Tapes #18 and 19

#18 - 520 to end of Side 1; all of Side 2

#19 - 1 to 870 of Side 1

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

Third Meeting, September 7, 1968

Minutes

Members Present: Representative Dale M. Harlan, Chairman
Judge James M. Burns
Mr. Donald E. Clark
Mr. Frank D. Knight

Also Present: Professor George M. Platt, Reporter, University of Oregon Law School
Professor Courtney Arthur, Reporter, Willamette University College of Law
Mr. Donald L. Paillette, Project Director
Miss Kathleen Beaufait, Deputy Legislative Counsel
Justice Gordon Sloan, Chairman, Bar Committee on Criminal Law and Procedure
Mr. Jacob B. Tanzer, Member, Bar Committee on Criminal Law and Procedure
Dr. Joseph H. Treleaven, Oregon State Hospital

The meeting was called to order by Chairman Dale M. Harlan at 9:45 a.m. in Room 309 Capitol Building, Salem.

Minutes of Meeting of August 7, 1968

Judge Burns moved that the minutes of the meeting of August 7, 1968, be approved as submitted. Mr. Clark seconded and the motion carried unanimously.

Responsibility; Preliminary Draft No. 1; July 1968; including Mental disease or defect excluding responsibility; Issue of insanity is affirmative defense; and Immaturity excluding criminal conviction (Art. 5)

Chairman Harlan asked Professor Platt to comment on the responsibility draft he had prepared. Professor Platt said that problems with the insanity defense were largely procedural and practical and no matter what rule the Commission ultimately adopted with respect to the insanity defense, it wouldn't make much difference in the number of insanity pleas entered in Oregon. In discussing this subject, he said, the committee was dealing with a very small number of people who raised the defense of insanity in comparison to the number of people who contested criminal actions. The number, he said, who contested criminal actions was a very small part of those actually arrested and as high as 90% of those apprehended for a crime, entered a plea of guilty or for some reason did not go to trial. Of the 10% to 20% who actually contested a criminal action, only a minute portion raised the defense of insanity. Although the number was small, Professor Platt noted, the subject was large in the public's

attention because normally the crime involved was a heinous type of offense -- usually a capital crime -- on which the public focused great attention.

Professor Platt explained that one of the reasons people did not plead the insanity defense more often was because if they won, they could face a long indeterminate period of detention in a mental institution since no sentence was involved and they were committed until returned to sanity and considered no longer to be dangerous to society. Also, a number of other courses competed with the insanity defense and they were all included in other parts of the Model Penal Code which dealt with the subjective approach to criminality.

The best example of subjective criminality which had a direct connection with insanity defense, he said, was the Wells-Gorshen doctrine of California, or partial responsibility, which said that if a man was charged with murder in the first degree, the state must show premeditation. Under the partial responsibility defense the defendant could show that he was incapable of premeditation because he had delusions or had a mental condition which fell short of the M'Naghten rule. If he won his case under this defense, he would be assured of a term rather than indeterminate detention.

Another example of the type of defense which competed with the insanity defense, Professor Platt said, was set forth in Model Penal Code section 3.04 (2) and established a completely subjective rule for self-defense which took into consideration what the individual's reaction was as well as his state of mind at the time of the offense. If the defendant was in fact subject to greater fear than the so-called normal person, he would be allowed to raise the issue of self-defense. Professor Platt pointed out that in many cases the mental disease or defect would cause a lessening of a person's ability to comprehend that he was really not in such great danger in a given situation and he would therefore over-react because of that mental disease or defect even though his mental condition fell short of insanity. As a result, there would be cases where the defendant would be given complete discharge under this defense.

Section 1. Mental disease or defect excluding responsibility. Professor Platt indicated that section 1 of the draft was the adoption of the Model Penal Code formulation. Subsection (2) was also found in the MPC and he had inserted it in brackets, he said, because he felt there was no necessity for its inclusion. If the defendant could qualify for the right - wrong test, he could do so under subsection (1) and subsection (2) appeared to be superfluous propaganda to give strength to the first formulation.

