacting penal legislation at all. I think that we may have reached the point where it would be better to have all of these things enacted in the State Penal Code. I certainly think that's true as to loitering, which we've done, and as to disorderly conduct and the many things that we've referred to in these hearings. But we haven't gone that far. We have allowed the local governments to continue to act in those areas where the Penal Code does not act. And when I say "the Penal Code does not act" it's because it does not act either intentionally by an expression of State policy, by intentional elimination, or where they have affirmatively acted in appeal.

I think that's a provision that has to be considered very carefully. There are several New Jersey cases on the problem about preemption of local government. We cite them in our notes. But I do think that we have attempted to draft language that meets the problem although we recognize that it's not going to be an easy provision to interpret or to apply in specific situations.

I think that's an area that the courts will simply have to work out on a case-by-case basis.

The question of the use of the criminal law in the area of public intoxication was raised in these proceedings. I would like to say that the Commission, I think unanimously, agreed that a public intoxication provision doesn't really belong in a penal code. I think Professor Knowlton addressed himself to the problem when we last met by saying that there simply, at this point in time, in our law is nothing to replace it.

I think that we would all agree that, if there were a medical or a health type provision that would keep these people off the streets, it does not belong in the Code.

Finally, I would like to address myself to some of the questions raised about loitering and about disorderly conduct, particularly by the representative of the American Civil Liberties Union.

I think, first of all, that it's important to point out that compared with what we have today, the provisions we suggest are much more rational, much more able to be interpreted by a court, and much more limited in their application to conduct by individuals. Today we both have several State statutes that are really without standards in many ways and we have a great number of local ordinances. I think that we have improved upon that by creating standards that are better able to be applied in particular situations. I think that we should review our language in the light of the recent decisions by the Supreme Court of the United States and by the Supreme Court of New Jersey as to loud and offensive language and perhaps they will lead us to the conclusion that there should be some tightening up of the language used there.

Those were the main areas that I saw as ones to which I wanted to address myself. I would like to

say that the Commission has asked me to say that we would like the opportunity to review our proposals in the light of the transcripts of these hearings, in the light of the papers to be submitted by the various groups, and in the light of the letters that we have received from members of the Bar and members of the Judiciary about particular provisions. I think that we would like to work with the Committee to try to draft a bill that will be acceptable. I suppose it's inherent in something of this sort that it's not going to be totally acceptable to those who represent law enforcement or police and it's not going to be totally acceptable to the Public Defender and to those interested in the defense side of things. I suppose that's inherent in the nature of enacting a new Penal Code that in attempting to rationalize it and to move it to a more modern stance it's natural that there are going to be some things that we're going to change that the Prosecutors won't like particularly and some things we're going to change that the Public Defenders won't like. I think perhaps that is the thing that may lead the Legislature to the conclusion that it's better than what we have.

Thank you.

ASSEMBLYMAN DICKEY: Thank you very much, Mr. Graham.

Any questions, Mrs. Klein?

ASSEMBLYWOMAN KLEIN: Mr. Graham, in discussing prostitution, you emphasized the health factor.

MR. GRAHAM: That's right.

ASSEMBLYWOMAN KLEIN: Yet I find it inconsistent with that that on page 64 2C:14-7 a diseased person who knowing that he's infected with a venereal disease has sexual intercourse or deviate sexual intercourse is a petty disorderly person; whereas a solicitation is a disorderly person. I just don't see - since this seems to me to be a far more serious offense, knowing - meaning,

I assume, in order to prove knowledge you probably have to prove the person was actually under treatment for a disease and knowingly communicates this to another person, and this is only a petty disorder.

MR. GRAHAM: I think that the reason that we graded them the way we do - I wouldn't compare the provision as to an infected person having sexual intercourse with the soliciting provision, I think I would compare it with the prostitution provision.

ASSEMBLYWOMAN KLEIN: That's what I meant, the prostitution.

MR. GRAHAM: Yes. It seems to me that an individual who is not engaged in the act for hire and who, therefore, at least probably is not engaged in the act with large numbers of persons on a constant basis does not raise the same kind of problem as does a prostitute who, if she becomes infected, can well infect very large numbers of men over a very short period of time.

The evidence from a study that was done on behalf of the English authorities in England is that it would not be uncommon for a prostitute to infect a minimum of a hundred men before her disease would become capable of being identified through blood analysis, in other words while it's still in the incubation period. I think that raises serious health problems, probably moreso than the relatively unusual application of the statute as to a knowingly diseased person having sexual relations.

I think that's the reason why we have a different level of punishment available. I think that as to the provision as to a person who knowingly has relations when he or she has a venereal disease that the use of the conviction there is virtually always, as far as I have been able to find out, to put the person on probation and force the person to have treatment.

ASSEMBLYWOMAN KLEIN: On this question of corroborative evidence, at present we do not have corroborative

evidence in any crimes?

MR. GRAHAM: No. We require corroboration today in seduction offenses. By statute that's required in New Jersey.

ASSEMBLYWOMAN KLEIN: Is it your experience that because of the absence of any form of corroborative evidence on rape that there has been a great deal of miscarriage of justice?

MR. GRAHAM: No. Let me put it this way. Rape today in New Jersey covers a multitude of sins, it's a statute that covers a great number of different acts including carnal abuse, and a charge of rape would also include attempted rape.

My experience has not been that I have ever seen a miscarriage of justice on either side in a true rape prosecution, in other words what we think of as a forcible sexual attack. I have seen cases and in discussions with other lawyers have discussed cases where charges by a young person, either a male or a female, of a sexual attack or attempted sexual attack by an adult, usually an adult male, have either resulted in convictions about which people have a great deal of doubt or have led to cases that are won at trial by what lawyers consider to be kind of luck. I have in mind the kind of case where a babysitter says that the man came home and tried to kiss her before he took her home, that kind of thing. I think that there is often, by a young person in that circumstance, a great deal of danger of a wrongful type of charge.

That's what we really were addressing ourselves to in our corroboration provision. Perhaps we have over-stated it.

ASSEMBLYWOMAN KLEIN: Well, you are saying then that at present with the absence of the necessity for corroborative evidence these charges are brought and are prosecuted and are punished while everyone is in

grave doubt as to whether they really took place?

MR. GRAHAM: Not everyone is in grave doubt because the jury found the person guilty so at least 12 people aren't in grave doubt. But people who have participated in the case, lawyers for both sides and judges, will tell you that they have a great deal of doubt about that kind of case and that they are all very hesitant about the worth of the conviction in that circumstance. That's the problem to which we were addressing ourselves.

ASSEMBLYWOMAN KLEIN: But the jury is not in doubt.

MR. GRAHAM: That's right. If the jury convicts, the jury is not in doubt. But the question is whether a case in that circumstance without any corroboration should be submitted to the jury. That's really the question that we are addressing ourselves to.

ASSEMBLYWOMAN KLEIN: Well, would that be different in other kinds of offenses? I mean, as I understand this Penal Code and understand our present law, there must be a finding of guilt beyond a reasonable doubt.

MR. GRAHAM: There must be evidence from which the jury could infer guilt beyond a reasonable doubt. That's right.

ASSEMBLYWOMAN KLEIN: Why would the same thing not be true in other kinds of cases, in other kinds of accusations?

MR. GRAHAM: I think that it's true in our law that the testimony of one person saying that the defendant did the crime is sufficient for a conviction. I think because of a history and an awareness of charges made by young girls and young boys against adults, claiming a kind of sexual attack that is often very hesitant, very preparatory, and the merest kind of intent, and because of the very serious effect that that kind of a charge,

even though it ultimately leads to an acquittal, has upon the life of the defendant that there is a feeling that there should be a little more evidence in that kind of a case. I think that's the problem we're worried about.

ASSEMBLYMAN DICKEY: Mr. Keogh-Dwyer, any questions?

MR. KEOGH-DWYER: No.

ASSEMBLYMAN DICKEY: Mr. Klein?

ASSEMBLYMAN KLEIN: I want to compliment you on your presentation. And I am very pleased to hear your comments, particularly about the subject of plea bargaining because I certainly agree with you that the thrust of this Code is to encourage plea bargaining and I consider that to be a very desirable effect.

I would like to ask you one question about the subject of preemption. Actually, it's a two-fold question on that subject.

First of all, can you tell me why the Committee decided that it did not want to go in the direction of total preemption; and, secondly, can you give me an example of the kind of area in which you believe municipalities would still be able to adopt penal ordinances or criminal ordinances.