Judge Burns mentioned that he had not seen any statistics on the number of cases in which the insanity defense was asserted or any figures as to how often it succeeded and asked if they had been

gathered. Professor Arthur said he had read somewhere that the defense was asserted in something like 3% of litigated cases. Miss Beaufait related that the University of Chicago jury study had found it was a relatively rare plea and almost always involved a capital offense or one where a severe punishment was a possibility. Professor Platt said he had looked at all the Oregon cases he could find on the insanity defense, which amounted to 30 or 35 since 1864 or before, and not until 1950 had one been successful.

Mr. Knight reported that in the last three and a half years he had tried five homicide cases and the defense of insanity was raised in three of them. Two were found not guilty by reason of insanity and only one of those was committed by the judge to the State Hospital where she was kept for not more than 60 days. Professor Platt asked who had the authority to discharge such a person from the hospital and Dr. Treleaven answered that the statute said the discharge was entirely in the discretion of the Superintendent of the State Hospital.

Judge Burns commented that another interesting statistic to see would be the length of time defendants remained in the State Hospital after commitment following acquittal by reason of insanity. He said he had heard some criticism that offenders were kept 30 days to six months and if they were too ill to be subjected to the criminal law, this seemed a relatively short period of detention.

Dr. Treleaven said that in the last two years he could think of three or four people who had been found not guilty by reason of insanity on homicide charges and most of their length of stay at the State Hospital was consumed by the time spent in getting their legal charges cleared up. He said the hospital treated these patients until they were well enough to stand trial and by the time they had gone through the process of being found not guilty, they were pretty well on their way to recovery. He said he thought the average stay would be from six months to a year.

Mr. Tanzer commented that in Multnomah County there was recognition by lawyers that acquittal by reason of insanity was generally better for the client than a straight defense. He expressed the view that the committee should not think too much in terms of statistics; the more important thing was whether justice was being done in the individual case and which rule had been shown to produce the best results. The statistics, he said, did not show the magnitude of the problem, one reason being that many offenders were taken out of the criminal process through civil commitment by the court at the arrest stage. If the police officer or the deputy district attorney believes the person to be insane, he often starts commitment procedures rather than criminal procedures.

Miss Beaufait noted that the University of Chicago jury study had shown that the question of the ultimate disposition of a particular

case did weigh on the willingness or the unwillingness of juries to find a person not guilty by reason of insanity. Professor Platt commented that one of the rules in Oregon was that the jury could not be told by the judge in his instructions to the jury that if the defendant was found not guilty by reason of insanity, his commitment was discretionary with the court.

Professor Platt expressed agreement with Mr. Tanzer that the choice of the rule should depend on how best to dispose of the individual case. He was of the opinion that adoption of the Model Penal Code formulation would not be too great a change from Oregon's present rule as applied in the courts but it might permit more realistic help from psychiatrists. He said Supreme Court reports indicated that in actual practice, despite the limitations of the M'Naghten rule, the judges allowed considerable leeway and broad psychiatric testimony rather than holding testimony strictly to whether the defendant knew the difference between right and wrong. Judge Burns confirmed this was true in the courts with which he was familiar.

Mr. Tanzer observed that the important question was whether the people sent to the Hospital or to the penitentiary on insanity verdicts were confined in the appropriate institution. Dr. Treleaven replied that in general the people sent to the Hospital needed to be there. He had seen, he said, cases of error, particularly of those in prison who were obviously mentally ill. The Hospital, he said, received many persons for examination who were raising the insanity defense whom the psychiatrists believed to be sane and usually by the time the final decision was made, those people were sent to the penitentiary. Mr. Tanzer commented that Dr. Treleaven's statement would indicate the M'Naghten rule was working fairly well in Oregon and Dr. Treleaven confirmed this statement.

Mr. Tanzer said the argument he had always heard for the M'Naghten rule was that it did work and was relatively easy to apply in court. The argument against the Durham rule was that it did not work; it was in effect a "non-rule." He did not know what the experience had been with the ALI formulation, he said.

Professor Platt maintained that one thing which should be added in Oregon was the control test, included in the Model Penal Code's formulation. It did not use the term "irresistible impulse" because that phrase was misleading but the test meant that if he had no volitional control -- knew right from wrong but could not control his action -- this was part of the insanity test and there should be free testimony on it. He said it was not a great expansion of the rule but would fill in an area which was not presently covered. He pointed out that he had seen cases where the circuit courts permitted this type of testimony and the Supreme Court was apparently not offended by it. The Supreme Court did, however, say that the court could not instruct on the point, but the jury received the information and that was the important consideration. Mr. Tanzer pointed out that such testimony

entered the record through the defense psychiatrist's testimony that the defendant was so excited at the time of the crime that he lost his capacity to know right from wrong and at that moment his reason was suspended.

Dr. Treleaven commented that psychiatrists at the State Hospital generally tended to be more conservative than the usual psychiatrist employed by the defense who ordinarily testified that the defendant was insane if he couldn't control himself. He reviewed the practice followed at the State Hospital with respect to persons raising the defense of insanity. He said there were 130 to 150 cases per year sent to the Hospital for court-ordered examinations and each individual was given a thorough study taking one or two months. Each case was then reviewed by a board, of which he was chairman, and the board heard five or six cases every week. Collectively, the board reached a decision as to the person's sanity at the time of the act, whether he could stand trial and whether his act was the result of a mental illness.

Mr. Paillette asked if most of the patients the court called upon the Hospital to examine had a history of violence or were being charged with crimes of violence and was told by Dr. Treleaven that the majority were there for crimes of violence, sex offenses or arson.

Professor Platt noted that Dr. Treleaven had discussed the repeated examinations given to each person at the Hospital and said there was a possibility that an individual might be detained for a number of years because the doctors could not predict what his reactions would be when he was returned to society. He asked if it would be advisable to provide a system that would force the state to review periodically the commitment of these people.

He referred to Professor Goldstein's book The Insanity Defense in which the author asserted that there should be a sentence for minimum detention in a State Hospital, much like a sentence in a criminal court. When the sentence had been served, the state would be required to grant that person a judicial court review of his case wherein the state would have the burden of showing that the person should remain in the institution. If this practice were adopted, he said, it would incline more people to adopt the insanity defense because they wouldn't fear a long, indeterminate period of detention.

Judge Burns said he disagreed with Professor Platt that defense attorneys in Oregon avoided asserting the insanity defense because they feared a long period of detention if the defense was successful. He said he was reasonably satisfied that the fear of a long, unreviewed detention in the State Hospital was seldom a meaningful consideration in the decision that the defense attorney made in deciding on the best defense for his client.

Mr. Knight agreed that if there was any danger of a long term commitment in the Hospital, the person was usually very obviously

insane. The only instance when the length of commitment might be of concern, he said, was where the person had committed a crime so minor that the maximum sentence for the offense was 30 to 60 days.

Dr. Treleaven said that when a person was committed to the State Hospital, it was the Hospital's responsibility to cure and release him as soon as possible and there was constant review of each case. The people who caused some concern, he said, were the ones who were unable to stand trial and where there was a tremendous amount of local feeling concerning the act committed.

Chairman Harlan asked if there was a substantial number of persons who were not ready to stand trial and yet were not dangerous to society. Dr. Treleaven replied that this was a problem and particularly so with the mentally retarded because by definition the mentally retarded probably would never be able to stand trial. He suggested that the period of time during which a person was unable to stand trial should have a time limit placed on it so the cases would have to be disposed of one way or the other within a given period.