MR. GRAHAM: Yes. As to your second question, I think dress codes to the extent that they can do that are still penal in nature, sometimes carry penal sanctions, but are not covered in any way by our Code and would not, therefore, be in conflict either with any provision of the Code or anything that's intentionally eliminated. We simply don't address ourselves to the question of whether one can appear on the street in a bathing suit. So that's I think, an example of it.

I think that the difficulty with total preemption of the right of the local governments to enact penal statutes is that it was really beyond the scope of the

mandate submitted to us. There are spread throughout Title 40 provisions applicable both to the local governments, the counties, the park commissions, the many different local governmental bodies that can deal with that kind of provision. I think if that's going to be put on a statewide basis someone would have to address themselves to the major problem of reviewing all of those statutes and deciding which of them should be eliminated and which of them should become the subject of statewide provisions. I don't think that that would be a bad idea; I agree that we have too much proliferation of too many statutes like that. I think, though, that we didn't recommend it someplace because it was beyond the scope of our mandate.

ASSEMBLYMAN KLEIN: One follow-up, and maybe this is a little bit of an unfair question but did the Committee consider that subject at all, the subject of preemption and, if so, aside from the administrative problems which you've properly pointed out that there is a great deal of work in doing that kind of thing, was there any sense of the Committee on that subject?

MR. GRAHAM: No. As the Commission reviewed it, I can recall that some people expressed almost the same view that was expressed this morning by the gentleman from the American Civil Liberties Union, the problem of different standards in so many different statutes. I think that we all agreed that what we wanted to do was protect the Code, protect what's here. And, of course, our provision is addressed solely to conflict with the Code and not with other statutes. So that that was really the scope of our review of the questions, protecting the Penal Code.

ASSEMBLYMAN KLEIN: Thank you.

ASSEMBLYMAN DICKEY: Mr. Wallace, any questions?

ASSEMBLYMAN WALLACE: I just have one question. I have before me here a copy of an ordinance that

was adopted in the Town of Kearny on June 14 of this year on the loitering problem. If this Penal Code is adopted, would this particular loitering ordinance then become non-active or inoperative?

MR. GRAHAM: Without seeing the ordinance and all of the many things that it might include in it, my quick answer would be that, if it's on the subject of loitering and the subject of loitering alone, the standard established by the State Legislature in the Penal Code would prevail over any standard set forth in the local ordinance.

ASSEMBLYMAN WALLACE: Thank you.

ASSEMBLYMAN DICKEY: Mr. Graham, I want to thank you very much for attending our two public hearings on the proposed Penal Code and for the excellent work you have done in assisting the Commission in drafting the Report.

We would like to accept your offer to meet with you and the members of the Study Commission after we've had a transcript of the hearings and the submission of recommendations from interested groups, and to assist us in drafting the proposed bill to be submitted to the Legislature.

MR. GRAHAM: Thank you. I will be happy to do so.

ASSEMBLYMAN DICKEY: Thank you very much.

The Judiciary Committee will recess for lunch. We will reconvene at 2 o'clock at which time we will have a public hearing on the subject of the death penalty.

(Hearing adjourned)

POSITION PAPER IN SUPPORT OF THE PROPOSED PENAL CODE

As presented in the Final Report of the

New Jersey Criminal Law Revision Commission

Oct. 1971.

Prepared for the Assembly Judiciary Committee

of the State of New Jersey

Presented by Law/Justice Studies

Glassboro State College, N.J.

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June 27th,1972

State Building

Trenton,N.J.

POSITION PAPER

The Law/Justice Studies department at Glassboro State College supports and endorses the proposed Penal Code as presented in the Final Report of the New Jersey Criminal Law Revision Commission of October 1971. The proposed Code has properly reasoned guidelines, is well researched and represents the best contemporary thinking. The Code is probably the most advanced and most realistic of any proposed at this time anywhere in the U.S.

We agree with Professor Wechsler that,.."If the penal law is weak and ineffective basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught in its toils." Therefore we are concerned with deprivation of protection for both the offender and the victim. With the increase in criminal activity and the increasing frequency of repeat offenders the question becomes what part does the legal process play in causing as well as deterring crime.

It is certain that the present increase in crime is severely taxing the courts and the resultant administration of justice. Thus there is a distinct inference that the present system may be perpertuating and intensifying a criminal sub-culture by its failure to move with the times. To return to our original statement of too much or too little punishment, it appears that either way the system offers no deterrent. Punishment exists with meaning only as social sanction.