Partial responsibility. Professor Platt called attention to the case of State v. Van Kleeck, 85 Ad. Sh. 319 (1967), which involved a woman who killed her three children. Four psychiatrists testified she was insane under M'Naghten; two for the state testified she wasn't insane on the control test questions; but all agreed she was mentally ill. She was prosecuted for murder in the first degree, found guilty of second degree murder, sentenced to 25 years in the penitentiary and the Supreme Court approved that conviction. Professor Platt said he cited this case because it pointed up an example of a person who fell short of the insanity test under M'Naghten and was in effect convicted of a reduced or partial responsibility crime (not premeditated murder) although the issue of partial responsibility was not raised at the trial.

This result, he said, raised a question of whether a person in this situation would be better off in a mental institution with an indeterminate commitment or in a penitentiary with a 25 year sentence where no psychiatric help was available to her. Dr. Treleaven said he was familiar with this particular case and Mrs. Van Kleeck was currently being reviewed by the Hospital. He indicated both she and society would benefit more by having her in the State Hospital rather than the penitentiary.

Mr. Tanzer asked if there was machinery for an administrative transfer from the penitentiary to the State Hospital and Dr. Treleaven said there was, but no way existed to make a transfer from the Hospital to the penitentiary.

Professor Platt pointed out that the Model Penal Code in section 4.02 (1) included a provision dealing with the subject of partial responsibility and said:

"Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense."

This provision had not been included in the draft, he said, because it was an issue which the committee might not want to consider at this point. He said the Supreme Court had never had the specific issue before it as to whether Oregon followed the doctrine of partial responsibility. Justice Sloan replied that in one case the court reduced a first degree murder charge to second degree because the defendant was intoxicated and the opinion virtually amounted to a holding on partial responsibility.

Professor Platt asked if the committee wanted to consider the problem of adopting a partial responsibility doctrine similar to the one in the Model Penal Code. Chairman Harlan was of the opinion that the committee should at least examine this possibility.

Bifurcated trial. Mr. Clark expressed the view that when a person was deemed unable to stand trial, there should nevertheless be a procedure by which it could be determined whether or not he actually committed the act charged to avoid incarcerating someone for a long period of time for an act which he might not have committed.

Mr. Tanzer commented that Mr. Sol Rubin had discussed this subject when he appeared before the Commission in January, 1968. He was asked which of the definitions of criminal responsibility the Commission should adopt and he replied that Oregon should stay with M'Naghten or, better yet, do away with the rule entirely and let the trial concern itself only with whether the defendant had committed the act and then allow psychiatric evaluation and permit the judge wide sentencing options.

Mr. Knight pointed out that Professor Goldstein in The Insanity Defense was opposed to the bifurcated trial because Supreme Courts in some states had held it to be unconstitutional for the reason that it violated due process by removing the defendant's right to a jury trial and because mens rea was an element of any crime. Mr. Tanzer suggested the possibility of drafting a narrow rule and broadening the alternatives available to the sentencing judge.

Justice Sloan said that if it were possible to hold an initial proceeding merely to determine if a person had in fact committed the act charged, a tremendous burden would be lifted from the courts. The question of treatment to be accorded the defendant would then be a separate issue. Mr. Clark advised that he would like to find some way to establish such a procedure in Oregon. He also recommended that the Commission obtain a copy of the book entitled Psychiatric Justice.

Professor Platt called attention to an article written in 1962 which was commissioned by a California legislative committee to

investigate the bifurcated trial system and to make recommendations. He read from the report, co-authored by Geoffrey Hazard, which indicated there was great dissatisfaction with the split trial system in California, principally because of the mens rea requirement in all major crimes. The report said in part:

> "The separate trial procedure was based on an inaccurate premise of law. It assumed that the issue of guilt and the issue of mental condition are separable. We submit that reason shows they are not separable and that experience confirms this conclusion. We therefore believe that the separate trial system should be abolished."

Professor Platt added that the study showed there was as much testimony on insanity at the first trial as at the second and the bifurcated trial merely extended and complicated the trial process. He also called attention to a recent article in the Washington Law Review in which the author pointed out that several states had shifted to the bifurcated trial and had long since returned to the one trial system. This, he said, would confirm the conclusion of the California study that the bifurcated trial was unworkable.