From this we can presume that social sanction ought to be welded to the concept of resocialization of the offender through the legal process.

This we feel is now part of the Code in its approach to culpability, excuse,justification, degree of responsibility and degree of punishment.

We had hoped that the Commission would propose further reform for Corrections and Treatment of the offender, but wisely that has been delayed until the present Penal Code is adopted. Thus the commission has wisely put the priorities in legal perspective and social importance.

Again while men of reason may disagree on each and every section of the proposed code, it is clearly seen that men of reason will agree on the usefullness and practicality of an advanced uniform penal code. Like the Phoenix that has just risen from the ashes, the code has yet to attain the perfection of movement. However we see no reason why the present proposal will not achieve that perfection when once adopted.

Specifically we agree that a major advance is made by

1) matching the degree of offense to the degree of culpability
2) virtually eliminating the 'over-kill' in criminal prosecution by modernized and formalized concepts in the code concerning contemporary sexual behaviour.

We have long said that making a law does not remove a cause, nor does it create morality. Neither should the law seek to censor or set moral standards. We agree that the courts ought to be free to attend to more serious matters.

The setting forth of equitable grading of offenses is probably the most significant proposal made. Here we see an attempt at unification of the existing chaos. Not only is this proposal a proper social concept in terms of the democratization of the law, but if carried into effect would result in the clearing of crowded court dockets. The Upper Courts would have more time available to give to more serious violations.

We also state that the approach to sentence,probation and parole and the limitations and guidelines set forth in the code are necessarily a part of advanced correctional proceedure. They are in fact the determinations of the incarcerogenic nature of the offender. For example, the application of social sanction via the ritual of court proceedure does in fact determine the beginning life of all inmates. It is in this 'rite of transition' that the offender is desocialized. However if a degree of fairness, justice and social aid is manifest, it can be reasonably assured that such qualities will be reflected in the inmate's eventual resocialization. That is, we see the inmate as learning socialization through the legal process as much as we see him learning deviance through criminogenic association. We feel that the Code provides a base for respect for the law and respect for those who administer the law. We surely cannot expect respect when multiple standards prevail or when the law itself is administered inefficiently.

This code does provide an element for instruction as well as for sanction of the offender. It does remove the anxiety

from present indefinite proceedures. It does set up uniform standards and those standards are singularly professional.

It can be stated with certainty by the Glassboro Group that the major reform is not stated in the code. It is hidden by the letter of the law. However concerned the Code is in its depth of social consequences, the writers cannot see the final ripple of the tablet they cast upon the waters.

No group is more aware of social consequences than our own. We are in daily contact with the inmates of the prisons. Glassboro offers a 4year degree program at Leesburg State Prison. Our Law/Justice studies are dedicated to social reform throughout the entire spectrum of our programs. Thus we see as the most important and far reaching consequence, the shift in emphasis from prisonization to re-socialization of the offender. What we are saying is that by modernizing the legal proceedures and bringing them in line with contemporary socio-legal thought, WE WILL NO LONGER PROVIDE THE RECRUITMENT GROUNDS FOR MEMBERS OF ORGANIZED CRIME.

Our prisons are graduation colleges for organized crime. Prisoners establish elites and hierarchies known only to professional insiders. With the expansion of prison populations and the super-criminization of society, the inmate culture has responded to heavier sanctions by organizing a polarized sub-culture of syndicated crime. Such criminals who are in these elites received their training in our prisons...and

have graduated summa cum laude!

With the adoption of a progressive uniform Penal Code we would realistically approach the problem of organized crime. In our application of sanctions we would reduce the number of persons available for criminal recruitment. We would materially reduce the number of persons labelled criminal..that is, those put in prison uniform and assigned a license number...as identified 'criminals' !

Thus for any one reason alone we would support the code, yet we would agree that this last one is the most important. The Code is the first major piece of legislation offered to control crime at its source. It is a frontal attack on a serious problem of our times.

However our total endorsement is based upon the reasons stated herein and upon our own professional conclusions and experience in the field. We, as professors in Law and Justice Studies emphaszie that this code should be adopted as soon as possible. Certainly it is in the social interests of the community, and more important it is in the interests of justice for the people of the State of New Jersey.

Dr. T. Zink

Dr. T. Cox

Prof. E.Johnson