Professor Arthur agreed that the split trial was too complicated and urged that the committee adopt the MPC formulation. Since Oregon presently allowed broad psychiatric testimony, he said, it should be legitimized by statute.

Dr. Treleaven advised that whatever the committee ultimately decided, the mental hospital should not be placed in the role of a punishment or custodial institution. The social concept of "getting even," he said, might apply to some offenders but it was not applicable to the vast majority of people committed to the State Hospital.

Chairman Harlan asked Dr. Treleaven if he would approve of a minimum commitment for insane persons and was told that he would be opposed to such a provision because he believed the role of the hospital was treatment, not custody.

Judge Burns indicated he had hoped to have three psychiatrists present at today's meeting but none had been able to attend. He said he had talked the previous evening to Dr. G. B. Haugen, a Portland psychiatrist generally considered to be a prosecution psychiatrist as opposed to a defense psychiatrist. He was, he said, active in 1961 in prevailing upon Governor Hatfield to veto the ALI insanity defense formulation passed by the legislature and had spent 18 years as psychiatric consultant to the State Board of Parole seeing essentially the most difficult cases.

Dr. Haugen had told Judge Burns that if the proposed draft were adopted, of those he saw in his work for the Parole Board, about 20%

would probably have proper insanity defenses under the proposal. Further, if the courts later declare alcoholism to be a disease, this would increase the number who would qualify under the ALI test. Dr. Haugen did not believe the language the committee ultimately adopted was as important as it would have been before the death penalty was abolished in Oregon and in his experience he said there was no urgency in changing the present rule and would favor retention of M'Naghten. He could recall only three persons who were found not to be insane under the M'Naghten rule whom he felt were actually insane. Dr. Haugen told Judge Burns he thought psychiatrists in general would probably endorse the proposed draft and, as a matter of protection to psychiatrists, he thought it would have a good effect in taking the psychiatrists out of the war of words in which they felt quite uncomfortable in an adversary proceeding. He also suggested that when the draft was ready for circulation, it should be sent to two organizations: the Portland Psychiatrists in Private Practice and the Oregon District Branch of the American Psychiatric Association.

Mr. Tanzer pointed out that the thing that distinguished Dr. Haugen from so-called defense oriented psychiatrists was that he didn't feel free to attach his own meanings to the words. When he was asked to apply M'Naghten, he did so in a very literal sense. Some of the defense psychiatrists, he said, didn't feel bound by the words and fashioned their own conclusions into the rule.

Professor Platt observed that the subcommittee so far had been discussing expert testimony, which was by far the most important testimony at a trial, but asked what rules should be applied to the layman who was testifying as to a person's sanity and how that testimony would fit under a rule of a new statute which prohibited a psychiatrists from stating a conclusion. Mr. Tanzer replied that the Commission should stay with the traditional rules of evidence, and Mr. Paillette informed the committee that a study of the rules of evidence was one of the priority items which the Law Improvement Committee intended to take up in the near future.

Dr. Treleaven indicated it was necessary for him to leave the meeting at this point. Judge Burns asked him how difficult it would be to supply the committee with figures as to the number of persons sent to the Hospital over the last several years after a verdict of not guilty by reason of insanity and the average length of their stay and also figures as to the number of persons found not to be able to assist in their own defense. Dr. Treleaven responded that their cases were not indexed in any of those classifications but he would attempt to go through the cases for the last year or two and try to furnish the committee with some statistics.

Mr. Tanzer, speaking to the formulation which should be adopted, said before he became a prosecutor he was in favor of the ALI formulation but he was now persuaded that the M'Naghten rule worked at least as well as any other rule in actual practice. There was, he said, an occasional case, such as the Van Kleeck case, where the defendant should have been sent to the Hospital rather than to the penitentiary but such cases could be handled through the administrative

transfer powers of the Corrections Division. He noted that the procedure available to shift persons from one institution to the other was now exercised very sparingly and probably should be expanded.

Judge Burns indicated he too at one time felt the M'Naghten rule was wrong but now believed it was as good as any of the other rules. As a practical matter, it did not prevent most of the helpful psychiatric testimony in court and he did not feel it was important that it be changed providing the Commission dealt with the other end of the problem, namely, what to do with the person once he was acquitted by reason of insanity. This, he said, was the key portion of the problem regardless of the rule adopted. He added that the legislature and the public would probably be generally less willing to accept a change to what they might feel was an easier rule than to stay with the M'Naghten rule.

Professor Platt agreed that M'Naghten was a good rule and Oregon would not be in trouble if no change was made. He reiterated, however, that Professor Goldstein made the point that if there was a legitimate criticism of M'Naghten, it was that the rule should contain a control formulation and should be more liberal on both the kind of evidence allowed on the question of control and on jury instructions. Mr. Knight objected to this suggestion because the prosecution would have to defend against the control test in every case.

Section 2. Issue of insanity is affirmative defense. Professor Platt pointed out that the proposed section 2 contained a substantive change from present Oregon law under which the defendant now bears the burden of proof by a preponderance and the state need not prove sanity beyond a reasonable doubt.

Judge Burns contended that the prosecution should not have to bear the burden of proof and further objected to the manner in which section 2 was drafted. He noted that the section first said that the issue of insanity was an affirmative defense and then provided that the minute evidence of insanity was entered, the burden was placed on the prosecution. If the Commission wanted that result, he said, the statute should so state rather than calling the procedure an "affirmative defense" which was a misnomer. He was of the opinion that the burden was where it belonged under the present law.

Professor Platt replied that "affirmative defense" was used because of the definition of the term contained in section 1.12 of the Model Penal Code. He had relied on that definition on the assumption it would later be adopted by the Commission, he explained, and if it were not adopted, revision of section 2 would be necessary.

Mr. Tanzer also opposed section 2 and pointed out that the Oregon Supreme Court had joined a minority of the Supreme Courts in the United States by holding that the Fifth Amendment applied to psychiatric evaluations and had thereby taken away the tool by which

the state could prove its case if this section were adopted because the defendant was not required to respond to psychiatric questions. Mr. Knight disapproved of section 2 and observed that under the present rule the defendant at least had to have some foundation for his insanity defense before he raised the issue. Justice Sloan agreed that the burden of proof should remain on the defendant.

Professor Platt asked the committee what they would think of adopting the approach of the Wisconsin Supreme Court which said that the defendant was required to answer all questions the state psychiatrist asked but in exchange for that, the insanity issue was tried first rather than trying the defendant's act. Judge Burns replied that adopting the Wisconsin procedure would be a substantial change from present Oregon law and might be more dangerous than the current statute which, in his opinion, was not unfair.

After further discussion, Judge Burns moved that section 2 be deleted from the draft and the burden of proof remain on the defendant by preponderance of the evidence. Mr. Knight seconded and the motion carried. Voting for the motion: Judge Burns, Mr. Clark and Mr. Knight. Voting no: Chairman Harlan.

Section 3. Immaturity excluding criminal conviction; transfer of proceedings to juvenile court. Professor Platt explained that section 3 made very little change in the Oregon law but posed the question of whether the time of the act should control with respect to jurisdiction of the juvenile or whether the time of remand should control. Present Oregon law, he said, followed the rule that the age of remand, not the age of the act, controlled. Section 3 would change the present rule and prohibit the 15 year old from being held by the juvenile court until he was 16. Professor Arthur pointed out that this would abrogate the rule in the case of State v. Little, 241 Or 557 (1965).

Judge Burns asked what the arguments were against the Little rule and was told by Professor Platt that a man was entitled to a swift trial and if he was held by the juvenile court for a long period, for example, two years, until he passed age 16, it worked an unfair hardship on the accused.

Mr. Knight expressed the view that the age of remand should control in this situation. He said the state could not sit back for a period of two years waiting for the defendant to reach the age of 16 because he had his right to a speedy trial. He further pointed out that under the language of the draft, if a person committed a crime at the age of 15 and was not apprehended until he passed the age of 18, he could not be prosecuted in any way. Under subsection (1) (a) he could only be treated as a juvenile and would only fall under the Juvenile Code if he were under the age of 18. Professor Platt agreed that the problem posed by Mr. Knight existed in the draft and noted that the intent of the draft was that the 18 year old should be

subject to regular criminal process as he would if he were 16 or 17 when apprehended. He also noted that it was not absolutely necessary to include section 3. If the Commission did nothing with respect to this subject, he said, the Juvenile Code would control and the Little rule would be in effect, but he had included the section in the draft for purposes of submitting a comprehensive criminal code.

Mr. Knight said it was his personal opinion that the ruling in the Little case produced a just result. In the very serious cases, he said, it would be best for society that the juvenile be treated as an adult so society could maintain controls over him. He suggested that in the more serious crimes the age of remand might be made even lower.

Professor Platt pointed out that the rule in the Little case would stand if the statute provided that the remand must be made before the expiration of a "reasonable time." That language, he said, would leave the age of remand at 16 and permit the court to hold the 15 year old who would be 16 in two or three months. Mr. Tanzer urged that the committee tamper as little as possible with the Juvenile Code and the members agreed.

Justice Sloan expressed the view that there was nothing wrong with the Little ruling other than the possibility that the court might attempt to hold a defendant until he reached the age of responsibility and the speedy trial requirement solved that problem. Judge Burns said he too would oppose section 3 in so far as it changed the result in the Little case.

Mr. Tanzer contended that the draft complicated the problem. There were, he said, two completely separate questions involved. One was the jurisdiction of the court and that was taken care of by the Juvenile Code. The other question was capacity and that could be handled by codifying the common law and changing the ages involved in the common law simply by saying "when tried in adult court." Even this language, he said, was unnecessary because there was no other manner in which the juvenile could have reached adult court.

Professor Platt replied that if the common law incapacity rule was reasserted without limiting it to the particular class of juveniles who committed a crime at an early age and were not caught until past age 17, this would undo the Juvenile Court Act. Mr. Tanzer said it should be clear that the provision was applicable only to that particular class that had gone past 17 when they were tried but even this was unnecessary.

Professor Platt requested the committee to give him specific instructions for redrafting section 3 and asked the members if they wished to retain the draft as presented in the Model Penal Code except to incorporate the Little rule so the court could hold the juvenile long enough to remand him. Chairman Harlan advised it was the concensus of the committee to omit any reference to the Little rule

because the Juvenile Code already covered that situation. He asked Professor Platt to prepare a draft either leaving the ages blank and the committee would insert them at the next meeting or, as an alternative, to select a draft from another state for the committee's consideration.

Next Meeting

The matter of psychiatrists appearing before the committee was discussed and it was decided that psychiatric testimony should be heard by the full Commission when they considered the Responsibility article rather than asking them to appear first before the subcommittee and later before the Commission.

Professor Platt indicated he had finished about three-fourths of the inchoate crimes article and it was his hope to have it completed before school began on September 30. The committee agreed to have another meeting on the Responsibility draft as soon as possible and prior to beginning work on inchoate crimes. The next meeting date was set for Friday, September 20, at 1:30 p.m.

Professor Platt pointed out that the committee also had a policy choice to make with respect to dealing with an offender after he had been found not guilty by reason of insanity and dealing with him after his competency had been decided. These, he said, were procedural matters but were so closely related to the substantive matters that it was difficult to separate them. The committee, he said, should make a decision whether to work on procedure together with the substantive revision or to postpone these difficult decisions until later. Mr. Paillette advised that the subjects were so closely related it would be almost impossible to postpone procedural decisions and recommended that an exception be made in this instance to the Commission's decision to defer procedural policies until the substantive revision was completed.

The meeting was adjourned at 1:30 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission