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FOREWORD

The proposed Criminal Code is the product of three years of concerted effort by the Oregon Criminal Law Revision Commission. The Commission was created by chapter 573, Oregon Laws 1967, and was directed to "prepare a revision of the criminal laws of this state, including but not limited to necessary substantive and topical revisions of the law of crime and of criminal procedure, sentencing, parole and probation of offenders, and treatment of habitual criminals" for submission to the 56th Legislative Assembly in 1971.

Since 1962, when the American Law Institute published the Model Penal Code, the number of states recognizing the need for penal code reform has steadily mounted, until today over 30 of them are engaged in revision projects. In addition, a special commission is working on an unprecedented overhaul of the federal criminal statutes. Oregon thus is part of a major criminal law reform movement now occurring in this country.

Oregon's basic *corpus* of statutes that comprise its substantive criminal "code" is 106 years old, dating back to Deady's Code of 1864. In the course of over a century minor surgery has been performed on that body hundreds of times to try to correct specific ailments, but a major operation has never before been attempted. In 1931 the Legislature created a temporary crime commission "to study . . . the crime situation . . . and to suggest revisions and amendments to the statutes," and in 1959 an Interim Committee on Criminal Law was established. Neither of these groups undertook to accomplish a complete revision of the criminal code, but the latter committee, recognizing the need for and the magnitude of such a project, recommended the creation of a state commission with a 10 year life to accomplish the task.

The existing code, because of its age and the numerous piecemeal changes made in it over the years, suffers from two basic infirmities that plague the laws of many of the states—it has not kept pace with society's changing standards, resulting in retention of substantive provisions now neither necessary nor desirable—and it is replete with overlapping and seemingly inconsistent crimes and penalties. The Commission has endeavored to rectify these faults by drafting a comprehensive, interrelated Code—internally consistent and designed not for the 1860's but for the 1970's.

During the past three years the Commission members have been called upon to make difficult, and frequently controversial, value judgments. The proposed Code—encompassing departures from present law that range from minor modifications to major policy changes (discussed in further detail in the commentaries)—reflects the results of those decisions. The issues were always vigorously discussed and often hotly debated, first by one of the three adoption and revision subcommittees and later by the full Commission. The provisions set forth in this final draft and report represent a Commission position that was sometimes a unanimous expression but always a majority view. So, while the entire Commission recommends the enactment of the proposed Code, obviously not every member agrees with every provision in it.

The most controversial question to come before the Commission was the matter of gun control, on which the members were almost evenly divided in their sentiments. By a narrow vote, after four grueling subcommittee drafting sessions and three Commission meetings, it was decided that a firearms registration proposal would be submitted to the Legislature in 1971, but because of its particularly volatile nature, that it would be introduced as a separate bill apart from the proposed Code. Consequently, the provisions dealing with gun registration, along with those covering the traditional kind of firearms offenses such as unlawfully carrying a concealed weapon and illegal possession of a firearm are not included in this draft.

It is self-evident, however, that sensitive and controversial provisions are contained in the Draft Code. A law revision project, especially one concerned with the criminal laws of the state,

could not—and should not—avoid such matters and still discharge its responsibilities. The paramount and pervasive considerations that underscored all deliberations of the Commission were: (1) the protection of the citizens of the State of Oregon which should be enhanced by (2) eliminating or minimizing many of the current law enforcement problems by the adoption of (3) a Criminal Code that will better protect society from acts that threaten life or property by providing a basic tool of law enforcement that does not invoke unenforceable criminal sanctions against activity that many persons either practice or condone.

Among the more polemical changes recommended by the Commission are: (1) the abolition of criminal penalties for adultery, lewd cohabitation, seduction and private consensual homosexual conduct between adults; (2) the approval of reasonable mistake as to the female's age as a defense to statutory rape; (3) the repeal of the *M'Naghten Rule* as a test for legal insanity and adoption of the Model Penal Code's somewhat broader definition; (4) a new concept of criminal assault which requires the intentional or reckless infliction of actual physical injury on another; and (5) abrogation of degrees of murder.

Two other areas in which significant policy changes are suggested involve gambling and obscenity. The sections on gambling focus on the professional, exploitative kind of conduct and do not prohibit the "friendly social game." The obscenity sections make no attempt at controlling material that is dispensed to or consumed by adults, but do try to carefully define the legal limits of permissible materials for minors or public displays of nudity or sex for advertising purposes.

Probably the most notable aspect of the proposal and a chief concern of the Commission are the grading and sentencing provisions which employ an offense classification system. Each offense, excepting the noncriminal "violation," is classified as a felony or misdemeanor under an *A*, *B*, *C* format, according to the seriousness of the crime. The grading and classification of offenses was the final step in the drafting of the specific crimes to ensure that differences in their gravity were appropriately considered and that similar penalties would attach for similar offenses.

The proposed Code consists of 288 sections, only 152 of which define specific offenses. The remaining 136 sections deal with general provisions, definitions, defenses, sentencing, etc. The draft would repeal 467 existing statute sections, 340 of which are crimes, transferring seven of them to other chapters in *Oregon Revised Statutes*. The net result is that the proposed Code contains 181 *fewer* crimes than the existing law. Of the 181 crimes deleted, 34 would be repealed outright with no comparable statute reenacted, and the other 147 crimes would be covered by new, comparable provisions that eliminate needless distinctions and redundant sections by consolidating similar offenses.

The substantive changes in the proposed Code are set forth in a new format that is designed to present the provisions as clearly and simply as possible. Everyday language is used wherever possible and terms that are intended to have fixed legal meanings are fully defined. The liberal use of definitions in each article permits a shorter and less complicated statement of the elements comprising each statutory offense.

We believe that the proposal removes many of the ambiguities that lurk in the existing statutes, but we realize that in drafting the 32 articles we may have unknowingly created some new questions that will have to be resolved by the courts. However, the criminal laws of the state should not remain static but, on the contrary, should be a viable force in society. The Commission certainly doesn't mean to imply that it has drafted a perfect criminal code; nonetheless it is submitted to be a vast improvement in many areas. The integrated structure of the Code will help it to remain a viable force in years to come because it can be systematically changed or amended by the Legislature as the future need arises. Furthermore, the culpability definitions, the classification of offenses and the general provisions of the Code will provide the Legislature with the guiding principles that can be followed to attain uniformity among the numerous regulatory statutes that carry criminal penalties.

This has been a *working* Commission. Since August 1967 the members have attended 57 subcommittee meetings and 21 full Commission meetings, six of which were two-day sessions. The combined total of 78 meetings represents approximately 4,000 manhours expended, not including staff time.

As the work of the Commission progressed, study drafts and related materials were distributed to the various legal, judicial and law enforcement groups and other interested persons throughout the state for their evaluation and comments. Literally hundreds of copies of such papers have been so circulated during the past 36 months in order to keep these parties apprised of Commission activity.

In the early stages of its activity the Commission decided to undertake first a revision of the substantive laws and to defer work on a procedural code until completion of this phase of the project. One of the main considerations in reaching this decision was the fact that the Model Penal Code and the recent revisions of several sister states provided us with a ready and valuable source of materials for comparative research. The *rationale* of the proposed Code is in many instances derived from the Model Penal Code, although the *structure* and frequently the substance of the Oregon proposal generally follows the New York Revised Penal Law (1965, amend. 1967-8) and the Michigan Revised Criminal Code (1967). Other state codes or drafts on which some of our proposals are based are the Illinois Criminal Code (1961) and the Proposed Connecticut Penal Code (1969). We gratefully acknowledge the assistance we have received from each of these states. We also wish to thank the members and staff of the Joint Legislative Committee for Revision of the California Penal Code for their generous help and advice.

Many other groups and individuals within the state have contributed time and talent to the project. The Commission is deeply grateful to George M. Platt, Associate Professor of Law, University of Oregon School of Law, who was Reporter for Articles 5, 6 and 10 and who assisted the Commission in many other ways during the past three years. We extend our thanks also to Courtney Arthur, Professor of Law, Willamette University College of Law, who assisted in drafting Articles 1 and 7. Liaison has been maintained with special committees of the Oregon Circuit Judges Association, the District Judges Association, the Oregon District Attorneys Association and the several law enforcement associations. Members of the Oregon State Bar Committee on Criminal Law and Procedure have been especially helpful. The Commission expresses its thanks to each of these associations, committees and individuals for the aid given.

One final observation about the proposed Code needs to be made. It does not contain procedural provisions, with a few minor and two major exceptions—the sections dealing with procedure in cases of mental disease or defect excluding responsibility (Article 5)—and the sections covering eavesdropping warrants (Article 27). In these instances the procedure involved was so important to the operation of the substantive sections that they were made a part of this draft. If the integrated Code is enacted by the Legislature, the Commission recommends that the procedural sections remain a part of it.

The Commission believes that a comprehensive revision of the criminal procedure statutes should be the next order of business and will now begin work on a procedural code. We intend to formally request the 56th Legislative Assembly for a two year extension in order to complete the procedure phase of the criminal law revision project.

Mr. Justice Frankfurter once observed that "the Legislature is dependent on treacherous words to convey complicated ideas." We earnestly trust that the words on which we have depended will not prove "treacherous" but will serve the Legislature well in the pages that follow.

OREGON CRIMINAL LAW REVISION COMMISSION
Senator Anthony Yturri, Chairman

Salem, Oregon
July 1970

TABLE SHOWING DISPOSITION OF EXISTING STATUTES

Column (1) lists each section of *Oregon Revised Statutes* that is either repealed or substantially amended by the proposed Criminal Code. Column (2) shows whether the section is repealed (R) or amended (A). Column (3) shows, if the ORS section is repealed and comparable coverage retained, the draft section(s) that specifically or generally covers the same or approximately the same subject matter; and if the ORS section is amended, the draft section that accomplishes the amendment. The printed bill will contain numerous "housekeeping" amendments to delete or change language or cross references in statutes outside the Code that would become obsolete under the proposed revision. In the interests of printing economy these subordinate amendments are not included in this draft nor shown on this table.

(1)	(2)	(3)
131.390	A	306
133.230	R	199
133.280	R	27 to 29
133.370	R	27 to 29
133.380	R	27 to 29
136.150	R	50 to 52
136.160	R	52
136.390	R	38
136.400	R	11
136.410	R	36
136.560	R	.....
136.730	R	43 to 49
137.010	A	307
137.075	A	308
137.111	R	85, 86
137.112	R	85, 86
137.113	R	85, 86
137.114	R	85, 86
137.115	R	85, 86
137.117	R	85, 86
137.119	R	85, 86
137.120	A	309
137.124	A	310
137.150	R	81, 82
137.200	R	80
137.205	R	80
137.340	R	199
137.510	R	84
141.720	R	235 to 244
141.730	R	228
141.740	R	231
144.230	R	.....
145.030	R	30
145.110	R	22 to 26
161.010	R	3, 7
161.020	R	66
161.030	R	67, 69, 83
161.040	R	5
161.050	R	2
161.060	R	6
161.070	R	6
161.075	R	76
161.080	R	69, 77
161.090	R	54
161.100	R	.....
161.110	R	.....
161.120	R	.....
161.210	R	12, 13
161.220	R	12, 13
161.230	R	207
161.240	R	207
161.250	R	209
161.310	R	.....
161.320	R	59
161.330	R	54, 57
162.010	R	217
162.020	R	217
162.030	R	217
162.040	R	217
162.110	R	183
162.120	R	183
162.130	R	57
162.140	R	57, 184
162.150	R	.....
162.160	R	188
162.210	R	178
162.220	R	102, 179
162.230	R	180
162.240	R	215
162.310	R	208
162.320	R	209
162.322	R	189
162.324	R	190, 191, 192
162.326	R	190
162.330	R	13
162.340	R	193
162.380	R	94
162.400	R	94
162.430	R	214, 215
162.440	R	214, 215
162.450	R	195, 196
162.510	R	215
162.520	R	213
162.530	R	199
162.540	R	211
162.550	R	198
162.560	R	.....
162.570	R	211
162.580	R	.....
162.590	R	.....

TABLE SHOWING DISPOSITION OF EXISTING STATUTES—Continued

(1)	(2)	(3)
162.600	R	211
162.610	R	294
162.620	R	205
162.630	R	214, 215
162.640	R	215
162.650	R	215
162.655	R	179
162.660	R	215
162.670	R	179
162.680	R	215
162.690	R	215
162.700	R	123
162.710	R	.....
162.720	R	224
162.730	R	224
162.740	R	.....
163.010	R	87, 88
163.020	R	87, 88
163.040	R	89
163.050	R	89
163.070	R	89
163.080	R	89
163.091	R	91
163.100	R	18 to 33
163.110	R	18 to 33
163.120	R	88
163.130	R	.....
163.140	R	18 to 33
163.210	R	109, 110, 111
163.220	R	111
163.230	R	94
163.240	R	93
163.250	R	93
163.255	R	93
163.260	R	92
163.270	R	54. 93, 111, 148
163.280	R	94, 150
163.290	R	148, 149
163.300	R	54, 88, 96
163.330	R	54, 93, 148
163.340	R	96
163.410	R	287
163.420	R	287
163.430	R	287
163.440	R	287
163.450	R	287
163.460	R	287
163.470	R	127
163.480	R	95, 102, 127
163.490	R	102
163.500	R	102
163.610	R	98
163.620	R	99
163.630	R	59, 99
163.635	R	99
163.640	R	100, 101
163.650	R	92, 93
163.660	R	286
164.010	R	141
164.020	R	144
164.030	R	143
164.040	R	143
164.070	R	142
164.080	R	142
164.090	R	54
164.100	R	128
164.110	R	.....
164.210	R	135
164.220	R	136, 137
164.230	R	136. 137
164.240	R	136
164.250	R	136, 137
164.260	R	137
164.310	R	124, 125
164.320	R	124, 125
164.330	R	136
164.340	R	124, 125
164.350	R	124, 125
164.355	R	.....
164.360	R	124, 125
164.362	R	295
164.364	R	296
164.366	R	297
164.368	R	298
164.370	R	124, 125
164.380	R	124, 125
164.385	R	169
164.390	R	124, 125
164.392	R	289
164.410	R	139, 146
164.420	R	124, 139, 146
164.430	R	124, 139, 146
164.440	R	283
164.450	R	145
164.452	R	145
164.455	R	145
164.460	R	139
164.462	R	139
164.465	R	139
164.470	R	.....
164.480	R	124, 139, 145
164.485	R	303
164.490	R	304
164.500	R	305
164.505	R	306
164.510	R	145
164.520	R	139
164.530	R	96
164.540	R	133
164.550	R	21
164.555	R	139
164.560	R	124, 125, 129, 145

TABLE SHOWING DISPOSITION OF EXISTING STATUTES—Continued

(1)	(2)	(3)
164.570	R	225
164.580	R	145
164.590	R	139
164.610	R	124, 125, 146
164.620	R	13, 59, 133, 143, 145
164.630	R	145
164.635	R	124, 125, 133
164.640	R	.....
164.650	R	134
164.660	R	145
164.670	R	134
164.680	R	145
164.690	R	128, 145
164.700	R	145
164.710	R	139, 226
164.720	R	54, 226
164.730	R	124, 125
164.740	R	124, 133
164.750	R	226
164.760	R	226
164.770	R	226
164.780	R	226
164.810	R	145
164.820	R	.....
164.830	R	54, 94, 145
164.840	R	145
164.850	R	124, 139, 145
164.860	R	145
164.871	R	145
164.880	R	145
164.890	R	124, 145
164.900	R	145
165.005	R	124, 125
165.010	R	124, 125
165.012	R	124, 125
165.015	R	124, 125
165.020	R	.....
165.025	R	124, 125
165.030	R	124, 125
165.035	R	13, 124, 125, 163, 166
165.040	R	13, 124, 125, 163, 166
165.045	R	54, 129
165.105	R	153
165.110	R	153
165.115	R	153
165.120	R	155
165.125	R	156
165.130	R	152
165.135	R	153
165.140	R	290
165.145	R	152
165.150	R	152
165.155	R	152
165.160	R	153
165.165	R	156
165.170	R	153
165.175	R	152
165.180	R	.....
165.185	R	.....
165.190	R	.....
165.205	R	128, 158
165.210	R	.....
165.215	R	128
165.220	R	128
165.225	R	161
165.230	R	133
165.235	R	128, 152
165.240	R	128
165.245	R	100
165.250	R	163
165.255	R	163
165.260	R	.....
165.265	R	128, 210
165.270	R	133
165.280	R	133, 152
165.285	R	152
165.290	R	160
165.295	R	160
165.300	R	160
165.305	R	.....
165.310	R	.....
165.315	R	128
165.320	R	.....
165.325	R	.....
165.330	R	214
165.335	R	.....
165.340	R	128
165.345	R	.....
165.350	R	211
165.352	R	.....
165.355	R	.....
165.405	R	152
165.410	R	299
165.415	R	300
165.420	R	226
165.425	R	124, 125
165.430	R	124, 125
165.435	R	129
165.440	R	.....
165.445	R	133
165.450	R	54, 128
165.455	R	54, 128
165.460	R	54, 128
165.465	R	128
165.505	R	234
165.510	R	54, 234
165.515	R	54, 234
165.520	R	234
165.525	R	159
165.530	R	133
165.532	R	13, 54, 133
165.535	R	227

TABLE SHOWING DISPOSITION OF EXISTING STATUTES—Continued

(1)	(2)	(3)
165.540	R	228
165.545	R	235
165.550	R	13, 223
165.605	R	285
165.610	R	13
165.615	R	167
165.620	R	128, 167
165.625	R	167
165.655	R	163
165.660	R	163
165.665	R	163
165.670	R	163
165.675	R	123
165.680	R	128
166.010	R	.....
166.020	R	.....
166.030	R	223
166.040	R	218, 219
166.050	R	218
166.060	R	220. 222, 250
166.110	R	220
166.120	R	220
166.130	R	220
166.140	R	220
166.150	R	96
166.160	R	221
166.560	R	284
166.610	R	220
166.630	R	96
166.640	R	145, 146, 147
166.650	R	.....
166.710	R	288
167.005	R	.....
167.010	R	.....
167.015	R	.....
167.020	R	171
167.025	R	.....
167.030	R	117
167.035	R	172
167.040	R	112, 113, 114
167.045	R	98, 99
167.050	R	85, 86
167.055	R	291
167.105	R	251
167.110	R	254
167.115	R	252
167.120	R	251
167.125	R	251, 252
167.130	R	251
167.135	R	252
167.140	R	253
167.145	R	120
167.151	R	255 to 262
167.152	R	255 to 262
167.157	R	260
167.170	R	139
167.205	R	.....
167.210	R	117, 177
167.215	R	174, 177
167.220	R	84, 304
167.225	R	100, 101, 252
167.227	R	115, 116
167.230	R	57
167.235	R	292
167.237	R	293
167.240	R	251
167.245	R	177
167.250	R	.....
167.295	R	.....
167.300	R	285
167.405	R	264, 265
167.410	R	264, 265
167.415	R	264, 265
167.420	R	128, 152, 154
167.425	R	.....
167.430	R	271
167.505	R	264, 265
167.510	R	13, 264, 265
167.515	R	214
167.520	R	.....
167.525	R	.....
167.530	R	.....
167.535	R	269
167.540	R	272
167.545	R	.....
167.550	R	.....
167.555	R	269
167.605	R	175
167.610	R	.....
167.615	R	.....
167.620	R	.....
167.625	R	176
167.630	R	176
167.635	R	.....
167.640	R	.....
167.645	R	.....
167.705	R	.....
167.710	R	.....
167.715	R	301
167.720	R	164
167.725	R	165
167.730	R	164
167.735	R	165
167.740	R	226
167.745	R	226
168.015	R	85, 86
168.025	R	85, 86
168.050	R	85, 86
168.055	R	85, 86
168.065	R	85, 86
168.075	R	85, 86
168.080	R	85, 86

TABLE SHOWING DISPOSITION OF EXISTING STATUTES—Continued

(1)	(2)	(3)
168.085	R	85, 86
168.090	R	85, 86
169.130	R	194
169.160	R	81, 82
181.420	R	205
191.050	R	145, 146, 147
191.990	R	145, 146, 147
260.780	R	214, 215
260.790	R	220
288.991	R	54, 128, 185
295.991	R	214, 215
323.992	R	153
357.965	R	145, 146, 147
376.140	R	220
390.665	R	283
407.060	R	13, 183, 84, 185
407.430	R	184, 185
407.990	R	13, 183, 184, 185
432.160	R	205
433.645	R	198
474.020	R	59, 274
474.100	A	311
474.110	R	279
474.130	A	312
474.170	R	278
474.180	R	280
474.210	R	282
474.990	A	313
475.010	A	314
475.070	R	.....
475.090	R	194
475.100	A	315
475.120	R	281
475.625	R	276
475.635	R	276
476.740	R	212, 220
476.750	R	145 to 147, 198
477.715	R	144
477.730	R	145 to 147
496.685	R	198
517.450	R	124, 125
561.210	R	180
610.300	R	128
618.290	R	211
657.305	R	128, 185
662.990	R	198
683.300	R	124, 125, 166
722.235	R	163, 204, 205
725.200	R	163
726.140	R	163
758.060	A	316

INTRODUCTION TO SENTENCE CHARTS

Three charts have been prepared to show the classification of offenses and the ordinary maximum terms of imprisonment (Chart I), the classification of offenses and authorized fines (Chart II) and the classifications of specific offenses (Chart III).

The charts do not reflect the other options that would be available to the sentencing judge such as a combination of fine and imprisonment, probation, suspended sentence, treatment of some felonies as misdemeanors, and discharge of the defendant. (See §§ 83, 84, 307).

Chart I sets out the *ordinary* maximum term. The court would be authorized to impose *extraordinary* terms up to a maximum of 30 years for "dangerous offenders." (See §§ 85, 86). Each class of offense listed on Chart I is a "crime" because a sentence of imprisonment is authorized. (See § 66). The chart does not include the noncriminal offense denoted in the Code as a "violation," the punishment for which is limited to a fine or other civil penalty. (See § 71). The new provisions dealing with Classes of Offenses, Authorized Disposition of Offenders and Authority of Court in Sentencing are located in §§ 65 to 86 of the proposed Code. Amendments to existing statutes on these subjects appear in §§ 307 to 310.

SENTENCE CHARTS

Chart I

Offense Classification and Authorized Terms

Classification of Offense	Ordinary Maximum Term
Murder	Life imprisonment
Treason	Life imprisonment
Class A felony	20 years
Class B felony	10 years
Class C felony	5 years
Unclassified felony	As set by statute
Class A misdemeanor	1 year
Class B misdemeanor	6 months
Class C misdemeanor	30 days
Unclassified misdemeanor	As set by statute

SENTENCE CHARTS

Chart II

Offense Classification and Authorized Fines

Classification of Offense	Ordinary Maximum Fine	Fines Against Corporations	Alternative Fine
Class A felony	$2,500	$50,000—any felony in code or felony outside code which specifies no special corporate fine.	If person or corporation has gained money or property through commission of any offense, the court in lieu of ordinary authorized fine may sentence defendant to fine of not more than double the amount of gain.
Class B felony	$2,500		
Class C felony	$2,500		
Unclassified felony	Set by Statute		
Class A misdemeanor*	$1,000	$5,000	
Class B misdemeanor	$ 500	$2,500	
Class C misdemeanor	$ 250	$1,000	
Unclassified misdemeanor	Set by Statute	$5,000—Unclass. misd. auth. more than 6 mos.; $2,500—Unclass. misd. auth. 6 mos. or less; $1,000—Unclass. misd. auth. 30 days or less; if no special corporate fine specified in statute.	
Violation	$ 250	$500	

* Court may impose $10,000 fine for crimes of furnishing, sending or displaying obscene materials to minors or exhibiting an obscene performance to minor.

SENTENCE CHARTS

Chart III

Specific Offenses and Their Classifications

Article	Section	Offense	Classification
6		**Inchoate Crimes**	
	54	Attempt to commit murder or treason	Class A felony
	54	Attempt to commit Class A felony	Class B felony
	54	Attempt to commit Class B felony	Class C felony
	54	Attempt to commit Class C felony or unclassified felony	Class A misdemeanor
	54	Attempt to commit Class A misdemeanor	Class B misdemeanor
	54	Attempt to commit Class B misdemeanor	Class C misdemeanor
	54	Attempt to commit Class C misdemeanor or unclassified misdemeanor	Violation
	57	Soliciting murder or treason	Class A felony
	57	Soliciting Class A felony	Class B felony
	57	Soliciting Class B felony	Class C felony
	57	Soliciting Class C felony or unclassified felony	Class A misdemeanor
	57	Soliciting Class A misdemeanor	Class B misdemeanor
	59	Conspiracy to commit murder, treason or Class A felony	Class A felony
	59	Conspiracy to commit Class B felony	Class B felony
	59	Conspiracy to commit Class C felony or unclassified felony	Class C felony
	59	Conspiracy to commit Class A misdemeanor	Class A misdemeanor
10		**Criminal Homicide**	
	88	Murder	Life imprisonment
	89	Manslaughter	Class B felony
	91	Criminally negligent homicide	Class C felony
11		**Assault and Related Offenses**	
	92	Assault—3	Class A misdemeanor
	93	Assault—2	Class C felony
	94	Assault—1	Class B felony
	95	Menacing	Class A misdemeanor
	96	Recklessly endangering another person	Class A misdemeanor
12		**Kidnapping and Related Offenses**	
	98	Kidnapping—2	Class B felony
	99	Kidnapping—1	Class A felony
	100	Custodial interference—2	Class A misdemeanor
	101	Custodial interference—1	Class C felony
	102	Coercion	Class C felony

Chart III—Continued

Specific Offenses and Their Classifications

Article	Section	Offense	Classification
13		**Sexual Offenses**	
	109	Rape—3	Class C felony
	110	Rape—2	Class B felony
	111	Rape—1	Class A felony
	112	Sodomy—3	Class C felony
	113	Sodomy—2	Class B felony
	114	Sodomy—1	Class A felony
	115	Sexual abuse—2	Class A misdemeanor
	116	Sexual abuse—1	Class C felony
	117	Contributing sexual delinquency of minor	Class A misdemeanor
	118	Sexual misconduct	Class C misdemeanor
	119	Accosting for deviate purposes	Class C misdemeanor
	120	Public indecency	Class A misdemeanor
14		**Theft and Related Offenses**	
	124	Theft—2	Class A misdemeanor
	125	Theft—1	Class C felony
	127	Theft by extortion	Class B felony
	133	Theft of services	Class A misdemeanor
	134	Unauthorized use of vehicle	Class C felony
15		**Burglary and Criminal Trespass**	
	136	Burglary—2	Class C felony
	137	Burglary—1	Class B felony
	138	Possession of burglar's tools	Class A misdemeanor
	139	Criminal trespass—2	Class C misdemeanor
	140	Criminal trespass—1	Class A misdemeanor
16		**Arson, Criminal Mischief and Related Offenses**	
	142	Reckless burning	Class A misdemeanor
	143	Arson—2	Class C felony
	144	Arson—1	Class A felony
	145	Criminal mischief—3	Class C misdemeanor
	146	Criminal mischief—2	Class A misdemeanor
	147	Criminal mischief—1	Class C felony
17		**Robbery**	
	148	Robbery—3	Class C felony
	149	Robbery—2	Class B felony
	150	Robbery—1	Class A felony

Chart III—Continued

Specific Offenses and Their Classifications

Article	Section	Offense	Classification
18		**Forgery and Related Offenses**	
	152	Forgery—2	Class A misdemeanor
	153	Forgery—1	Class C felony
	154	Criminal possession of forged instrument—2	Class A misdemeanor
	155	Criminal possession of forged instrument—1	Class C felony
	156	Criminal possession of forgery device	Class C felony
	157	Criminal simulation	Class A misdemeanor
	158	Fraudulently obtaining signature	Class A misdemeanor
	159	Unlawfully using slugs	Class B misdemeanor
	160	Fraudulent use of credit card	Class A misdemeanor or Class C felony*
	161	Negotiating a bad check	Class A misdemeanor
19		**Business and Commercial Offenses**	
	163	Falsifying business records	Class A misdemeanor
	164	Sports bribery	Class C felony
	165	Sports bribe receiving	Class C felony
	166	Misapplication of entrusted property	Class A misdemeanor
	167	Issuing a false financial statement	Class A misdemeanor
	168	Obtaining execution of documents by deception	Class A misdemeanor
	169	Failing to maintain a metal purchase record	Class B misdemeanor
20		**Offenses Against the Family**	
	171	Bigamy	Class C felony
	172	Incest	Class C felony
	173	Child abandonment	Class C felony
	174	Child neglect	Class A misdemeanor
	175	Criminal nonsupport	Class C felony
	177	Endangering welfare of a minor	Class A misdemeanor
21		**Bribery and Corrupt Influences**	
	179	Bribe giving	Class B felony
	180	Bribe receiving	Class B felony
22		**Perjury and Related Offenses**	
	183	Perjury	Class C felony
	184	False swearing	Class A misdemeanor
	185	Unsworn falsification	Class B misdemeanor

Chart III—Continued

Specific Offenses and Their Classifications

Article	Section	Offense	Classification
23		**Escape and Related Offenses**	
	190	Escape—3	Class A misdemeanor
	191	Escape—2	Class C felony
	192	Escape—1	Class B felony
	193	Aiding unauthorized departure	Class A misdemeanor
	194	Supplying contraband	Class C felony
	195	Bail jumping—2	Class A misdemeanor
	196	Bail jumping—1	Class C felony
24		**Obstructing Governmental Administration**	
	198	Obstructing governmental administration	Class A misdemeanor
	199	Refusing to assist peace officer	Violation
	200	Refusing to assist firefighting operations	Violation
	201	Bribing a witness	Class C felony
	202	Bribe receiving by a witness	Class C felony
	203	Tampering with a witness	Class A misdemeanor
	204	Tampering with physical evidence	Class A misdemeanor
	205	Tampering with public records	Class A misdemeanor
	206	Resisting arrest	Class A misdemeanor
	207	Hindering prosecution	Class C felony
	208	Compounding	Class A misdemeanor
	210	Simulating legal process	Class B misdemeanor
	211	Criminal impersonation	Class A misdemeanor
	212	Initiating a false report	Class C misdemeanor
	213	Unlawful legislative lobbying	Class B misdemeanor
25		**Abuse of Public Office**	
	214	Official misconduct—2	Class C misdemeanor
	215	Official misconduct—1	Class A misdemeanor
	216	Misuse of confidential information	Class B misdemeanor
26		**Riot, Disorderly Conduct and Related Offenses**	
	217	Treason	Life imprisonment
	218	Riot	Class C felony
	219	Unlawful assembly	Class A misdemeanor
	220	Disorderly conduct	Class B misdemeanor
	221	Public intoxication	Class C misdemeanor
	222	Loitering	Class C misdemeanor
	223	Harassment	Class B misdemeanor
	224	Abuse of venerated objects	Class C misdemeanor
	225	Abuse of corpse	Class C misdemeanor
	226	Cruelty to animals	Class B misdemeanor

Chart III—Continued

Specific Offenses and Their Classifications

Article	Section	Offense	Classification
27		**Offenses Against Privacy of Communications**	
	228	Eavesdropping	Class C felony
	229	Possession of eavesdropping device	Class A misdemeanor
	231	Divulging an eavesdropping warrant	Class A misdemeanor
	232	Divulging illegally obtained information	Class A misdemeanor
	234	Tampering with private communications	Class B misdemeanor
28		**Prostitution and Related Offenses**	
	250	Prostitution	Class A misdemeanor
	251	Promoting prostitution	Class C felony
	252	Compelling prostitution	Class B felony
29		**Obscenity and Related Offenses**	
	256	Furnishing obscene materials to minors	Class A misdemeanor
	257	Sending obscene materials to minors	Class A misdemeanor
	258	Exhibiting an obscene performance to minor	Class A misdemeanor
	259	Displaying obscene materials to minors	Class A misdemeanor
	261	Publicly displaying nudity or sex for advertising purposes	Class A misdemeanor
30		**Gambling Offenses**	
	264	Promoting gambling—2	Class A misdemeanor
	265	Promoting gambling—1	Class C felony
	266	Possession of gambling records—2	Class A misdemeanor
	267	Possession of gambling records—1	Class C felony
	269	Possession of gambling device	Class A misdemeanor
31		**Offenses Involving Narcotics and Dangerous Drugs**	
	274	Criminal activity in drugs	Class B felony or Class A misdemeanor**
	275	Tampering with drug records	Class C felony
	276	Criminal use of drugs	Class A misdemeanor
	277	Criminal drug promotion	Class A misdemeanor
	278	Obtaining a drug unlawfully	Class C felony
32		**Miscellaneous Offenses**	
	283	Offensive littering	Class C misdemeanor
	284	Creating a hazard	Class B misdemeanor
	285	Misrepresentation of age by a minor	Class C misdemeanor
	286	Concealing birth of an infant	Class A misdemeanor
	287	Criminal defamation	Class A misdemeanor
	288	Misconduct with emergency telephone calls	Class B misdemeanor

* If total amount is $250 or more.
** At court's discretion.

PROPOSED

OREGON CRIMINAL CODE

FINAL DRAFT AND REPORT - - - - JULY 1970

CRIMINAL LAW REVISION COMMISSION

311 State Capitol – Salem

TABLE OF CONTENTS

PART I. GENERAL PROVISIONS

ARTICLE 1. PRELIMINARY

ARTICLE 2. GENERAL PRINCIPLES OF CRIMINAL LIABILITY

TABLE OF CONTENTS

ARTICLE 3. PARTIES TO CRIME

ARTICLE 4. GENERAL PRINCIPLES OF JUSTIFICATION

TABLE OF CONTENTS

ARTICLE 5. RESPONSIBILITY

TABLE OF CONTENTS

ARTICLE 6. INCHOATE CRIMES

TABLE OF CONTENTS

ARTICLE 7. CLASSES OF OFFENSES

ARTICLE 8. AUTHORIZED DISPOSITION OF OFFENDERS

TABLE OF CONTENTS

TABLE OF CONTENTS

ARTICLE 12. KIDNAPPING AND RELATED OFFENSES

ARTICLE 13. SEXUAL OFFENSES

TABLE OF CONTENTS

OFFENSES AGAINST PROPERTY

ARTICLE 14. THEFT AND RELATED OFFENSES

TABLE OF CONTENTS

ARTICLE 15. BURGLARY AND CRIMINAL TRESPASS

ARTICLE 16. ARSON, CRIMINAL MISCHIEF AND RELATED OFFENSES

ARTICLE 17. ROBBERY

TABLE OF CONTENTS

ARTICLE 18. FORGERY AND RELATED OFFENSES

ARTICLE 19. BUSINESS AND COMMERCIAL OFFENSES

TABLE OF CONTENTS

OFFENSES AGAINST THE FAMILY

ARTICLE 20. OFFENSES AGAINST THE FAMILY

OFFENSES AGAINST PUBLIC ADMINISTRATION

ARTICLE 21. BRIBERY AND CORRUPT INFLUENCES

ARTICLE 22. PERJURY AND RELATED OFFENSES

TABLE OF CONTENTS

ARTICLE 23. ESCAPE AND RELATED OFFENSES

ARTICLE 24. OBSTRUCTING GOVERNMENTAL ADMINISTRATION

TABLE OF CONTENTS

TABLE OF CONTENTS

ARTICLE 27. OFFENSES AGAINST PRIVACY OF COMMUNICATIONS

TABLE OF CONTENTS

TABLE OF CONTENTS

ARTICLE 30. GAMBLING OFFENSES

ARTICLE 31. OFFENSES INVOLVING NARCOTICS AND DANGEROUS DRUGS

TABLE OF CONTENTS

MISCELLANEOUS OFFENSES AND PROVISIONS

ARTICLE 32. MISCELLANEOUS OFFENSES

ARTICLE 33. MISCELLANEOUS PROVISIONS

TABLE OF CONTENTS

PART I. GENERAL PROVISIONS

ARTICLE 1. PRELIMINARY

Section 1. Short title. Sections 1 to 288 of this Act shall be known and may be cited as Oregon Criminal Code of 1971.

COMMENTARY

The short title is suggested to avoid confusion with the present "Penal Code" and to distinguish the proposed substantive code from a revised criminal procedure code that the Commission plans to submit separately.

Section 2. Purposes; principles of construction. (1) The general purposes of the provisions of this Act are:

(a) To ensure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the correction and rehabilitation of those convicted, and their confinement when required in the interests of public protection.

(b) To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests.

(c) To give fair warning of the nature of the conduct declared to constitute an offense and of the sentences authorized upon conviction.

(d) To define the act or omission and the accompanying mental state that constitute each offense and limit the condemnation of conduct as criminal when it is without fault.

(e) To differentiate on reasonable grounds between serious and minor offenses.

(f) To prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders.

(g) To safeguard offenders against excessive, disproportionate or arbitrary punishment.

(2) The rule that a penal statute is to be strictly construed shall not apply to this Act or any of its provisions. All provisions of this Act shall be construed according to the fair import of their terms, to promote justice and to effect the purposes stated in subsection (1) of this section.

COMMENTARY

A. Summary

The section is intended to state the general philosophy of the Code and to lay down principles for the construction of the Code.

B. Derivation

The section is based on § 105 of the Michigan Revised Criminal Code, § 1.05 of the New York Revised Penal Law, Article I, § 15 of the Oregon Constitution, ORS 161.050 and § 1.02 of the Model Penal Code.

The section includes deterrence and protection of the public, which are included in the New York and Michigan statutes but are not found in the Model Penal Code nor in the Illinois statements of purposes.

C. Relationship to Existing Law

The purposes or philosophy of Oregon's criminal law are not now expressed in our statutes. The only expression of purpose we now have is the provision of Article I, § 15 of the Oregon Constitution that: "Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice." It is vital that the constitutionally expressed purpose be expressed and carried out in the Code, but it seems totally unrealistic not to verbalize deterrence and the protection of society as additional purposes of the criminal law, since there is common consent that those are important purposes of any penal system.

One of the important reasons for criminal law revision is to prevent minor crimes from being assigned more severe penalties than those prescribed for more serious offenses. That idea is expressed in paragraphs (f) and (g) of subsection (1).

Paragraph (d) is intended to make it clear that there is a legislative policy against creating liability without fault crimes (the so-called regulatory, public welfare, public tort or absolute liability crimes), with heavy penalties. This provision should be considered in connection with Article 7 which sets up the violation classification and in connection with the general requirements for culpability set out in Article 2.

The other purposes expressed in the section are largely self-explanatory.

No major change is made in the principles of construction. ORS 161.050 provides:

> "The rule of the common law that penal statutes are to be strictly construed has no application to the criminal and criminal procedure statutes of this state. Their provisions shall be construed according to the fair import of their terms with a view to effect their objects and to promote justice."

The section simply adds the principle of construction that the provisions of the Code are to be construed to effect the purposes set out in § 2 (1). One of those purposes is to give fair warning of the nature of the conduct declared to constitute an offense. It is not intended that this provision should lead back to strict construction in favor of the defendant. While some courts have in effect closed their eyes to statutes abolishing the common law rule of strict construction, the Oregon Supreme Court has given the statute a liberal rather than a narrow construction. *State v. Gilmore*, 236 Or 349, 354, 388 P2d 451, 453 (1963). It is not intended that the Code should make any change in that regard.

Section 3. General definitions. As used in this Act, unless the context requires otherwise:

(1) "Dangerous weapon" means any instrument, article or substance which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury.

(2) "Deadly weapon" means any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury.

(3) "Deadly physical force" means physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury.

(4) "Peace officer" means a sheriff, constable, marshal, municipal policeman or member of the Oregon State Police.

(5) "Person" means a human being and, where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality.

(6) "Physical injury" means impairment of physical condition or substantial pain.

(7) "Serious physical injury" means physical injury which creates a substantial risk of death or which causes serious and pro-

tracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.

(8) "Possess" means to have physical possession or otherwise to exercise dominion or control over property.

(9) "Public place" means a place to which the general public has access and includes, but is not limited to, hallways, lobbies and other parts of apartment houses and hotels not constituting rooms or apartments designed for actual residence, and highways, streets, schools, places of amusement, parks, playgrounds and premises used in connection with public passenger transportation.

COMMENTARY

This section provides a new set of terms for general use throughout the proposed Code. There are, of course, other definitions in the Code, either as a part of the specific section in which they appear or in the definitional sections of the particular articles to which they apply. For example, the definitions of "crime," "felony," "misdemeanor" and "violation" appear in Article 7.

The definitions of some terms that are employed generally in our present criminal statutes are located in ORS 161.010, most of which deal with language that will be replaced by new definitions set out in Article 2. Except for the definitions of "person" and "peace officer," none of the proposed terms are now defined by statute.

Most of the definitions are derived from New York Revised Penal Law § 10.00, but differ therefrom in certain particulars of both form and substance. Michigan Revised Criminal Code § 135 contains basically the same list as New York. The Model Penal Code also contains a long list of definitions, most of which deal with culpability requirements.

Subsections (1) "dangerous weapon" and (2) "deadly weapon" must be considered together because these definitions attempt to distinguish between those instruments, articles or substances that are specifically designed to be used as "weapons" and those which, because of the circumstances in which they are used or attempted to be used, become "weapons." The definition of "dangerous weapon" is substantially the same as the definition of "dangerous instrument" in § 10.00 (13) of the New York Revised Penal Law. The draft does not use the New York definition of "deadly weapon" which is merely an itemized list of well-known weapons, but nevertheless uses the same rationale.

"Weapon" is defined in *Words and Phrases* as "an instrument of offensive or defensive combat." The courts generally have not drawn a clear distinction between a deadly weapon and a dangerous one. A deadly weapon is often defined as a weapon likely, from the manner of its use, to produce death or great bodily injury. (The draft definition of "dangerous weapon" is closer to this one.) But, as one court observed in *Pittman v. State*, 25 Fla 648, 6 So 437, ". . . any weapon is a deadly weapon which is likely to produce death, but a weapon capable of producing death is not necessarily likely to produce death."

State v. Rosever, 8 Wash 43, 35 P 357, indicates a basis of distinction between "deadly" and "dangerous" weapons in this statement:

> "Some weapons are per se deadly; others, owing to the manner in which they are used, become deadly."

This is the foundation on which the draft definitions are laid: A *deadly* weapon is labeled so because of the nature of the instrument itself, whereas a *dangerous* weapon is one which has become such due to the use it is put to. This, then, places the determination of the former on the court as a matter of law, the latter on the jury as a question of fact to be decided under proper court instructions.

The Oregon cases and, indeed, the statutes appear to employ "deadly" and "dangerous" interchangeably. (See ORS 41.350 (1), 163.240, 163.250, 163.280, 162.380, 162.400.) The early case of *State v. Godfrey*, 17 Or 300 (1889), stated that a dangerous weapon is one by the use of which death or great bodily injury may be inflicted. This definition is broad enough to include lethal weapons such as guns, knives and the others that are deemed dangerous weapons as a matter of law and also those things which become dangerous weapons owing to the manner in which they are employed. The Oregon Court has consistently adhered to the above definition, which is adequate in the assault area, but which is unsatisfactory when applied to robbery or burglary while armed with a "deadly" weapon. See Articles 15, 17.

Oregon does not follow that line of case law which includes an unloaded gun in the classification of a "dangerous weapon" within the meaning of a statute denouncing robbery while armed with a dangerous weapon. But the use of a firearm within carrying distance of the threatened victim in Oregon allows an inference that the weapon was loaded and the burden of going ahead with the evidence to prove that the weapon was not loaded is on the de-

fendant. *State v. Noblen*, 214 Or 60, 326 P2d 139 (1958); *State v. Lanegan*, 192 Or 691, 236 P2d 438 (1951). The result is that a robbery with an unloaded gun, not used to strike with, is not robbery while armed with a dangerous weapon. This rule would place in jeopardy a definition of a "deadly" weapon as one specifically designed or *readily adaptable* to produce serious bodily injury. A firearm is specifically designed for such a purpose and although unloaded is readily adapted to that purpose by loading it. Therefore, to continue the necessity of the firearm being loaded before it would be considered a "deadly" weapon within the meaning of the "armed robbery" statute, it is necessary to adopt a definition which demands such a result, but which also does not disturb the inference that the gun is loaded. The New York Revised Penal Law and the Michigan Revised Criminal Code accomplish this by simply stating that a "deadly weapon" is "any loaded weapon." Both codes also enumerate several other instruments which are classed as "deadly." To avoid the difficulty of enumeration and the possibility of gaps which such a technique leaves, a more general definition is suggested. The requirement of "present capability" resolves the problem of an "unloaded" gun. If a gun has a shell in firing position it is "loaded" and presently capable of causing death or serious physical injury and, hence, a deadly weapon. Likewise, a gun that has a shell in the magazine or chamber would be within the purview of the definition of deadly weapon because, for all practical purposes, the weapon is "loaded" and has the same present capability. The demand that the instrument be "specifically designed" for "the purpose of inflicting serious bodily injury" would encompass all firearms as well as other instruments designed for offensive or defensive purposes, such as metallic knuckles, billies, switchblade knives and gravity knives.

Subsection (3) "deadly physical force" is a new definition borrowed from the New York Revised Penal Law and has significance in the assault area and in connection with the defense of "justification." The term, as defined, would include the use of dangerous or deadly weapons, as well as other "physical force" of such magnitude so as to be "deadly" in nature.

Subsection (4) "peace officer" is substantially the same as ORS 133.170.

Subsection (5) "person" is derived from New York Revised Penal Law § 10.00 (7) and resembles the existing statutory definition in ORS 161.010 (11):

> "'Person' includes corporations as well as natural persons. Where 'person' is used to designate the party whose property may be the subject of a crime it includes this state, any other state, government or country which may lawfully own any property in this state, and all municipal, public or private corporations, as well as individuals."

The draft continues the present legislative policy of including corporations within the sanction and protection of the criminal law and of protecting the property interests of governmental entities.

In addition to "corporations" the definition encompasses other business entities such as unincorporated associations and partnerships, as do the New York and Michigan codes. The conditional phrase "where appropriate" will leave to the courts the determination of whether a particular entity should be held to be included within a specific statute. Such a provision obviates the necessity of expressly mentioning the business or governmental units in every instance where the text is meant to apply and allows the courts to apply the provision in fact situations as appropriate.

Subsection (6) "physical injury" and subsection (7) "serious physical injury" are taken from the New York statute and have particular importance in the assault and robbery areas. Use of the modifying adjective "physical" instead of "bodily" seems preferable in a criminal code because it is more precise. Both definitions impliedly recognize that the cause of such an injury is some form of external violence that produces a harmful effect upon the body. This is in accord with the case law definition of "bodily injury." See 117 ALR 733.

The meaning of "serious physical injury" is synonymous with "serious bodily harm" or "great bodily harm," according to 21A *Words and Phrases*. The proposed definitions furnish guidelines for distinguishing between minor and major injuries which are based on the same type of rationale found in the majority of cases on the subject. Most courts have said that an injury is "serious" when it gives rise to the apprehension of danger to life, health or limb. See for example *Gonzales v. State*, 146 Tex Cr R 108, 172 SW2d 97; *Hall v. State*, Okla Cr, 309 P2d 1096. *Restatement, Torts*, § 63 (b) defines serious bodily harm as:

> ". . . bodily harm, the consequence of which is so grave that it is regarded as differing in kind, and not merely in degree, from other bodily harm. A harm which creates a substantial risk of fatal consequences is a 'serious bodily harm' as is a harm, the infliction of which constitutes the crime of mayhem."

Subsection (8) "possess" is a term appearing frequently in the draft and has been defined to include the doctrine of constructive possession of property. It is identical to New York Revised Penal Law § 10.00 (8).

Section 4. Defenses; burden of proof. (1) When a "defense," other than an "affirmative defense" as defined in subsection (2) of this section, is raised at a trial, the state has the burden of disproving the defense beyond a reasonable doubt.

(2) When a defense, declared to be an "affirmative defense" by this Act, is raised at a trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

COMMENTARY

This section defines two types of defenses, an "affirmative defense" and a plain "defense" in terms of where the burden of proof lies with respect to each of them.

Every defense postulated in the proposed Code is expressly labeled either one or the other. Thus, "mental disease or defect" (Article 5) is an affirmative defense and the defendant has the burden of establishing the defense by a preponderance of the evidence, while "self-defense" (Article 4) is an ordinary defense and the state has the burden of disproving the defense beyond a reasonable doubt.

The section is based on New York Revised Penal Law § 25.00.

Section 5. Application of provisions. (1) The provisions of this Act shall govern the construction of and punishment for any offense defined in this Act and committed after the effective date hereof, as well as the construction and application of any defense to a prosecution for such an offense.

(2) Except as otherwise expressly provided, or unless the context requires otherwise, the provisions of this Act shall govern the construction of and punishment for any offense defined outside this Act and committed after the effective date hereof, as well as the construction and application of any defense to a prosecution for such an offense.

(3) The provisions of this Act shall not apply to or govern the construction of and punishment for any offense committed before the effective date of this Act, or the construction and application of any defense to a prosecution for such an offense. Such an offense shall be construed and punished according to the law existing at the time of the commission of the offense in the same manner as if this Act had not been enacted.

(4) When all or part of a criminal statute is amended or repealed, the criminal statute or part thereof so amended or repealed remains in force for the purpose of authorizing the accusation, prosecution, conviction and punishment of a person who violated the statute or part thereof before the effective date of the amending or repealing Act.

COMMENTARY

This section is taken from New York Revised Penal Law § 5.05 and Michigan Revised Criminal Code § 120. The substance of it is that the revision applies only to conduct occurring after the effective date of the Code, and that the law in existence governs with respect to conduct occurring before that date. Subsection (4) is a restatement of ORS 161.040.

Section 6. Other limitations on applicability of this Act. (1) Except as otherwise expressly provided, the procedure governing the accusation, prosecution, conviction and punishment of offenders and offenses is not regulated by this Act but by the criminal procedure statutes.

(2) This Act does not affect any power conferred by law upon a court-martial or other military authority or officer to prosecute and punish conduct and offenders violating military codes or laws.

(3) This Act does not bar, suspend or otherwise affect any right or liability to damages, penalty, forfeiture or other remedy authorized by law to be recovered or enforced in a civil action, regardless of whether the conduct involved in the proceeding constitutes an offense defined in this Act.

(4) No conviction of a person for an offense works a forfeiture of his property, except in cases where a forfeiture is expressly provided by law.

COMMENTARY

This section sets forth other limitations of the proposed Code. Subsections (1), (2) and (3) are taken from New York Revised Penal Law § 5.10 and Michigan Revised Criminal Code § 125. Subsection (3) is similar to ORS 161.060. Subsection (4) is a restatement of ORS 161.070.

ARTICLE 2. GENERAL PRINCIPLES OF CRIMINAL LIABILITY

Section 7. Culpability; definitions. As used in this Act, unless the context requires otherwise:

(1) "Act" means a bodily movement.

(2) "Voluntary act" means a bodily movement performed consciously and includes the conscious possession or control of property.

(3) "Omission" means a failure to perform an act the performance of which is required by law.

(4) "Conduct" means an act or omission and its accompanying mental state.

(5) "To act" means either to perform an act or to omit to perform an act.

(6) "Culpable mental state" means intentionally, knowingly, recklessly or with criminal negligence as these terms are defined in subsections (7), (8), (9) and (10) of this section.

(7) "Intentionally" or "with intent," when used with respect to a result or to conduct described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described.

(8) "Knowingly" or "with knowledge," when used with respect to conduct or to a circumstance described by a statute defining an

offense, means that a person acts with an awareness that his conduct is of a nature so described or that a circumstance so described exists.

(9) "Recklessly," when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(10) "Criminal negligence" or "criminally negligent," when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

COMMENTARY

See commentary under § 11 infra.

Section 8. General requirements of culpability. (1) The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is capable of performing.

(2) Except as provided in section 9 of this Act, a person is not guilty of an offense unless he acts with a culpable mental state with respect to each material element of the offense that necessarily requires a culpable mental state.

COMMENTARY

See commentary under § 11 infra.

Section 9. Culpability requirements inapplicable to violations and to offenses defined by other statutes. (1) Notwithstanding the provisions of section 8 of this Act, a culpable mental state is not required if:

(a) The offense constitutes a violation, unless a culpable mental state is expressly included in the definition of the offense; or

(b) An offense defined by a statute outside this Code clearly indicates a legislative intent to dispense with any culpable mental state requirement for the offense or for any material element thereof.

(2) Notwithstanding any other existing law, and unless a statute enacted after the effective date of this Act otherwise provides, an

offense defined by a statute outside this Code that requires no culpable mental state constitutes a violation.

(3) Although an offense defined by a statute outside this Code requires no culpable mental state with respect to one or more of its material elements, the culpable commission of the offense may be alleged and proved, in which case criminal negligence constitutes sufficient culpability, and the classification of the offense and the authorized sentence shall be determined by sections 66 to 76 of this Act.

COMMENTARY

See commentary under § 11 infra.

Section 10. Construction of statutes with respect to culpability requirements. (1) If a statute defining an offense prescribes a culpable mental state but does not specify the element to which it applies, the prescribed culpable mental state applies to each material element of the offense that necessarily requires a culpable mental state.

(2) Except as provided in section 9 of this Act, if a statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required and is established only if a person acts intentionally, knowingly, recklessly or with criminal negligence.

(3) If the definition of an offense prescribes criminal negligence as the culpable mental state, it is also established if a person acts intentionally, knowingly or recklessly. When recklessness suffices to establish a culpable mental state, it is also established if a person acts intentionally or knowingly. When acting knowingly suffices to establish a culpable mental state, it is also established if a person acts intentionally.

(4) Knowledge that conduct constitutes an offense, or knowledge of the existence, meaning or application of the statute defining an offense, is not an element of an offense unless the statute clearly so provides.

COMMENTARY

See commentary under § 11 infra.

Section 11. Intoxication. (1) Voluntary intoxication is not, as such, a defense to a criminal charge, but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged.

(2) When recklessness establishes an element of the offense, if the defendant, due to voluntary intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.

COMMENTARY TO SECTIONS 7 TO 11

A. Summary

These sections set out the blameworthy mental states or *mens rea* required for the establishment of criminal liability and are intended to present a simpler, more understandable and more accurate statement of the requirements than is found in existing law.

Section 7. Definitions:

Subsection (1) requires bodily movement.

Subsection (2) defines a voluntary act to be a bodily movement performed consciously, and includes the "conscious" possession or control of property. Possession (or control) of property is included in the concept, providing the actor is aware of it.

Subsections (3), (4) and (5) stress the fact that omissions are included when performance is required by law.

Subsection (6) defines the term "culpable mental state." This must consist of one of the following: "intentionally," "knowingly," "recklessly" or with "criminal negligence" as defined in subsections (7), (8), (9) and (10). These are the only culpable mental states proposed to be recognized or used in the revised Code.

Section 8. General requirements of culpability:

Subsection (1) enunciates the basic principle that, no matter how an offense is defined, the minimal requirement for criminal liability is conduct which includes a "voluntary" act or omission. This excludes all "involuntary" acts such as reflex actions, acts committed during hypnosis, epileptic fugue, etc. Also excluded are omissions to perform an act which one is incapable of performing.

Subsection (2) states that except as provided in § 9, a culpable mental state is required for each material element "that necessarily requires a culpable mental state." The quoted phrase is designed to make it clear that the draft does not require *scienter* with respect to an element relating solely to the statute of limitations, jurisdiction, venue and the like.

Section 9. Culpability requirements inapplicable to violations and to offenses defined by other statutes:

This section sets forth the only exceptions to the need for a culpable mental state. Subsection (1) provides that a culpable mental state is not required for a violation (a noncriminal offense because the only authorized punishment is a fine) unless a culpable mental state is expressly included in the definition of the offense. Paragraph (b) provides, in the alternative, that a culpable mental state is not required for an offense defined by a statute outside the criminal code if the statute clearly indicates a legislative intent to dispense with any culpable mental state requirement.

Subsection (2) applies the minimal culpability requirements to statutes outside the criminal code that may be enacted after its effective date. However, the Legislature will have flexibility to specifically provide otherwise, but in the absence of a statute that provides to the contrary, an offense that requires no culpable mental state will constitute a violation.

Subsection (3) provides that even though no culpable mental state is required for an offense defined outside the criminal code, the prosecution could nonetheless allege and prove culpability, in which case proof of criminal negligence would be sufficient to take the offense out of the violation category and to make it punishable as a crime.

Section 10. Construction of statutes with respect to culpability requirements:

This section provides a statutory framework for construing penal statutes as regards their culpability content, and the application of the culpable mental state requirement to specific offenses.

Section 11. Intoxication:

Subsection (1) substantially reenacts existing law, ORS 136.400.

Subsection (2) provides, in effect, that a defendant may be guilty of reckless conduct, although he is unaware of a risk, if his unawareness is the result of voluntary intoxication. The reckless offender is aware of and "consciously disregards" it (§ 7 (9)). The criminally negligent offender is not aware of the risk created; therefore he cannot be guilty of disregarding it (§ 7 (10)). The New York commentary suggests this illustration of how an offender can act with both forms of culpability: "[T]he driver of a car who stops at a bar, drinks heavily, continues on his way and then runs over a pedestrian whom he fails to see in his intoxicated condition and whom he undoubtedly would have seen had he been sober. Here, his culpability goes well beyond his failure of perception at the time of the accident. By getting drunk in the course of his automobile trip, he consciously disregarded a substantial and unjustifiable risk of accident and, hence, in the overall setting, he acted 'recklessly.'" (§ 15.05, New York Revised Penal Law).

Note re ignorance or mistake as defense: The Model Penal Code, New York Revised Penal Law and Michigan Revised Criminal Code contain sections relating to ignorance or mistake of fact or law as a defense. The Commission, while not disagreeing with the legal proposition behind such a section, was of

the opinion that a specific statute was probably unnecessary in view of the broad culpability provisions already formulated by the draft. A factual mistake that supports a defense of justification is covered by Article 4 of the proposed Code.

B. Derivation

Section 7 is based on the definitions formulated in New York Revised Penal Law §§ 15.00–15.05. Similar definitions appear in Michigan Revised Criminal Code §§ 301, 305. The key definitions, i.e., the culpable mental states set out in subsections (7), (8), (9) and (10), follow the same rationale as § 2.02 of the Model Penal Code with one exception. The definition of "knowingly" or "with knowledge" in subsection (8) was changed by the New York reporters to eliminate any reference to result of conduct and to restrict the term to awareness of the nature of one's conduct or of the existence of specified circumstances (e.g., that property is stolen, that one has no right to enter a building, etc.). The New York commentary has this to say:

> "Under the formulations of the Model Penal Code (§ 2.02 [2bii]) and the Illinois Criminal Code (§ 4–5 [b]), 'knowingly' is, in one phase, almost synonymous with 'intentionally' in that a person achieves a given result 'knowingly' when he 'is practically certain' that his conduct will cause that result. This distinction between 'knowingly' and 'intentionally' in that context appears highly technical or semantic, and the Revised Penal Law does not employ the word 'knowingly' in defining *result* offenses. Murder of the common law variety, for example, is committed *intentionally* or not at all." (Commentary § 15.05, New York Revised Penal Law).

Section 8. Sources of the language used in this section are New York Revised Penal Law §§ 15.10, 15.15 and Model Penal Code § 2.02.

Section 9 is based on Model Penal Code § 2.05.

Section 10 is based on language of Model Penal Code § 2.02.

Section 11. Subsection (1) is derived from New York Revised Penal Law § 15.25 with the modifying adjective "voluntary" retained from ORS 136.400. Subsection (2) is taken from Model Penal Code § 2.08 (2).

C. Relationship to Existing Law

ORS 161.010 expressly defines the following mental states: "wilfully," "neglect," "corruptly," "malice," "wrongfully," "wantonly" and "knowingly." The definitions are not clear, and have been difficult to interpret and apply. See Hans A. Linde's article, "Criminal Law—1959 Oregon Survey," 39 *Or L Rev 161*. "Malice" and "maliciously" are defined as importing a wish to vex, annoy or injure another person, established either by proof or presumption of law. The definition is either very much too narrow or it requires reference to the entire historical development of murder and other crimes which require malice for any sort of understanding. Perkins, *Criminal Law* 31, 173, 676 (Foundation Press, 1957). The definitions set out in ORS 161.010 are not useful tools for meaningful instruction of injuries. Intent, intention and recklessness are not defined. See also ORS 163.010, 163.020, 166.220, 483.992 (1).

Article 2 would change Oregon law in its treatment of negligence and recklessness. The blameworthy mental state now required for guilt of negligent homicide under ORS 163.091 is gross negligence. In *State v. Hodgdon,* 244 Or 219, 223, 416 P2d 647 (1966), the court held: (1) that gross negligence is the same when applied to civil law (guest passenger statute, ORS 30.115 (2)) as when used to define an ingredient of crime; (2) that the guest passenger statute definition of gross negligence may properly be used in instructing the jury in a negligent homicide case; and (3) that "in gross negligence, we find *not simply an inadvertent breach of duty or imprudent conduct* (as in ordinary negligence), but the violation of the duty to others is so flagrant as to evidence an indifference to or reckless disregard of the rights of others." (Emphasis supplied).

The court in *Hodgdon* thus adopted Mr. Justice O'Connell's conclusion in *Williamson v. McKenna,* 223 Or 366, 387–88, 354 P2d 56 (1960), that: "Gross negligence thus becomes identical with recklessness."

And finally, the court in *State v. Hodgdon,* supra, at 228 said: ". . . 'recklessness' may be found in circumstances where defendant did not appreciate the extreme risk, but where any reasonable man would appreciate it."

To summarize, Oregon now equates gross negligence with recklessness, and in Oregon, one may be found to have been reckless on the basis of an objective test, without an actual subjective appreciation of risk.

The Model Penal Code, the Illinois and New York laws, the Michigan draft and the instant proposal, on the other hand, distinguish between recklessness and gross negligence, and characterize an act as "negligent" or "criminally negligent" (a better term) when the actor *should* be aware of the risk, and characterize an act as reckless when the actor *consciously* disregards the risk.

The comments to the new penal codes and to the various drafts indicate that negligence will rarely be used as the mental state required for guilt. To that extent this article makes somewhat less change in the law than appears at first blush. Since gross negligence in Oregon is now equated with recklessness,

the only substantial change is in using a subjective test for awareness of risk, rather than an objective one. Ordinary negligence will not be an adequate basis for criminal liability under the proposal. This is, of course, true in present Oregon law as far as negligent homicide is concerned. *State v. Wilcox,* 216 Or 110, 124, 337 P2d 797 (1959); ORS 163.091 (1).

The article will do away with the problem that now often arises when a statute defining a crime fails to prescribe a required culpable state of mind. In that case, it requires that intention, knowledge, recklessness or criminal negligence shall have existed in order to find the defendant guilty, except in cases of violations (which are not punished by imprisonment) or if the law defining the offense clearly indicates a purpose to dispense with any culpable mental state requirement.

Substantial uniformity of basic criminal law throughout the various states is a highly desirable goal. Perhaps the single most basic part of the Code is the culpability part of it. It would seem, therefore, that the culpability provisions should be matched as closely as possible to those of other recently revised state codes. It would hardly seem possible that Oregon could have local conditions that would dictate major differences.

The Commission follows the Model Penal Code in expressing a policy adverse to use of "strict liability" concepts in criminal law, whenever the offense carries a possibility of sentence of imprisonment.

This position relates not only to offenses defined by the criminal code itself, but covers the entire body of state law, so far as penal sanctions are involved. As noted by the Model Penal Code commentators, in the absence of minimal culpability, the law has neither a deterrent nor corrective nor an incapacitative function to perform. They support this approach by stating:

> "It has been argued and the argument undoubtedly will be repeated, that absolute liability is necessary for enforcement in a number of areas where it obtains. But if practical enforcement cannot undertake to litigate the culpability of alleged deviation from legal requirements, we do not see how the enforcers rightly can demand the use of penal sanctions for the purpose. Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was wrong. This is too fundamental to be compromised. The law goes far enough if it permits the imposition of a monetary penalty in cases where strict liability has been imposed." (Tent. Draft No. 4. at 140 (1955)).

ARTICLE 3. PARTIES TO CRIME

Section 12. Criminal liability based upon conduct. A person is guilty of a crime if it is committed by his own conduct or by the conduct of another person for which he is criminally liable, or both.

COMMENTARY

A. Summary

The underlying purpose of this section and those that follow is to declare the general principles under which criminal liability will be imposed for accessorial conduct.

Section 12 states the fundamental rule that liability is based upon one's own conduct or the conduct of another for which he may be liable. As noted in the Model Penal Code, all modern criminal justice systems are founded upon this principle of accountability. (Commentary, Model Penal Code, Tent. Draft No. 1, at 14 (1953)).

B. Derivation

The section is derived from Model Penal Code § 2.06 (1) except that the words "criminally liable" are used instead of the language "legally accountable." Similar provisions are contained in Michigan Revised Criminal Code § 401 and Illinois Criminal Code § 5–1.

C. Relationship to Existing Law

The section is consistent with Oregon statutory law which long ago abolished the common law distinction between principals and accessories before the fact. The field of accessories *after* the fact is not covered by this article; such behavior amounts to an interference with the administration of justice and is dealt with under Article 24. Existing Oregon statutes relating to parties to crime:

ORS 161.210. Principals and accessories. (1) The parties to crime are classified as principals and accessories. (2) There are no accessories in misdemeanors.

ORS 161.220. Common law distinctions abrogated; principals defined. The distinction in felonies

between an accessory before the fact and a principal, and between principals in the first and second degree, is abrogated; all persons concerned in the commission of a felony or misdemeanor, whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals and shall be indicted, tried and punished as principals.

ORS 161.230. Accessories defined. All persons are accessories who, after the commission of any felony, conceal or aid the offender, with knowledge that he has committed a felony, and with intent that he may avoid or escape from arrest, trial, conviction or punishment.

ORS 161.240: Punishment of accessory. Except where a different punishment is prescribed by law, an accessory, upon conviction, shall be punished by imprisonment in the penitentiary for not more than five years, or by imprisonment in the county jail for not less than three months nor more than one year, or by fine of not less than $100 nor more than $500.

ORS 161.250. Accessory punishable though principal not tried. An accessory may be indicted, tried and punished though the principal is not indicted or tried.

All of the above statutes would be repealed by the proposed Code.

Section 13. Criminal liability for conduct of another; complicity. A person is criminally liable for the conduct of another person constituting a crime if:

(1) He is made criminally liable by the statute defining the crime; or

(2) With the intent to promote or facilitate the commission of the crime he:

(a) Solicits or commands such other person to commit the crime; or

(b) Aids or abets or agrees or attempts to aid or abet such other person in planning or committing the crime; or

(c) Having a legal duty to prevent the commission of the crime, fails to make an effort he is legally required to make.

COMMENTARY

A. Summary

Section 13 sets forth the modes and extent of complicity in criminal conduct and the requisite mental state.

Subsection (1) fixes liability if it is so provided by the specific criminal statute and will not disturb those situations where special legislation may impose extraordinary liability upon a person for the behavior of another. An example of such a statute would be one which places vicarious criminal liability on a tavern owner for the act of an employe resulting in sale of liquor to a minor. See *State v. Brown*, 73 Or 325, 144 P 444 (1914).

Paragraphs (a) and (b) of subsection (2) comprise a comprehensive statement of criminal liability based on conspiracy, solicitation or aiding in the commission of the crime. The *mens rea* is an intent to "promote or facilitate" the commission of the crime. Note, however, that "conspiracy" as such, is not the basis of complicity in substantive offenses committed in furtherance of its aims. The type of conduct covered is phrased in terms of "solicits," "commands," "aids," "abets" or "agrees or attempts to aid or abet." Solicitation has the same meaning for the purposes of this section as is proposed in the inchoate crimes article. A lengthy discussion of the subject is found in Model Penal Code (Commentary, Tent. Draft No. 1, at 20–26) wherein the reason advanced for this treatment of conspiracy is that there appears to be no better way to confine within reasonable limits the scope of liability to which a criminal conspiracy may give rise.

Paragraph (c) refers to the failure to act by one having a legal duty to do so. In such situations, if the omission is undertaken with the intent to facilitate the commission of a crime, it should make the individual as much an accomplice as one who gives affirmative aid.

B. Derivation

Subsection (1) is taken from Model Penal Code § 2.06 (2) (b) with the words "criminally liable" used instead of the word "accountable."

The language of "intent to promote or facilitate" the commission of the crime in subsection (2) comes from Michigan Revised Criminal Code § 415. The balance of the subsection is based on Model Penal Code § 2.06 (3), but follows the Michigan view that retaining the common law verb "abets" is desirable because the word has been well defined by the courts.

C. Relationship to Existing Law

Subsection (1) restates the existing rule, although Oregon now has no comparable statute, that a principal may be held liable for the criminal acts of his agent done by the principal's authority. *State ex rel. Kruckman* v. *Rogers,* 124 Or 656, 256 P 784 (1928).

Paragraphs (a) and (b) of subsection (2) do not differ substantially from present law governing accessorial liability, whether that liability arises by virtue of aiding and abetting or by virtue of conspiracy liability for substantive crimes. See ORS 161.220; *State v. Blackwell,* 241 Or 528, 407 P2d 617 (1965); *State v. Shannon,* 242 Or 404, 409 P2d 911 (1966); *State v. Moczygemba,* 234 Or 141, 399 P2d 557 (1963); *State v. Brown,* 113 Or 149, 231 P 929 (1925); *State v. Johnson,* 7 Or 210 (1879).

The same language that is suggested for the inchoate crime of solicitation has been used in paragraph (a). Although the crime of solicitation could be utilized as a basis for prosecution even where the substantive crime was actually committed, it is anticipated that solicitation will be employed primarily where the solicitation was unsuccessful, and that prosecution as an accomplice will be the normal course in cases where the solicitation did actually lead to the commission of a crime.

The terms "aids" and "abets" have been utilized in paragraph (b) without definition inasmuch as they have been interpreted in a number of Oregon cases. *State v. Rosser,* 162 Or 293, 344, 91 P2d 295 (1939), defined an "aider and abettor" as "one who advises, counsels, procures or encourages another to commit a crime, though not personally present at the time and place of the commission of the offense." *State v. Start,* 65 Or 178, 182, 132 P 512 (1913), defined "abet" as meaning "to countenance, assist, give aid" and to include "knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime." Accord, *State v. Wedemeyer,* 65 Or 198, 132 P 518 (1913).

The principle enunciated in paragraph (c) can be illustrated by a case cited in the Michigan commentary. In *People v. Chapman,* 28 NW 896 (Mich 1886), a husband seeking grounds for divorce had hired a man to commit adultery with his wife. The wife did not cooperate and instead was raped by the husband's accomplice. The husband was in the next room but made no effort to come to the aid of his wife. The court had no difficulty in finding that his failure to interfere under the circumstances, constituted aid and assistance rendering him liable for the offense.

Another kind of case in which there clearly would be a duty to try to prevent the crime would be that of a police officer who permits a prisoner to escape from official detention without making an effort to prevent the escape. (ORS 162.324 provides that this is one of the means of committing the crime of escape.)

Section 14. Criminal liability for conduct of another; no defense. In any prosecution for a crime in which criminal liability is based upon the conduct of another person pursuant to section 13 of this Act, it is no defense that:

(1) Such other person has not been prosecuted for or convicted of any crime based upon the conduct in question or has been convicted of a different crime or degree of crime; or

(2) The crime, as defined, can be committed only by a particular class or classes of persons to which the defendant does not belong, and he is for that reason legally incapable of committing the crime in an individual capacity.

COMMENTARY

A. Summary

Subsection (1) codifies the case rule that lack of conviction of the principal is no defense to prosecution of an accomplice. See Oregon cases cited infra.

Subsection (2) states the generally accepted principle that a person who is not capable in his individual capacity of committing a crime may nevertheless be liable for the behavior of another who has the capacity to commit the crime. For example, *A*, who

is not a public servant, aids *B*, who is a public servant, to receive a bribe. The fact that *A* is incapable of committing the crime of bribe receiving alone because he does not belong to the class of persons to whom it applies (public servants) does not preclude his conviction thereof on the basis of his accessorial conduct. See Oregon cases infra.

B. Derivation

The section is based upon language appearing in Model Penal Code § 2.06 (7), New York Revised Penal Law § 20.05 and Michigan Revised Criminal Code § 425.

C. Relationship to Existing Law

ORS 161.250 provides that an accessory is punishable though the principal is not tried, but there is no comparable statute relating to accomplices. However, our court decisions have articulated the same rules. Pertinent cases relating to subsection (1):

A principal may be convicted of murder in the second degree and an accessory before the fact of the crime of manslaughter. *State v. Steeves,* 29 Or 85, 43 P 947 (1896).

The fact that a codefendant was acquitted does not prevent the conviction of the accused. *State v. Casey,* 108 Or 386, 217 P 632 (1923). *Rooney v. U.S.,* 203 F 928 (CCA 1913).

Subsection (2):

Since enactment of ORS 161.220, the Oregon Court has consistently adhered to the doctrine that who cannot alone commit a crime defined by statute may, by aiding and abetting one within the class against which the statute is directed, render himself criminally liable though the statute does not in express terms extend to persons not within the class. *State v. Case,* 61 Or 265, 122 P 304 (1912); *State v. Fraser,* 105 Or 589, 209 P 467 (1922).

Section 15. Exemptions to criminal liability for conduct of another. Except as otherwise provided by the statute defining the crime, a person is not criminally liable for conduct of another constituting a crime if:

(1) He is a victim of that crime; or

(2) The crime is so defined that his conduct is necessarily incidental thereto.

COMMENTARY

A. Summary

This section states certain principles for relieving a person from accountability for the conduct of another.

Under subsection (1), unless the statute defining the crime provides to the contrary, a "victim" of the criminal act does not share the guilt of the actor. Thus, a victim of a blackmail plot who pays over money, even though he "aids" the commission of the crime, or the girl under the age of consent in statutory rape, even though she "solicits" the criminal act, is not deemed guilty of the substantive offense.

Subsection (2) extends the same concept to situations wherein the person may not be characterized exactly as a "victim." The Model Penal Code suggests the following examples: Should a man accepting a prostitute's solicitation be guilty of prostitution? Should a woman upon whom an illegal miscarriage is produced be guilty of abortion? (See State v. Barnett, infra). Should a bribe taker be guilty of bribery? (Commentary, Tent. Draft No. 1, at 35 (1953)).

B. Derivation

The origin of § 15 is Model Penal Code § 2.06 (6), New York Revised Penal Law § 20.10 and Michigan Revised Criminal Code § 420. It more closely resembles the last cited section.

C. Relationship to Existing Law

There are no comparable existing Oregon statutes; however, the two exemptions are well recognized in general common law throughout the United States and by the Oregon Court.

The justification for subsection (1) is stated in the Model Penal Code commentary:

"It seems clear that the victim of a crime should not be held as an accomplice in its perpetration, though his conduct in a sense assists in the commission of the crime. The businessman who yields to the extortion of a racketeer, the parent who pays ransom to the kidnapper, may be unwise or even may be thought immoral; [but] to

view them as involved in the commission of the crime confounds the policy embodied in the prohibition; it is laid down, wholly or in part, for their protection. So, too, to hold the female an accomplice in a statutory rape upon her person would be inconsistent with the legislative purpose to protect her against her own weakness in consenting, the very theory of the crime." (Model Penal Code, Tent. Draft No. 1, at 35).

This position is consistent with Oregon case authority. *State v. Knighten*, 39 Or 63, 64 P 866 (1901) (prosecutrix is not an accomplice to statutory rape); *State v. Mallory*, 92 Or 133, 180 P 99 (1919) (prosecutrix is not an accomplice to fornication).

The justification for subsection (2) also is well put in the Model Penal Code commentary:

"Exclusion of the victim does not wholly meet the problems that arise. Should a woman be deemed an accomplice when an abortion is performed upon her? Should the man who has intercourse with a prostitute be viewed as an accomplice in the act of prostitution, the purchaser an accomplice in the unlawful sale, the unmarried party to a bigamous marriage an accomplice of the bigamist, the bribe-giver an accomplice of the taker?

"These are typical situations where conflicting policies and strategies, or both, are involved in determining whether the normal principles of accessorial accountability ought to apply. One factor that has weighed with some state courts is that affirming liability makes applicable the requirement that testimony be corroborated; the consequence may be to diminish rather than enhance the law's effectiveness by making any convictions unduly difficult. More than this, however, is involved. In situations like prostitution, prohibition, even abortion, there is an ambivalence in public attitudes that makes enforcement very difficult at best; if liability is pressed to its logical extent, public support may be wholly lost. Yet to trust only to the discretion of prosecutors makes for anarchial diversity and enlists sympathy for those against whom prosecution may be launched.

"To seek a systematic legislative resolution of these issues seems a hopeless effort; the problem must be faced and weighed as it arises in each situation. What is common to these cases is, however, that the question is before the legislature when it defines the individual offense involved. No one can draft a prohibition of adultery without awareness that two parties to the conduct necessarily will be involved. It is proposed, therefore, that in such cases the general section on complicity be made inapplicable, leaving to the definition of the crime itself the selective judgment that must be made. If legislators know that buyers will not be viewed as accomplices in sales unless the statute indicates that this behavior is included in the prohibition, they will focus on the problem as they frame the definition of the crime. And since the exception is confined to behavior 'inevitably incident to' the commission of the crime, the problem, we repeat, inescapably presents itself in defining the crime." (Model Penal Code, supra at 35–36).

In *State v. Barnett*, 249 Or 226, 437 P2d 821 (1968), a prosecution for manslaughter by abortion, the defendant argued that the mother upon whom the abortion was performed was an accomplice within the meaning of ORS 161.220 and that therefore, the defendant could not be convicted on her testimony alone because of ORS 136.550 (requiring corroboration of accomplice testimony). The court in affirming the conviction stated: "It is our opinion that it was not the intention of the legislature by the passage of this statute (ORS 161.220) to make the consent and solicitation of the mother culpable when such actions had not been previously so considered . . . . The fact that certain actions have been held to constitute the aiding and abetting of crimes other than manslaughter by abortion does not result in the necessary conclusion that historical precedent must be disregarded and that the consent and solicitation of the mother should be treated as sufficiently concerning her with the commission of the crime so that she is an accomplice. We do not believe the legislature intended any such result." At 229.

Adoption of the proposed section would clearly show that, indeed, the Legislature does not intend any such result and would undoubtedly be of great aid to the courts in deciding whether or not as a matter of law a person is an accomplice in any given case.

The rule in this state is that an accomplice is one who is subject to be indicted and punished for the same crime for which the defendant is being tried. *State v. Barnett*, supra, at 228. See also, *State v. Coffey*, 157 Or 457 72 P2d 35 (1937) (a bribe-giver is not an accomplice of the public officer receiving the bribe); *State v. McCowan*, 203 Or 551, 280 P2d 976 (1955) (a prostitute is not an accomplice of a man who receives her earnings in violation of ORS 167.120).

An accomplice has been further defined in Oregon cases as "a person who knowingly, voluntarily and with common intent with the principal offender, unites in the commission of a crime." *State v. Stacey*, 153 Or 449, 53 P2d 1152 (1936); *State v. Ewing*, 174 Or 487, 149 P2d 765 (1944); *State v. Nice*, 240 Or 343, 401 P2d 296 (1965).

Section 16. Criminal liability of corporations. (1) A corporation is guilty of an offense if:

(a) The conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation and the offense is a misdemeanor or a violation, or the offense is one defined by a statute that clearly indicates a legislative intent to impose criminal liability on a corporation; or

(b) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(c) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded or knowingly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation.

(2) As used in this section:

(a) "Agent" means any director, officer or employe of a corporation, or any other person who is authorized to act in behalf of the corporation.

(b) "High managerial agent" means an officer of a corporation who exercises authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employes, or any other agent in a position of comparable authority.

COMMENTARY

See commentary under section 17 infra.

Section 17. Criminal liability of an individual for corporate conduct. A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of a corporation to the same extent as if such conduct were performed in his own name or behalf.

COMMENTARY TO SECTIONS 16 AND 17

A. Summary

Section 16 indicates the circumstances under which a corporation may be held criminally liable.

Section 17 assures that a person is not exempted from personal criminal liability performed through or in the name of a corporation.

Paragraph (a) of subsection (1) indicates the offenses for which a corporation may be held criminally liable for the conduct of an agent acting within the scope of his employment. It adopts the agency principle of *respondeat superior,* qualified by the additional requirement that the conduct be "in behalf of the corporation." Liability based upon *respondeat superior* is limited to offenses that are misdemeanors or violations. The only exceptions to this limitation would need to be clearly indicated by the Legislature in the statute defining a felony that imposed corporate liability.

Paragraph (b) affirms the responsibility of corporations for the commission of an offense through omission of a duty specifically imposed on corporations by law.

Paragraph (c) also states a basis for liability that relates more to the actual responsibility of the corporation than the theory of *respondeat superior.* It applies to those activities which were known specifically to high corporate executives.

The policy issues to be considered are well stated in the Model Penal Code:

"In approaching the analysis of corporate criminal capacity, it will be observed initially that the imposing of criminal penalties on corporate bodies results in a species of vicarious criminal liability. The direct burden of a corporate fine is visited on the shareholders of the corporation. In most cases, the shareholders have not participated in the criminal conduct and lack the practical means of supervision of corporate management to prevent misconduct by corporate agents. This is not to say, of course, that all the considerations of policy which are involved in imposing vicarious responsibility on the human principal are present in the same degree in the corporate cases. Two fundamental distinctions should be noted. First, the very fact that the corporation is the party nominally convicted means that the individual shareholders escape the opprobrium and incidental disabilities which normally follow a personal conviction or those which may result even from being named in an indictment. Second, the shareholder's loss is limited to his equity in the corporation. His personal assets are not ordinarily subject to levy and the conviction of the corporation will not result in loss of liberty to the stockholders. Nevertheless, the fact that the direct impact of corporate fines is felt by a group ordinarily innocent of criminal conduct underscores the point that such fines ought not to be authorized except where they clearly may be expected to accomplish desirable social purposes. To the extent that shareholders participate in criminal conduct, they may be reached directly through application of the ordinary principles of criminal liability.

"It would seem that the ultimate justification of corporate criminal responsibility must rest in large measure on an evaluation of the deterrent effects of corporate fines on the conduct of corporate agents. Is there reason for anticipating a substantially higher degree of deterrence from fines levied on corporate bodies than can fairly be anticipated from proceeding directly against the guilty officer or agent or from other feasible sanctions of a non-criminal character?

"It may be assumed that ordinarily a corporate agent is not likely to be deterred from criminal conduct by the prospect of corporate liability when, in any event, he faces the prospect of individually suffering serious criminal penalties for his own act. If the agent cannot be prevented from committing an offense by the prospect of personal liability, he ordinarily will not be prevented by the prospect of corporate liability.

"Yet the problem cannot be resolved so simply. For there are probably cases in which the economic pressures within the corporate body are sufficiently potent to tempt individuals to hazard personal liability for the sake of company gain, especially where the penalties threatened are moderate and where the offense does not involve behavior condemned as highly immoral by the individual's associates. This tendency may be particularly strong where the individual knows that his guilt may be difficult to prove or where a favorable reaction to his position by a jury may be anticipated even where proof of guilt is strong. A number of appellate opinions reveal situations in which juries have held the corporate defendant criminally liable while acquitting the obviously guilty agents who committed the criminal acts. See, e.g., *United States v. General Motors Corp.*, 212 F. 2d 376, 411 (7th Cir. 1941) ('We cannot understand how the jury could have acquitted all of the individual defendants.'); *United States v. Austin-Bagley Corp.*, 31 F. 2d 229, 233 (2d Cir. 1929) ('How an intelligent jury could have acquitted any of the defendants we cannot conceive'); *American Medical Ass'n. v. United States*, 130 F. 2d 233 (D.C. Cir. 1942).

"This may reflect more than faulty or capricious judgment on the part of the juries. It may represent a recognition that the social consequences of a criminal conviction may fall with a disproportionately heavy impact on the individual defendants where the conduct involved is not of a highly immoral character. It may also reflect a shrewd belief that the violation may have been produced by pressures on the subordinates created by corporate managerial officials even though the latter may not have intended or desired the criminal behavior and even though the pressures can only be sensed rather than demonstrated. Furthermore, the great mass of legislation calling for corporate criminal liability suggests a widespread belief on the part of legislators that such liability is necessary to effectuate regulatory policy. In some cases, such as the Elkins Act, legislatures have added corporate liability to the criminal penalties on the belief founded on experience that such additional sanctions are necessary. *N.Y. Central R.R. v. United States*, 212 U.S. 481, 494-495 (1909).

"The case so made out, however, does not demonstrate the wisdom of corporate fines generally. Rather, it tends to suggest that such liability can best be justified in cases in which penalties directed to the individual are moderate and where the criminal conviction is least likely to be interpreted as a form of social moral condemnation. This indicates a general line of distinction between the '*malum prohibitum*' regulatory offenses, on the one hand, and more serious offenses, on the other. The same distinction is suggested in dealing with the problems of jury behavior. The cases cited above involving situations in which individual defendants were ac-

quitted are all cases of economic regulations. It may be doubted that such results would have followed had the offenses involved a more obvious moral element. In any event, it is not clear just what conclusions are to be drawn from the cited cases. In each, the jury had corporate liability available as an alternative to acquittal of all the defendants. Conceivably, if that alternative had not been available, verdicts against the individuals in some of the cases might have been returned. Thus, it is at least possible that corporate liability encourages erratic jury behavior. It may be true that the complexities of organization characteristic of large corporate enterprise at times present real problems of identifying the guilty individual and establishing his criminal liability. It would be hoped, however, that more could be pointed to in justification of placing the pecuniary burdens of criminal fines on the innocent than the difficulties of proving the guilt of the culpable individual. Where there is concrete evidence that the difficulties are real, however, the effectuation of regulatory policy may be thought to justify the means.

"In surveying the case law on the subject of corporate criminal liability one may be struck at how few are the types of common-law offenses which have actually resulted in corporate criminal responsibility. They are restricted for the most part to thefts (including frauds) and involuntary manslaughter. Conspiracy might also be included, but generally the cases have involved conspiracies to violate regulatory statutes (such as the anti-trust laws), and often these statutes include specific conspiracy provisions made applicable to corporate bodies. No cases have been found in which a corporation was sought to be held criminally liable for such crimes as murder, treason, rape or bigamy. In general, such offenses may be effectively punished and deterred by prosecutions directed against the guilty individuals. One would not anticipate the same reluctance on the part of juries to convict which seems sometimes to be present where the offense is a regulatory crime. Moreover, in many of the situations, such as those involving involuntary manslaughter, there is a strong possibility that the shareholders will be called upon to bear the burden of tort recoveries. The prospect of tort recoveries may also be expected to encourage supervision of subordinate employees by executive personnel." (Model Penal Code, Tent. Draft No. 4, at 148-150 (1955)).

B. Derivation

Source of § 16 is New York Revised Penal Law § 20.20, Michigan Revised Criminal Code § 430 and Model Penal Code § 2.07.

Section 17 is identical to Michigan § 435 and New York § 20.15.

C. Relationship to Existing Law

At present there is no specific statutory provision dealing generally with corporate criminal liability, although there are statutes dealing with some individual fields relating thereto and a definitional criminal statute that includes corporations.

ORS 161.010 contains definitions of terms used in statutes relating to crimes and criminal procedure and includes "(11) 'Person' includes corporations as well as natural persons."

ORS 135.840 provides that a plea of guilty to an indictment against a corporation may be put in by counsel.

State v. Fraser, 105 Or 589, 209 P 467 (1922), held that a corporation is capable of committing the crime of selling and offering securities for sale as a dealer without complying with the Blue Sky Law.

Oregon, along with the vast majority of states, has refused to extend corporate criminal liability to crimes of personal violence such as homicide or manslaughter. *State v. Pacific Powder Co.*, 226 Or 502, 360 P2d 530 (1961). The draft would leave this position unchanged but should assist the courts in construing future criminal statutes that may involve corporate liability and in determining the legislative intent with respect to each particular offense.

ARTICLE 4. GENERAL PRINCIPLES OF JUSTIFICATION

Section 18. Justification; a defense. In any prosecution for an offense, justification, as defined in sections 19 to 35 of this Act, is a defense.

COMMENTARY

This section designates justification as a "defense" instead of an "affirmative defense," thereby requiring that justification, when invoked by the defendant, must be negatived by the state beyond a reasonable doubt.

This treatment of the defense continues the Oregon case law doctrine with respect to "self-defense" and is in accord with the majority of states. (See Model Penal Code, Tent. Draft No. 8, at 4 (1958); Hall and Glueck, *Cases on Criminal Law* 96 (2d ed 1958).

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This treatment of the defense continues the Oregon case law doctrine with respect to "self-defense" and is in accord with the majority of states. (See Model Penal Code, Tent. Draft No. 8, at 4 (1958); Hall and Glueck, *Cases on Criminal Law* 96 (2d ed 1958).

The best statement regarding the burden of proof in such cases appears in *State v. Ruff*, 230 Or 546, 370 P2d 942 (1962), a prosecution for second degree murder in which the defendant contended that the killing of the victim amounted to excusable homicide as defined in ORS 163.110 and that the trial court erred in denying a motion for a directed verdict of acquittal. Perry, J. in the opinion states:

"While it is not necessary that the defendant establish that the death was accidental or the defendant acted in self defense to have a jury return a verdict of not guilty, as it is only necessary that the jury entertain a reasonable doubt in these respects, nevertheless, it is for the jury to determine whether or not there is a reasonable doubt." At 551. See *State v. Holbrook*, 98 Or 43, 188 P 947, 192 P 640, 193 P 434 (1920).

The Oregon Court also has held that in a homicide case, even if the defendant denies the killing, he is entitled to an instruction on self-defense if the issue is raised by the evidence in the case. *State v. Anderson*, 207 Or 675, 694, 298 P2d 195 (1956).

State v. Steidel, 98 Or 681, 194 P 854 (1921), held that it is not necessary to plead self-defense in order to raise the issue at trial. See also *State v. Mack*, 57 Or 565, 112 P 1079 (1911).

Section 19. Justification; generally. (1) Unless inconsistent with other provisions of this Act defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when it is required or authorized by law or by a judicial decree or is performed by a public servant in the reasonable exercise of his official powers, duties or functions.

(2) As used in subsection (1) of this section, "laws and judicial decrees" include but are not limited to:

(a) Laws defining duties and functions of public servants;

(b) Laws defining duties of private citizens to assist public servants in the performance of certain of their functions;

(c) Laws governing the execution of legal process;

(d) Laws governing the military services and conduct of war; and

(e) Judgments and orders of courts.

COMMENTARY

A. Summary

Subsection (1) merely provides that statutes or court decisions which impose a duty or grant a privilege to act may be followed without the actor incurring criminal liability thereby.

The term "public servant" is not defined in this article but would generally include the same public officers or employes included within the definition of the term as used elsewhere in the proposed Code. Ordinarily, however, the application of the justification principles would involve public servants such as law enforcement officers, firemen or others dealing with emergency situations that might call for the use of some degree of force by them.

The term "conduct" is not defined but is not used in the broad sense as the term is defined for purposes of Article 2 of the Code. For the purposes of the instant article, the noun is intended to have its ordinary dictionary meaning.

Subsection (2) sets forth examples of the types of instances in which conduct is to be considered as required or authorized by law.

B. Derivation

The section embodies language that is essentially the same as Michigan Revised Criminal Code § 601. The last phrase in subsection (1) is taken from New York Revised Penal Law § 35.05 (amended 1968). The New York commentary indicates that the original provision has been criticized in some quarters as not being sufficiently comprehensive for its purpose because official conduct of the nature indicated, though accepted as proper, may not always be expressly "required or authorized" by law. An example given is that there may not be any statute or regulation

explicitly authorizing officers of a particular police department to buy narcotics for purposes of criminal prosecution and, hence, that such activity might subject the officer to a technical charge of unlawful possession of narcotics. While such a charge would be unlikely, the Commission believes that the New York approach is desirable.

C. Relationship to Existing Law

Oregon has no comparable existing statute but does have specific provisions relating to arrests, execution of search warrants and other legal process and the duties and privileges of peace officers and private persons in relation thereto. See ORS 133.220, 133.350, 141.110, 162.530, 163.100, 426.215.

Section 20. Justification; choice of evils. (1) Unless inconsistent with other provisions of this Act defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when:

(a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and

(b) The threatened injury is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

(2) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder.

COMMENTARY

A. Summary

Subsection (1) of this section is designed to allow the balancing of the injury which the actor sought to prevent against the injury which he caused. (See Model Penal Code, Tent. Draft No. 8, at 5–10 (1958)). Examples of its application would include blasting buildings to prevent a major fire from spreading, breaking into an unoccupied rural house in order to make an emergency telephone call to save a person's life or forcibly restraining a person infected with a highly contagious and dangerous disease.

Subsection (2), however, is intended to ensure that the balancing cannot go to the desirability of the statute itself under which the prosecution is maintained. In other words, the actor cannot "pick and choose" the laws he will obey on the basis of whether he or anyone else deems them advisable. As the Michigan commentary illustrates, "a person cannot claim that euthanasia ought not be viewed as a crime, or that there is an exemption in a criminal trespass statute in favor of those who invade public offices to protest against United States foreign policy."

The preliminary drafts contained the following additional subsection: "(3) Whenever evidence relating to the defense of justification under this section is raised by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification." Its purpose was to attempt to control possible misuse of the "choice of evils concept." The Commission decided to delete this provision and leave it to the trial judge to deal with the matter as he would any other offered evidence.

B. Derivation

The section is derived from Model Penal Code § 3.02, New York Revised Penal Law § 35.05 (2) and Michigan Revised Criminal Code § 605.

C. Relationship to Existing Law

There is no counterpart of this section in present Oregon law.

Section 21. Justification; use of physical force generally. The use of physical force upon another person that would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

(1) A parent, teacher, guardian or other person entrusted with the care and supervision of a minor or an incompetent person may use reasonable physical force upon such minor or incompetent person when and to the extent he reasonably believes it necessary to maintain discipline or to promote the welfare of the minor or incompetent person.

(2) An authorized official of a jail, prison, or correctional facility may use physical force when and to the extent that he reasonably believes it necessary to maintain order and discipline or as is authorized by law.

(3) A person responsible for the maintenance of order in a common carrier of passengers, or a person acting under his direction, may use physical force when and to the extent that he reasonably believes it necessary to maintain order, but he may use deadly physical force only when he reasonably believes it necessary to prevent death or serious physical injury.

(4) A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious physical injury upon himself may use physical force upon that person to the extent that he reasonably believes it necessary to thwart the result.

(5) A person may use physical force upon another person in defending himself or a third person, in defending property, in making an arrest or in preventing an escape, as hereafter prescribed in this Act.

COMMENTARY

A. Summary

The purpose of § 21 is to set forth the different circumstances in which physical force may be used by a person without committing a criminal offense.

Subsection (1) justifies the use of reasonable, but not deadly, force by parents, teachers, guardians and others entrusted with the care of minors and incompetents for the purpose of maintaining discipline or promoting the welfare of the minor or incompetent person.

Subsection (2) is designed to integrate the criminal code provisions with other applicable statutes governing discipline of prisoners. (See ORS 137.380, 421.105, 421.120, Const. Art. I, § 13).

Subsection (3) permits railroad conductors, bus drivers and others responsible for maintenance of order on common carriers to use reasonable physical force to maintain order.

Subsection (4) allows reasonable physical force to be used to prevent an apparent suicide attempt.

Subsection (5) integrates the section with the sections which follow in order to present a complete list of the general types of situations in which the use of physical force is justifiable.

B. Derivation

The section is based on New York Revised Penal Law § 35.10 and Michigan Revised Criminal Code § 610.

C. Relationship to Existing Law

Subsection (1): As noted in the Model Penal Code:

> ". . . existing law universally allows a privilege for the exercise of domestic authority, sometimes articulated in the penal statutes, though

often without seeking to define its scope." (Tent. Draft No. 8, at 72 (1958)).

Oregon treats the subject in the statute relating to excusable homicides.

> ORS 163.110. The killing of a human being is excusable when committed . . . by accident or misfortune in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with usual and ordinary caution and without any unlawful intent.

No existing statute deals specifically with the matter of the use of physical force against a minor or incompetent person by a teacher or other person entrusted with his care; however, the same considerations that call for a special justification for the use of force by parents would seem to apply. (See ORS 339.250, 339.260).

Subsection (2) has no existing statutory counterpart.

Subsection (3) is a new statutory proposal. Railroad conductors and engineers now are vested with the power of sheriff under ORS 764.160.

Subsection (4) also is new, but supports the general policy of the law to discourage and prevent suicides. (See ORS 163.050.)

Subsection (5), as noted previously, is intended to tie together the basic section with the subsequent sections in the article.

Section 22. Justification; use of physical force in defense of a person. Except as provided in sections 23 and 24 of this Act, a person is justified in using physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force, and he may use a degree of force which he reasonably believes to be necessary for the purpose.

COMMENTARY

See commentary under § 24 infra.

Section 23. Justification; limitations on use of deadly physical force in defense of a person. Notwithstanding the provisions of section 22 of this Act, a person is not justified in using deadly physical force upon another person unless he reasonably believes that the other person is:

(1) Committing or attempting to commit a felony involving force or violence; or

(2) Using or about to use physical force against an occupant of a dwelling while committing or attempting to commit a burglary in the dwelling; or

(3) Using or about to use unlawful deadly physical force; however, a person shall not use deadly physical force in defense of himself if he knows that he can with complete safety avoid the necessity of using such force by retreating. A person is under no duty to retreat if he is:

(a) In his dwelling and is not the original aggressor; or

(b) A peace officer or a person assisting a peace officer at his direction, acting under section 30 of this Act.

COMMENTARY

See commentary under § 24 infra.

Section 24. Justification; limitations on use of physical force in defense of a person. Notwithstanding the provisions of section 22 of this Act, a person is not justified in using physical force upon another person if:

(1) With intent to cause physical injury or death to another person, he provokes the use of unlawful physical force by that person; or

(2) He is the initial aggressor, except that his use of physical force upon another person under such circumstances is justifiable if he withdraws from the encounter and effectively communicates to the other person his intent to do so, but the latter nevertheless continues or threatens to continue the use of unlawful physical force; or

(3) The physical force involved is the product of a combat by agreement not specifically authorized by law.

COMMENTARY TO SECTIONS 22 TO 24

A. Summary

Taken as a whole, §§ 22, 23 and 24 attempt to formulate statutory guidelines to be followed in determining when and to what degree a person is justified in using physical force against another in self-defense.

Section 22 permits one to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force and, subject to the limitations set out in §§ 23 and 24, to use a degree of force which he reasonably believes to be necessary. No special relationship between the actor and the third person is required before he can act to protect another.

Section 23 restricts the use of deadly physical force, a term defined in the general definitions section of Article 1, to situations in which the actor reasonably believes that the person is about to commit forcible felonies, or is about to use physical force against an occupant of a dwelling during a burglary, or is about to use deadly physical force. However, with respect to the latter situation the actor is not privileged to use such force if he knows he can with complete safety avoid the problem by retreating. Paragraph (a) of subsection (3) provides that he is under no duty to retreat, even though he knows it is possible, if he is in his own dwelling and is not the originator of the affray. Paragraph (b) makes it unnecessary to retreat if the actor is a peace officer or a person assisting the officer at his direction.

Section 24 further qualifies the availability of physical force (as contrasted to *deadly* physical force) by a person acting in self-protection. Subsection (1) prohibits a person from provoking another into using force and later claiming that he employed physical force in self-defense. Subsection (2) prevents the original aggressor from claiming self-defense, unless he withdraws and effectively communicates his withdrawal to the other person. If the original victim still continues the engagement he then becomes the aggressor and the original assailant becomes the victim. Under subsection (3), neither party to mutually agreeable combat, which is not sanctioned by law, can claim self-defense.

B. Derivation

Sections 22, 23 and 24 are adapted from Michigan Revised Criminal Code § 615 and New York Revised Penal Law § 35.15.

C. Relationship to Existing Law

Two existing statutes, ORS 145.110 and 163.100, which would be repealed, deal with the matter of using justifiable physical force in self-defense.

ORS 145.110, the general "self-defense" statute, provides two bases for lawful resistance by a person "about to be injured" or by any third person in his defense: (1) to prevent a crime against his person, and (2) to prevent an illegal attempt by force to take or damage property. The statute is silent on the question of the degree of force that may be used under either of the circumstances.

The pertinent parts of ORS 163.100 for the purposes of these sections are paragraphs (a) and (b) of subsection (2) which justify the killing of another by a person to prevent the commission of a felony upon him or upon the spouse, parent, child, master, mistress or servant or to prevent a felony upon his property.

Two related statutes which should be noted are the following:

ORS 163.110. The killing of a human being is excusable when committed:

(1) By accident or misfortune in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with usual and ordinary caution and without any unlawful intent.

(2) By accident or misfortune in the heat of passion, upon a sudden and sufficient provocation, or upon a sudden combat, without premeditation or undue advantage being taken, and without any dangerous weapon or thing being used, and not done in a cruel or unusual manner. This statute would be repealed.

ORS 163.140. Whenever, on a trial of a person indicted for murder or manslaughter, it appears that the alleged killing was committed under circumstances or in cases where it is justifiable or excusable, the jury must give a general verdict of not guilty. This statute would be repealed. (See Article 10 infra).

In addition to the foregoing, the statute that defines the crime of pointing a firearm at another contains a self-defense exception. (See ORS 163.320).

Sections 22, 23 and 24 attempt to describe more precisely than do the existing statutes those situations in which force and the degree thereof may be employed in defense of a person. The provisions of the sections, except for subsection (3) of § 23, relating to the duty to retreat in the face of deadly force, are basically a codification of Oregon case law doctrines.

The Oregon Reports abound in self-defense opinions, particularly homicide cases. The leading cases in this area are *State v. Gray*, 43 Or 446, 74 P 927 (1904), and *State v. Rader*, 94 Or 432, 186 P 79 (1919).

In *Gray* the defendants, Woodson and Wade Gray, were indicted for first degree murder, and Woodson was convicted of manslaughter for the fatal shooting of one Hallgrath during a fight upon a public road. The evidence showed that the deceased was the initial aggressor, but was unarmed, and that the defendant drew a pistol and warned the deceased to desist. The latter continued and in the ensuing scuffle he was shot.

The *Gray* trial court instructed the jury on self-defense in the following language:

"But such right of self-defense as will justify the taking of life of the assailant can only be exercised to defend his life or defend his person from great bodily harm. But danger of a battery alone will not be sufficient to justify the taking of the life of his assailant." At 454.

The refusal of the court to give the following requested instruction was one of the errors urged successfully on appeal:

"It is not necessary that the assault made by the deceased at the time upon the defendant Woodson Gray, if you find that an assault was made, should have been made with a deadly weapon. An assault with the fist alone, if there was an apparent purpose and the ability to inflict death or serious bodily injury by the deceased upon the defendant Woodson Gray, is sufficient to justify the killing in self-defense, if the defendant, Woodson Gray, at the time he shot and killed the deceased, had reason to believe and did believe, that he was in imminent danger of death or great bodily harm at the hands of the deceased." *Ibid.*

In reversing the *Gray* judgment, the Oregon Supreme Court held that the requested instruction should have been given, noting that the evidence tended to show that the deceased was a blacksmith in the prime of life and a large, powerful man, while the defendant, although a large man also, was much older and in ill health. The reasons given for the holding were:

"A mere assault, or the danger of a battery alone, without any real or apparent danger of life or limb, or the infliction of great bodily harm, will not, it is true, justify the taking of human life. In such a case the assailed may withstand the attack and meet force with force, but not kill his assailant. The law does not require that he, being in a place where he has a lawful right to be, and not being himself the aggressor, shall retreat to the wall, but *it is his duty to retreat or otherwise avoid further conflict if he can reasonably do so without danger to his life or subjecting himself to great bodily harm*, rather than take the life of his aggressor; that is to say, *retreat or avoidance of further conflict to prevent the taking of human life is only required where the assault is not accompanied with imminent danger to life or great bodily injury, real or apparent.* Where, however, the assault is attended with such demonstration, and the present ability to execute it, whether the assailant is armed with a deadly weapon or not, as to indicate to the assailed, acting reasonably upon appearances, that he is in imminent danger of being beaten and maltreated, and probably disfigured or maimed, or his life imperiled, he has a right to withstand the assault, even to the taking of the life of the aggressor." At 454-455. (Emphasis supplied.)

The *Rader* case is quite similar on its facts to *Gray* in that the defendant was indicted for second degree murder and convicted of manslaughter, was armed with a gun and fatally shot an unarmed, but larger, more powerful adversary. In reversing the judgment of conviction the Oregon Supreme Court discussed several different aspects of self-defense:

> "Although many expressions have been used to the effect that a man rightfully may defend himself against a felonious attack, yet it is not reasonable or just to say that the attack must in all cases be a felonious one before the defendant is allowed to repel it with sufficient force to prevent not only danger to his life but also great bodily harm, irrespective of whether the latter is effected by felonious means or not.
>
> ". . . . It is not the intent of the assailant which harms the one he attacks, neither is the latter bound by it nor required to ascertain it. . . . It is the imminent danger, real or apparent, of great bodily harm to himself which justifies a defendant in protecting himself." At 456.
>
> "It is essential that the defense must not be excessive nor disproportionate to the force involved in the attack upon the defendant, all to be judged by the jury from the standpoint of a reasonable man in the situation of the defendant at the time, under all the circumstances surrounding him." At 458.

The *Rader* court also approved the doctrine of retreat laid down in *State v. Gray*.

Subsection (3) of § 23 qualifies the *Gray-Rader* retreat doctrine to the extent of requiring retreat by a person in the face of unlawful deadly physical force, if the actor knows that he can with complete safety avoid the necessity of using deadly physical force against another. However, the result in a given situation would probably be no different under the proposed "complete safety" test before retreat becomes necessary than under the case law formulation which requires retreat "only where the assault is not accompanied with imminent danger to life or great bodily injury" inasmuch as it seems impossible that the former could exist without the latter.

The proposed sections are consistent with the holdings in the following additional self-defense cases:

> Where a woman slapped defendant for calling her a dirty dog, he was justified in striking back only if necessary for self-protection. *Silfast v. Matheny*, 171 Or 1, 136 P2d 260 (1943).
>
> If a policeman not known to be such to the defendant was recklessly firing his pistol and endangering bystanders, force could be used to disarm him. *State v. Steidel*, 98 Or 681, 194 P 854 (1921).
>
> A defendant may not justify himself in doing more for the defense of another than the latter could do for himself. *State v. Yee Guck*, 99 Or 231, 195 P 363 (1921); *Linkhart v. Savely*, 190 Or 484, 227 P2d 187 (1951); *State v. Young*, 52 Or 227, 96 P 1067 (1908).
>
> If a man, being upon his own premises, or a place where he has a right to be, is assailed without provocation by a person with a deadly weapon, and apparently seeking his life, he is not obligated to retreat, or consider whether he could safely do so, but may stand his ground and meet the attack in such a way and with such force as, under the circumstances, he at the moment honestly believes, and has reasonable ground to believe is necessary to save his own life or protect himself from great bodily harm. *State v. Gibson*, 43 Or 184, 73 P 333 (1903). (The duty to retreat would be modified to the extent hereinbefore noted.)
>
> A homicide cannot be justified on the ground of self-defense unless it is made to appear that the accused had been put in imminent danger by another, and that the killing was done to prevent the apparent commission of a felony by the other on the accused. *State v. Smith*, 43 Or 109, 71 P 973 (1903).
>
> When a man is armed, and seeks another for an affray, the law will not permit him to provoke and urge on the difficulty to a point where there is an appearance of an attempt to use weapons, and then justify the aggressor in taking life simply on the ground of apparent danger. In such case he is the aggressor, and the cause of the danger which menaces him, and he must abide by the condition of things which his own lawless conduct has produced. *State v. Hawkins*, 18 Or 476, 23 P 475 (1890); *State v. McCann*, 43 Or 155, 72 P 137 (1903); *State v. Joseph*, 230 Or 585, 371 P2d 689 (1962).
>
> The term "self-defense" is used in ORS 163.320 in a broad sense, and includes the right to kill in defense of one's child or to prevent the commission of a felony. *State v. Nodine*, 198 Or 679, 259 P2d 1056 (1953).
>
> The terms "justifiable" and "excusable" homicide are often used synonymously. *State v. Trent*, 122 Or 444, 252 P 975 (1927).
>
> See also *Goodall v. State*, 1 Or 333 (1861); *State v. Remington*, 50 Or 99, 91 P 473 (1907); *State v. Barnes*, 150 Or 375, 44 P2d 1071 (1935); *State v. Doherty*, 52 Or 591, 98 P 152 (1908); *State v. Morey*, 25 Or 241, 35 P 655 (1894); *State v. Finch*, 54 Or 482, 103 P 505 (1909); *State v. Young*, 52 Or 277, 96 P 1067 (1908); *State v. Walsworth*, 54 Or 371, 103 P 516 (1909).

Section 25. Justification; use of physical force in defense of premises. (1) A person in lawful possession or control of premises is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission of a criminal trespass by the other person in or upon the premises.

(2) A person may use deadly physical force under the circumstances set forth in subsection (1) of this section only:

(a) In defense of a person as provided in section 23 of this Act; or

(b) When he reasonably believes it necessary to prevent the commission of arson by the trespasser.

(3) As used in subsection (1) and paragraph (a) of subsection (2) of this section, "premises" includes any building as defined in section 135 of this Act and any real property. As used in paragraph (b) of subsection (2), "premises" includes any building.

COMMENTARY

A. Summary

Section 25 allows the use of nondeadly force whenever there is a criminal intrusion into premises, or the reasonable appearances of such an intrusion. Premises as defined in subsection (3) incorporates, for the purposes of subsection (1) and paragraph (a) of subsection (2), the definition of the term that appears in the article on burglary and criminal trespass and includes real property and any vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein. For the purposes of paragraph (b) of subsection (2), the term is limited to "buildings" and does not include real property.

Deadly physical force, as defined in the general definitions, can only be used in circumstances which fall under the provisions of § 23 of the Act, or in which it is reasonably believed necessary to prevent the commission of arson. The listing of arson takes care of the only other serious felony not included in subsection (1) of § 23. The consensus of the Commission was that a person who commits arson would, by virtue of that act, be considered to be a "trespasser" within the meaning of § 25.

B. Derivation

The section is based on Michigan Revised Criminal Code § 620.

C. Relationship to Existing Law

As observed earlier in commentary to this article, one of the grounds for justifiable homicide is "*To prevent the commission of a felony* upon his property, or upon property in his possession, or *upon or in* any dwelling house where he is." (ORS 163.100 (b)). (Emphasis supplied). To the extent that the statute authorizes the use of deadly force against a burglar in the absence of danger to an occupant therein (if in fact it does) the law would be tightened so as to prohibit the use of deadly force in defense of a dwelling except where a person reasonably believes the intruder is using or about to use physical force against an occupant while committing a burglary in the dwelling or to prevent what a person reasonably believes to be an attempt by the trespasser to commit arson.

In connection with the use of deadly force against a burglar, the New York commentators make a sound observation:

> "It would seem that anyone seeking to check a burglar from committing his crime, and having reasonable cause to believe deadly force necessary for that purpose, would also have reasonable cause to fear some physical force by the burglar." (Commentary, New York Revised Penal Law § 35.20 (1968 Amendment)).

The proposed section, in allowing a greater degree of physical force to be used by a person in defense of a dwelling or in defense of an occupant in a dwelling than would be justifiable in defense of a person generally or in defense of property generally, is consistent with the traditional concept of a man's habitation as his "castle" that has long been favored by the law. However, the section recognizes the social interest in human life and does not authorize the use of deadly force to prevent a mere trespass alone.

The draft section attempts to strike a balance between conflicting social interests by placing de-

fense of habitation on a higher plane than mere defense of other property, and defense of a person in a dwelling on a higher plane than would otherwise be justified. These conflicting interests are clearly summarized by one noted authority, who observes:

"Defense of the dwelling may be for the purpose of saving the house itself from damage or destruction, or it may be to preserve its character as a place of refuge and repose by preventing the unlawful intrusion of outsiders. The dweller is privileged to use reasonable nondeadly force to prevent any unlawful harm or injury to his place of abode and if a malicious attack is made for the purpose of destroying it by fire, explosion or in some other manner, he is privileged to use deadly force if this reasonably seems necessary to defend his 'castle' against such threatened harm.

"If the defense is for the purpose of preventing an unlawful intrusion it becomes necessary to inquire into the nature or apparent nature of the threatened invasion. There is a strong social interest in preventing any unlawful entry of the dwelling and the dweller is privileged to use reasonable nondeadly force in the effort to prevent such an entry regardless of its nature or purpose, but the social interest in human life is too great to permit the use of deadly force for the prevention of a mere civil trespass even in the dwelling itself, as mentioned above. On the other hand deadly force is privileged if it is necessary or reasonably seems to be necessary to prevent an unlawful entry attempted for the purpose of committing burglary, or of killing or inflicting great bodily injury upon the dweller or some member of his household.

"The point of difficulty has been in regard to an unlawful entry attempted for the purpose of a personal attack *of a nonfelonious* nature upon the dweller or some member of his household. The rule mentioned above in the discussion of self-defense, which prohibits the use of deadly force in defending against an obviously nondeadly attack, has induced some courts to make a similar limitation to the privilege of defending the habitation against an unlawful entry. Such courts hold that the privilege to use deadly force to prevent an unlawful entry of the dwelling is limited to cases of entry with intent to commit a felony and does not apply to an entry attempted for the mere purpose of making a personal assault which is neither intended nor likely to kill or to inflict great bodily injury. On the other hand there are strong reasons for recognizing the dwelling as a place of refuge in which the dweller may expect to be free from personal attack even of a nondangerous character, and the trend has been in the direction of holding that an unlawful entry of the dwelling for the purpose of an assault upon some person therein may be resisted by deadly force if this reasonably seems necessary for the purpose 'although the circumstances may not be such as to justify a belief that there was actual peril of life or great bodily harm.'" Perkins, *Criminal Law* 1023–1024 (Foundation Press, 2d ed 1969).

The limitations on the use of physical force against a trespasser are in accord with Oregon case law, (e.g., Schefele v. Newman, 187 Or 263, 210 P2d 573 (1949); Eldred v. Burns, 182 Or 394, 188 P2d 154 (1948); Penn v. Henderson, 174 Or 1, 146 P2d 760 (1944)).

Section 26. Justification; use of physical force in defense of property. A person is justified in using physical force, other than deadly physical force, upon another person when and to the extent that he reasonably believes it to be necessary to prevent or terminate the commission or attempted commission by the other person of theft or criminal mischief of property.

COMMENTARY

A. Summary

This section covers the use of physical force by a person, who is not present or defending a dwelling and who is not in fear of physical injury, to prevent theft or criminal mischief of property.

B. Derivation

The language of the section is taken from New York Revised Penal Law § 35.25 (1968 Amendment) and resembles Michigan Revised Criminal Code § 625.

C. Relationship to Existing Law

A literal reading of the "justifiable homicide" statute might lead one to believe that a person now may kill another to prevent the commission of a felony upon his property:

"The killing of a human being is also justi-

fiable when committed: . . . By any person . . . To prevent the commission of a felony upon his property or upon property in his possession. . . ." ORS 163.100(2)(a).

As defined in ORS 161.010(11): "'Property' includes both real and personal property."

Professor Rollin Perkins states:

"In the absence of statutory authority the use of force intended or likely to cause death or great bodily injury is never authorized for the defense of property (as such)." Perkins, *Criminal Law* 917 (Foundation Press, 1957; 2d ed 1969 at 1026).

Interestingly enough, Perkins, in a footnote to this statement, cites ORS 163.100 as an example of statutory authority for the use of such force in defense of property in Oregon. The statute appears on its face to grant such authority. However, the recent case of *State v. Weber*, 246 Or 312, 423 P2d 767, *cert. den.*, 389 US 863 (1967), indicates that the Oregon Supreme Court would undoubtedly hold to the contrary. In that case the defendant was convicted of the crime of assault while being armed with a dangerous weapon committed during an attempt to retrieve from a police officer an automobile belonging to defendant's son. The defendant contended that he was entitled to an instruction on the law of self-defense and on the law of justification as it applied to the recaption of personal property. Both claims were rejected by the court, which, speaking to the question of use of force in protection of property, said:

"The defendant in his brief concedes that the use of a dangerous weapon is, as a matter of law, excessive force when used solely in the defense of property. This proposition is supported by the authorities." At 319. (The court lists among the authorities cited the previously quoted passage from Perkins.)

The *Weber* opinion also approves this statement from 1 Wharton, *Criminal Law & Procedure* 709:

"The use of a deadly weapon in protection of property is generally held, except in extreme cases, to be the use of more than justifiable force, and to render the owner of the property liable criminally for the assault. . . ." At 319–320.

The court then concludes by saying:

"The 'extreme cases' ordinarily are those in which either the home is intruded upon or in which there is an imminent threat to person as well as property." At 320.

The opinion contains no mention of ORS 163.100 (2)(a) and the issue was not raised in the *Weber* case, nor were any like Oregon cases found in which it was brought up. A reasonable inference certainly can be drawn from the opinion, notwithstanding the seemingly broad language of the statute, that the killing of a person solely to prevent the commission of a felony upon personal property would not be justifiable homicide. Cf., *State v. Nodine*, 198 Or 679, 259 P2d 1056 (1953).

In effect then, the proposed section restates the present law with respect to the use of force solely in defense of property where no threat to the person nor the home is involved.

Section 27. Justification; use of physical force in making an arrest or in preventing an escape. Except as provided in section 28 of this Act, a peace officer is justified in using physical force upon another person only when and to the extent that he reasonably believes it necessary:

(1) To make an arrest or to prevent the escape from custody of an arrested person unless he knows that the arrest is unlawful; or

(2) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while making or attempting to make an arrest or while preventing or attempting to prevent an escape.

COMMENTARY

See commentary under § 31 infra.

Section 28. Justification; use of deadly physical force in making an arrest or in preventing an escape. (1) A peace officer is justified in using deadly physical force upon another person for the purpose specified in section 27 of this Act only when he reasonably believes that it is necessary:

(a) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) To make an arrest or to prevent the escape from custody of a person whom he reasonably believes has committed or attempted to commit a felony involving force or violence.

(2) Nothing in paragraph (b) of subsection (1) of this section constitutes justification for reckless or criminally negligent conduct by a peace officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.

COMMENTARY

See commentary under § 31 infra.

Section 29. Justification; use of physical force in making an arrest or preventing an escape; basis for reasonable belief. (1) For the purposes of sections 27 and 28 of this Act, a reasonable belief that a person has committed an offense means a reasonable belief in facts or circumstances which if true would in law constitute an offense. If the believed facts or circumstances would not in law constitute an offense, an erroneous though not unreasonable belief that the law is otherwise does not render justifiable the use of force to make an arrest or to prevent an escape from custody.

(2) A peace officer who is making an arrest is justified in using the physical force prescribed in sections 27 and 28 of this Act unless the arrest is unlawful and is known by the officer to be unlawful.

COMMENTARY

See commentary under § 31 infra.

Section 30. Justification; use of physical force by private person assisting an arrest. (1) Except as provided in subsection (2) of this section, a person who has been directed by a peace officer to assist him to make an arrest or to prevent an escape from custody is justified in using physical force when and to the extent that he reasonably believes that force to be necessary to carry out the peace officer's direction.

(2) A person who has been directed to assist a peace officer under circumstances specified in subsection (1) of this section may

use deadly physical force to make an arrest or to prevent an escape only when:

(a) He reasonably believes that force to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) He is directed or authorized by the peace officer to use deadly physical force unless he knows that the peace officer himself is not authorized to use deadly physical force under the circumstances.

COMMENTARY

See commentary under § 31 infra.

Section 31. Justification; use of physical force by private person acting on his own account to make an arrest. (1) Except as provided in subsection (2) of this section, a private person acting on his own account is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary to make an arrest or to prevent the escape from custody of an arrested person whom he reasonably believes has committed a felony and who in fact has committed a felony.

(2) A private person acting under the circumstances prescribed in subsection (1) of this section is justified in using deadly physical force only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

COMMENTARY TO SECTIONS 27 TO 31

A. Summary

Section 27 sets forth the basic justification for using nondeadly force when a peace officer is arresting a person.

Section 28 (1) extends a privilege to use deadly physical force when the officer is met by deadly physical force, or when the arrest is for a felony involving force or violence.

Section 28 (2) makes it clear that the basis for justification in subsection (1) does not protect the officer from criminal responsibility for reckless or criminally negligent conduct against an innocent person whom he is not trying to take into custody.

Section 29 sets out the standard for what constitutes a reasonable belief by the officer. It requires the officer to know the legal rules which affect his right to interfere with the citizen, and to know the legal gravity of conduct he encounters. For example, his belief that violation of the basic rule is a felony and that he can arrest a person for such an offense committed outside his presence would not constitute an acceptable mistake by the officer. On the other hand, if he is correct on the law, but makes a reasonable misinterpretation of the facts, then the defense is available to him. The officer can use physical force as authorized by the article to make an arrest unless he knows that the arrest is unlawful.

Section 30 (1) protects the citizen who is ordered by a peace officer to assist in making an arrest, provided that the extent of the nondeadly force seems reasonably necessary for the purpose. Subsection (2) limits the citizen's ability to use deadly physical force to cases in which there is the use or reasonably apparent use of deadly physical force by the arrestee

against the citizen or a third person, or when he is directed by the officer to use such force and does not know that the officer lacks the authority to employ such force under the circumstances.

Section 31 covers the citizen's right to use physical force to enforce a private citizen's arrest without any demand for assistance by a peace officer. The citizen is allowed to use physical force whenever he is in fact authorized to make an arrest, but he cannot use deadly physical force unless he or a third person is threatened from what he reasonably believes to be the use or imminent use of deadly physical force.

B. Derivation

Sections 27 to 31 are derived from Michigan Revised Criminal Code § 630 with some changes in language.

C. Relationship to Existing Law

See commentary under § 19 supra for a listing of existing statutes related to arrests by peace officers and private persons.

The sections are in accord with the scant Oregon case law in the area:

To justify the homicide of a felon for the purpose of arresting him, the slayer must show that he avowed his object and that the felon refused to submit. *State v. Nodine*, 198 Or 679, 259 P2d 1056 (1953); *State v. Bailey*, 179 Or 163, 170 P2d 355 (1946).

When making an arrest, a police officer is presumed to be acting in good faith in determining the amount of force to be used. *Rich v. Cooper*, 234 Or 300, 380 P2d 613 (1963).

Firing a gun is not justifiable where the arrest can be secured by less dangerous means. *Landen v. Miles*, 3 Or 35 (1868).

Shooting at an escaping felon was necessary and proper to effect the arrest. *Askay v. Maloney*, 92 Or 566, 179 P 899 (1919).

Section 32. Justification; use of physical force in resisting arrest prohibited. A person may not use physical force to resist an arrest by a peace officer who is known or reasonably appears to be a peace officer, whether the arrest is lawful or unlawful.

COMMENTARY

A. Summary

This section prohibits the use of physical force to resist an arrest by a peace officer and adopts a doctrine popularly known as the "no sock" principle.

The rationale of the principle is that to authorize or encourage a person to engage an arresting officer in combat because of a difference of opinion concerning the validity of the arrest produces an unhealthy situation; that orderly procedure dictates peaceful submission to duly constituted law enforcement authority in the first instance; and that if it develops that the officer was mistaken and the arrest unauthorized, ample means and opportunity for remedial action in the courts are available to the person arrested.

B. Derivation

The section is the same as New York Revised Penal Law § 35.27 (1968 Amendment). See also Model Penal Code § 3.04 (2) (a) (i).

C. Relationship to Existing Law

Section 32 is a departure from what appears to be existing law in Oregon regarding the right to use force to resist an "unlawful" arrest.

In *State v. Meyers*, 57 Or 50, 110 P 407 (1910), the court held that where an arrest is made by a known officer without authority and nothing is to be reasonably apprehended beyond temporary detention in jail, resistance cannot be carried to the extent of killing the officer. The implication of the holding is that lesser force would be permissible in resisting such an arrest.

Perkins contains this statement:

"At common law any unlawful arrest was a trespass which could be resisted by whatever nondeadly force reasonably seemed necessary to retain or regain the liberty of the arrestee. It seems, however, that when an arrest is being made by a known peace officer, any disagreement as to the authority to make the arrest should be settled in court rather than by violence on the street. Hence the modern trend is in the direction of some such statutory provision as this: 'If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest.' In any event if the unlawful arrest is attempted under circumstances which obviously threaten no more than a very tem-

porary deprivation of liberty, the use of deadly force in resistance is not privileged; but if the unlawful manner of the arrest reasonably leads the arrestee to believe he is the victim of a murderous assault, or of kidnapers, homicide committed by him will not be criminal if he uses no more force than reasonably appears to be necessary under the circumstances." Perkins, *Criminal Law* 997 (Foundation Press, 2d ed 1969).

Section 32 rejects the common law rule and is in accord with the modern view as noted by the above author.

Section 33. Justification; use of physical force by guard in correctional facility to prevent an escape. A guard or other peace officer employed in a correctional facility, as that term is defined in section 189 of this Act, is justified in using physical force including deadly physical force, when and to the extent that he reasonably believes it necessary to prevent the escape of a prisoner from a correctional facility.

COMMENTARY

A. Summary

This section provides special coverage to permit guards or other peace officers to use reasonable physical force to prevent the escape of a prisoner from a correctional facility.

"Correctional facility" is defined in the article on escape and related offenses. (See Article 23).

B. Derivation

The section is derived from proposed Connecticut Penal Code § 24 (1969).

C. Relationship to Existing Law

Existing statutes dealing with this question provide:

ORS 163.100. The killing of a human being is justifiable when committed by public officers or those acting in their aid and assistance and by their command . . . when necessarily committed in retaking persons charged with or convicted of crime who have escaped or been rescued.

ORS 133.370. If a person arrested escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and retake him at any time and in any place in this state.

ORS 133.380. To retake the person escaping or rescued, the person pursuing may use all the means and do any act necessary and proper in making an original arrest.

Section 34. Duress. (1) The commission of acts which would otherwise constitute an offense, other than murder, is not criminal if the actor engaged in the proscribed conduct because he was coerced to do so by the use or threatened use of unlawful physical force upon him or a third person, which force or threatened force was of such nature or degree to overcome earnest resistance.

(2) Duress is not a defense if a person intentionally or recklessly places himself in a situation in which it is probable that he will be subjected to duress.

(3) It is not a defense that a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense under subsection (1) of this section.

COMMENTARY

A. Summary

This section provides for the defense of duress. Subsection (1) permits the defense if the actions of the defendant constitute an offense, other than murder, and his conduct was coerced by the use or threatened imminent use of unlawful physical force upon him or a third person. The standard by which the defendant would be judged would be force or

threat of force which was of such nature or degree as to overcome earnest resistance.

Subsection (2) accepts the view that there should be no exculpation if the actor recklessly or intentionally places himself in a situation in which it is probable that he will be subjected to duress. This subsection is intended to guard against the claim of justification being raised by a criminal acting in concert. (See State v. Ellis infra).

Subsection (3) abolishes the common law presumption that a woman, acting in the presence of her husband, is coerced.

B. Derivation

The section is based on Model Penal Code § 2.09 but the language in subsections (1) and (2) is adapted from Michigan Revised Criminal Code § 635. The section differs from both of those codes, however, in that the defense is unavailable in respect to the crime of murder.

C. Relationship to Existing Law

About half of the states now have legislation regarding the defense of duress in a criminal case. Oregon is not one of them. According to the American Law Institute, most of the state statutes do not recognize the defense in respect to the most serious crimes and three states do not allow duress as a defense in a murder case. (Commentary, Model Penal Code, Tent. Draft No. 10, at 2 (1958)).

The Model Penal Code § 2.09, New York Revised Penal Law § 35.35 and Michigan Revised Criminal Code § 635 contain no exceptions as to crimes to which the defense is available. The Illinois Criminal Code of 1961 does not allow the defense in cases of crimes punishable with death (§§ 7–11).

The Model Penal Code and the Illinois statute both specifically abolish the presumption that a woman acting in the presence of her husband is coerced.

Only three reported Oregon criminal cases were found in which the defense of duress or compulsion was raised. Several facets of the defense are discussed in *State v. Weston*, 109 Or 19, 219 P 180 (1923), which held that it was error to instruct that if a witness acted from extreme fear in aiding murder, his testimony would not require the corroboration necessary in the case of an accomplice.

The *Weston* opinion goes on to state that if the witness did aid or abet in the killing of the victim he could not be excused under the plea of compulsion, necessity or coercion under either the common law or statutory law regarding justifiable or excusable homicide (now ORS 163.100, 163.110):

> "The . . . sections neither justify nor excuse the killing of an innocent third person by reason of the slayer's fear caused by threats of another." At 34.
>
> "The authorities seem to be conclusive that, at common law, no man can excuse himself under the plea of necessity or compulsion, for taking the life of an innocent person." At 35.
>
> "Even in the commission of crimes that may be excused on account of threats or menace sufficient to show that they had reasonable cause to, and did, believe their lives would be endangered if they refused, *such danger must be, not one of future violence, but of present, impending and imminent violence at the time of the commission of the crime.*" At 35. (Emphasis supplied).

In *State v. Patterson*, 117 Or 153, 241 P 977 (1926), the defendant was convicted of embezzlement. In answer to the question of whether the fear of prosecution for a former offense is a sufficient compulsion upon the defendant, when threatened with it, to exonerate him from criminal liability, the court quoted with approval the rule stated in 16 *CJ* 91:

> "An act which would otherwise constitute a crime may also be excused on the ground that it was done under compulsion or duress. The compulsion which will excuse a criminal act, however, *must be present, imminent, and impending* and of such a nature as to induce a *well grounded apprehension of death or serious bodily harm* if the act is not done. A threat of future injury is not enough. *Such compulsion must have arisen without the negligence or fault of the person* who insists upon it as a defense." At 156. (Emphasis supplied). Accord, *State v. Ellis*, 232 Or 70, 374 P2d 461 (1962).

Subsections (1) and (2) amount basically to a codification of the doctrines announced in the above cases. No Oregon cases were discovered involving coercion of a married woman by her husband as a defense to prosecution for a crime committed by her.

Section 35. Entrapment. (1) The commission of acts which would otherwise constitute an offense is not criminal if the actor engaged in the proscribed conduct because he was induced to do so by a law enforcement official, or by a person acting in cooperation with a law enforcement official, for the purpose of obtaining evidence to be used against the actor in a criminal prosecution.

(2) As used in this section, "induced" means that the actor did not contemplate and would not otherwise have engaged in the proscribed conduct. Merely affording the actor an opportunity to commit an offense does not constitute entrapment.

COMMENTARY

A. Summary

The section provides a statutory formulation of the defense of entrapment in subsection (1) and defines the term "induced" in subsection (2).

B. Derivation

The section is a modified form of Michigan Revised Criminal Code § 640 and New York Revised Penal Law § 40.05 (1968 Amendment).

C. Relationship to Existing Law

Section 35 restates the doctrines of entrapment which have been recognized in Oregon case law (e.g., State v. Le Brun, 245 Or 265, 419 P2d 948, cert den 386 US 1011 (1966); State v. Murray, 238 Or 567, 395 P2d 780 (1964); State v. Beeson, 106 Or 134, 211 P 907 (1923)).

ARTICLE 5. RESPONSIBILITY

Section 36. Mental disease or defect excluding responsibility. (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Act, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

COMMENTARY

A. Summary

Subsection (1) of this section, based on § 4.01 (1) of the Model Penal Code, is a modernized rendition of the *M'Naghten* and the "control" (irresistible impulse) tests. The *M'Naghten* rule in its classical form reads as follows:

> "In all cases of this kind the jurors ought to be told that a man is presumed sane . . . until the contrary be proved to their satisfaction. It must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong." 8 Eng Rep 718 (1843).

M'Naghten is in effect in all but a half dozen or so of the states.

The "irresistible impulse," or control, test addendum to the *M'Naghten* rule, which is operative in about a third of the states, adds the following consideration to the rule:

> "If he did have such knowledge, he may nevertheless not be responsible if by reason of the duress of such mental disease, he had so far lost the power to choose between right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed."

The draft section substitutes "appreciate" for *M'Naghten's* "know," thereby indicating a preference for the view that an offender must be emotionally as well as intellectually aware of the significance of his conduct. The section uses the word "conform" instead of the phrase "loss of power to choose between right and wrong" while studiously avoiding any reference to the misleading words "irresistible impulse."

In addition the section requires only "substantial" incapacity, thereby eliminating the occasional references in some of the older cases to "complete" or "total" destruction of the normal cognitive capacity of the defendant.

Subsection (2) of this section, based on § 4.01 (2) of the Model Penal Code, is the object of a divergence of opinion as to its efficacy and desirability.

The main purpose of the provision is to bar psychopaths (more modernly called sociopaths) from the insanity defense. The comment on this portion in the Model Penal Code reads as follows:

> "Paragraph (2) of section 4.01 is designed to exclude from the concept of 'mental disease or defect' the case of so-called 'psychopathic personality.' The reason for the exclusion is that, as the Royal Commission put it, psychopathy 'is a statistical abnormality; that is to say, the psychopath differs from a normal person only quantitatively or in degree, not qualitatively; and the diagnosis of psychopathic personality does not carry with it any explanation of the causes of the abnormality.' While it may not be feasible to formulate a definition of 'disease', there is much to be said for excluding a condition that is manifested only by the behavior phenomena that must, by hypothesis, be the result of disease for irresponsibility to be established. Although British psychiatrists have agreed, on the whole, that psychopathy should not be called 'disease', there is considerable difference of opinion on the point in the United States. Yet it does not seem useful to contemplate the litigation of what is essentially a matter of terminology; nor is it right to have the legal result rest upon the resolution of a dispute of this kind." (Tent. Draft No. 4, at 160 (1955)).

The principal criticism of the Model Penal Code formulation, apart from those who oppose the addition of the "control" test, centers on subsection (2) of the section. The critics of this portion suggest that it represents an inadvisable effort to bar psychopaths from the insanity test. (A psychopath is commonly regarded as having either antisocial character or no character at all. Though his cognitive faculties are likely to be intact, he is unable to defer his gratifications. What he does seems unmotivated by conventional standards, and he feels neither anxiety nor guilt if he hurts others in the process. Because he will seem very much like the "normal" man in most respects, he will be less able to persuade a jury that he should be acquitted.)

Others in support of the provision in subsection (2) feel that the effort to bar psychopaths from the insanity defense is advisable because it is essential to keep the defense from swallowing up the whole of criminal liability, as it might if all recidivists could qualify for the defense merely by being labeled psychopaths. The Commission adopts this view.

Before passing from the discussion of this section, a brief review of the *M'Naghten* rule and some of the more modern deviations from it seems appropriate.

The *M'Naghten* rule was not strictly a product of common law case-by-case analysis although there had been cases prior to *M'Naghten* announcing a similar rule. Rather it was the response of fifteen common law judges to five hypothetical questions put to them by the House of Lords. The now famous rule was espoused in 1843 by Chief Justice Tindal in response to these questions.

Although the *M'Naghten* rule has remained in force in Oregon, other jurisdictions have attempted to find new tests both through the judicial and legislative processes. The following is a discussion of these alternatives.

The United States Supreme Court has left the states free to experiment and to adopt their own test for legal insanity.

> "At this stage of scientific knowledge it would be indefensible to impose upon the States through the due process of law . . . one test rather than another for determining criminal culpability, and thereby displace a State's own choice of such a test, no matter how backward it may be in light of the best scientific canons." *Leland v. Oregon*, 343 US 790 (1952); cf., *United States v. Freeman*, 357 F2d 607 (2d Cir 1966).

M'Naghten is by no means a perfect test for criminal insanity. Weighty arguments have been advanced in opposition to the rule. As early as 1930 Mr. Justice Cardozo said to the New York Academy of Medicine that "the present legal definition of insanity has little relation to the truths of mental life." B. Cardozo, *Law and Literature and Other Essays and Addresses, 106* (Harcourt, Brace 1931). The Royal Commission on Capital Punishment concluded that the "right-wrong test was based on an entirely obsolete and misleading conception of the nature of insanity." *Royal Commission Report* 73-129 (1949). The major difficulty found with the *M'Naghten* test was that it concentrated solely on one aspect of mental make-up, viz., the cognitive, to the exclusion of all other phases of mental life.

The most radical shift away from *M'Naghten* occurred in 1954 with the decision of the United States Court of Appeals for the District of Columbia in *Durham v. United States*, 214 F2d 862, in which Judge Bazelon rejected the *M'Naghten* rule as well as the supplemental control test. The rule finally adopted in *Durham* was similar to the rule in use in New Hampshire since 1870. "An accused is not criminally responsible if his unlawful act was the product of mental disease or defect." The *Durham* rule supposedly would give much more freedom to the expert witness to explain fully the mental condition of the defendant. However, a major difficulty with *Durham* was that it tended to confuse medical "concepts" of mental illness with legal insanity. Critics of the rule point out that this tends to outstrip community attitudes toward insanity and that expert testimony may usurp the function of the jury. The rule came further into disrepute when psychiatrists of St. Elizabeth's Hospital in Washington, D.C., decided at a weekend conference to change "sociopathy" (the new term for

psychopathic personality) from a nondisease to a disease category which had the immediate effect of freeing the defendant when the change was incorporated into the *Durham* rule in *Blocker v. United States*, 288 F2d 853 (DC Cir 1961). These weekend changes in medical nomenclature affecting the *Durham* rule have been strongly criticized as demonstrating that the *Durham* rule really is not a useful legal standard.

Because of these and other difficulties with the *Durham* test, Maine and the Virgin Islands have been the only jurisdictions to date to adopt the *Durham* rule. Me Rev Stat Ann, c 15, § 102 (1963); V I Code Ann, Title 14, § 14.

In 1953 the American Law Institute began its exhaustive study of criminal conduct. Nine years of research and debate culminated in § 4.01, formally adopted by the Institute in 1962. The section is a well considered compromise between *M'Naghten* and *Durham*. It was first followed in part in *United States v. Currens*, 290 F2d 751 (3rd Cir 1961). The *Currens* case provides:

> "The jury must be satisfied that at the time of committing the prohibited act, the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law . . . ."

Unlike the *M'Naghten* rule which was concerned with absolutes (right or wrong), the *Currens* rule only requires "substantial" impairment of one's capacity to control his conduct. Like the Model Penal Code § 4.01, the *Currens* test recognizes variations in degree and allows wide scope for expert testimony without the troublesome causal questions raised by *Durham*. *Currens* has been criticized, however, as being too narrow in that it relies on the control test to the exclusion of the right-wrong cognitive test. The Model Penal Code incorporates both.

Five years after *Currens* the United States Court of Appeals for the Second Circuit adopted a full-blown version of § 4.01 of the Model Penal Code. *United States v. Freeman*, 357 F2d 606 (1966). The trend in the federal courts is decidedly toward the Model Penal Code. At least five states have also adopted the Model Penal Code version in complete or substantially complete form including Illinois, Vermont, Massachusetts, Maryland and Wisconsin. Of the Model Penal Code insanity test one authority has said recently:

> "Its proposal solves most of the problems generally associated with the older rules while at the same time representing the same line of historical development. As a result, it is likely to become the formula for the immediate future in the United States." Goldstein, *The Insanity Defense* 95 (1967).

B. Derivation

The insanity test proposed in the draft is that of the Model Penal Code § 4.01. Illinois has adopted § 4.01 of the Model Penal Code in its entirety. Michigan in its proposed draft chooses the *Currens* formulation. New York has chosen to follow the more liberal language of the right-wrong portion of the Model Penal Code but has refused to incorporate the control test portion and subsection (2). The comments of the New York Commission on the New York version were that the prosecutors throughout the state felt the control test was too liberal and for this reason it was deleted. Thus the New York version falls somewhere between *M'Naghten* and the Model Penal Code version.

C. Relationship to Existing Law

This section will effect a substantial change in Oregon's present insanity test. Oregon's test came into being largely as the result of decisional law. The most recent formulation of the Oregon rule appears in the following jury instruction approved in *State v. Gilmore*, 242 Or 463 (1966):

> "Insanity, to excuse a crime, must be such a disease of the mind as dethrones reason and renders the person incapable of understanding the nature and quality and consequences of his act or of distinguishing between right and wrong in relation to such act." At 568.

It should be noted that this formulation is somewhat more liberal than the original *M'Naghten* rule. The Oregon test speaks of lack of capacity for "understanding" the nature of the act. This would seem to allow a full examination of the mental condition of a defendant on not only the intellectual awareness of his acts but also the emotional awareness. The word "know" in the psychiatric sense is understood to be not limited to intellectual awareness. Psychiatrists uniformly insist that it is possible for a person to "know" intellectually what he is doing but not to "know" it emotionally, and, if either of the two levels of "knowledge" is missing, a person qualifies as insane under the test. By using the word "understanding" in the Oregon formulation this subtle, yet highly significant distinction of levels of knowledge seems to be incorporated. This is in accord with the meaning generally given the "knowledge" test in most jurisdictions which have directly faced the issue and in a great number of jurisdictions which have not. In these latter jurisdictions the word "know" is given no narrow definition in the jury instruction—it is simply presented to the jury which is then permitted to make its own "common sense" determination of the word's meaning. Psychiatrists testifying at the trial in these jurisdictions (and Oregon) are, as a practical matter, able to testify as to both the intellectual and emotional awareness of the defendant. And the juries, in actual practice, then consider all such testimony.

The section proposed further modifies the Oregon rule by requiring that the defendant's capacity for understanding need only be "substantially" impaired. This again liberalizes the kind of expert evidence which is necessary for the jury to have a more complete understanding of the defendant's mental life before it makes its decision.

The section in its second major aspect would permit a defendant raising the defense to show that even if he had substantial capacity to appreciate the wrongfulness of his act, he may still bring himself under the defense if he can show he lacked substantial capacity to "conform his conduct to the requirements of law." This, of course, is the control test formulation. Presently Oregon by statute prohibits a defendant from raising the control test. ORS 136.410 provides: "A morbid propensity to commit a prohibited act, existing in the mind of a person who is not shown to have been capable of knowing the wrongfulness of the act, forms no defense to a prosecution for committing the act." This section would be repealed if the proposed section on the insanity test is adopted.

Lest the impression be given that the new section is too radical a departure from existing Oregon law to command acceptance by the Oregon Legislature, it is important to note that the entire language of § 4.01 of the Model Penal Code was actually enacted by the 1961 session of the Oregon Legislative Assembly in Senate Bill No. 96. Only a veto by Governor Hatfield prevented Oregon from having as law the section in the form now presented. In his veto message, the Governor said:

> "Senate Bill No. 96 while a laudable and humanitarian approach to the problem of mental illness or defect in a criminal case, is in my judgment, premature. The bill lacks adequate safeguards and there are not sufficient institutional facilities and trained personnel to implement . . . wide sweeping changes in our concept of criminalty." *Senate and House Journal*, 1963 at 32.

An examination of the literature in the field indicates that what Governor Hatfield feared might happen if the Model Penal Code version were adopted—a flood of successful insanity pleas—has in fact not occurred in the jurisdictions which have adopted the rule.

Section 37. Partial responsibility due to impaired mental condition. Evidence that the actor suffered from a mental disease or defect is admissible whenever it is relevant to the issue of whether he did or did not have the intent which is an element of the crime.

COMMENTARY

A. Summary

A defendant may be charged with a crime which includes an element such as specific intent or premeditation. Examples of these would be burglary, where the breaking and entering of a dwelling must be accompanied with a specific intent to commit a felony before the crime is complete, and first degree murder, where premeditation is required as an element. The defendant may not be insane within the meaning of the *M'Naghten* rule, but he may be suffering from a mental disease or defect which directly affects his capacity to form a specific intent or purpose. In this situation a growing number of jurisdictions now permit such defendant to introduce evidence of his mental condition to negate the element of specific intent for the purpose of reducing the defendant's responsibility (and consequent punishment) to a lesser offense included within the crime charged. For example, a defendant charged with murder in the first degree may convince the jury he could not premeditate because of a mental condition. This would not enable the defendant to escape conviction entirely (as he would if he established his insanity under the *M'Naghten* rule). Instead the jury may find him guilty of the lesser included offense of second degree murder.

The trend to the subjective theory of culpability embodied in the partial responsibility doctrine is apparent. Professor Goldstein says that in 1925 only two states subscribed to the doctrine. By 1967 a dozen had adopted the rule. In England the doctrine is called diminished responsibility and recently has been extended by statute to reduce murder to manslaughter. Goldstein, *The Insanity Defense* 195 (1967).

The Model Penal Code also recognizes the concept and adopts it in § 4.02 (1). In the comments to the section it is said, "If states of mind such as deliberation or premeditation are accorded legal significance, psychiatric evidence should be admissible when relevant to prove or disprove their existence to the same extent as any other relevant evidence." (Tent. Draft No. 4 at 193 (1955)).

The comment to the proposed Michigan section adopting the doctrine of partial responsibility stresses

the usefulness of the doctrine in that it gives the jury wide latitude in dealing with an offender:

> "The jury should not be placed totally in an 'either-or' position so far as the use of evidence relating to mental condition is concerned, and 'diminished responsibility' or 'impaired mental condition' should be something they can properly take into account." Michigan Rev Crim Code, 78-79.

The basic theory underlying the partial responsibility doctrine is that the verdict and sentence should be tied more accurately than in the past to the defendant's culpability.

B. Derivation

The section is based on the Model Penal Code formulation of the partial responsibility doctrine in § 4.02 (1). The language of the draft section is similar to the Michigan formulation contained in § 710 of that state's proposed criminal code.

C. Relationship to Existing Law

Whether the partial responsibility doctrine is in effect in Oregon seems to be in doubt. The Oregon Supreme Court occasionally has referred to the doctrine but has never ruled squarely on the issue. In *State v. Jensen,* 209 Or 239 (1957), the court held that the doctrine could not be applied to reduce first degree murder arising from the felony murder doctrine to second degree murder or manslaughter. But felony murder is more in the nature of a "strict liability" crime and not a crime of premeditation. The *Jensen* case, beginning at page 266 of the report, examines other Oregon cases where the doctrine has been incidentally involved.

Adoption of the doctrine of partial responsibility would not be without analogous precedent in Oregon. ORS 136.400 (in effect since 1864) provides in part that "whenever the actual existence of any particular motive, purpose or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the defendant was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act." In fact the doctrine of partial responsibility has its origin in the early cases which admitted evidence of intoxication to negate the elements of murder in the first degree. Goldstein, *The Insanity Defense* 195 (1967).

The defense of partial responsibility is not too dissimilar to another defense familiar in Oregon and elsewhere—the rule that a homicide will be reduced from murder to manslaughter if defendant killed in a "heat of passion" arising out of a "sufficient" provocation. See ORS 163.040. Adoption of the partial responsibility doctrine contained in the proposed section seems, then, to be a natural extension of legal principles already well established in Oregon.

Section 38. Burden of proof in defense excluding responsibility. Mental disease or defect excluding responsibility under section 36 of this Act is an affirmative defense.

COMMENTARY

The policy presently embodied in ORS 136.390 reads as follows:

> "When the commission of the act charged as a crime is proved and the defense sought to be established is the insanity of the defendant, the same must be proved by the preponderance of the evidence."

The draft section continues this policy in language believed to be more appropriately phrased. The Commission wishes to emphasize that this section in no way affects the well established principle that the state has a rebuttable presumption that the defendant is sane.

Section 39. Notice required in defense excluding responsibility. No evidence may be introduced by the defendant on the issue of criminal responsibility as defined in section 36 of this Act, unless he gives notice of his intent to do so in the manner provided in section 41 of this Act.

COMMENTARY

ORS 135.870 now provides that a defendant may raise the defense of insanity under a simple "not guilty" plea. However, the section requires that where the defendant wishes to raise insanity as a defense under this plea he must give written notice or otherwise obtain the permission of the court where

he fails to file notice. The details of filing the notice are not set out here for the reason that § 40, the next section dealing with partial responsibility, also requires notice. In the interest of drafting economy, the details of the notice requirements are set out in § 41 so to as apply to both § 39 and § 40.

Section 40. Notice required in defense of partial responsibility. The defendant may not introduce in his case in chief expert testimony regarding partial responsibility under section 37 of this Act unless he gives notice of his intent to do so in the manner provided in section 41 of this Act.

COMMENTARY

Under the provisions of this section, the defendant without giving notice can introduce any lay evidence in an effort to show that he suffered from a mental disease or defect which rendered it impossible for him to form intent where such is required as an element of the offense with which he is charged. But if the defendant wishes to introduce the testimony of psychiatrists, psychologists or other expert witnesses, he must comply with the notice requirements of § 41.

The underlying reason for the notice requirements for this section (and for § 39, also) is to avoid surprising the prosecution with a highly technical and complicated issue where experts are going to be used by the defense. The Commission concluded that it was sufficiently fair to the state that defendant put it on notice, in cases of partial responsibility as a defense, only when defendant intends to bring in experts in his case in chief.

Section 41. Notice requirements. A defendant who is required under section 39 or 40 of this Act to give notice shall file a written notice of his purpose at the time he pleads not guilty. The defendant may file such notice at any time after he pleads but before trial when just cause for failure to file the notice at the time of making his plea is made to appear to the satisfaction of the court. If the defendant fails to file any such notice, he shall not be entitled to introduce evidence for the establishment of a defense under section 36 or 37 of this Act unless the court, in its discretion, permits such evidence to be introduced where just cause for failure to file the notice is made to appear.

COMMENTARY

This section sets out the notice requirements where defendant intends to base his defense on insanity or partial responsibility. The language closely parallels existing notice requirements set out in ORS 135.870.

Section 42. Right of state to obtain mental examination of defendant; limitations. Upon filing of notice or the introduction of evidence by the defendant as provided in section 41 of this Act, the state shall have the right to have at least one psychiatrist of its selection examine the defendant. The state shall file notice with the court of its intention to have the defendant examined. Upon filing of the notice, the court, in its discretion, may order the defendant committed to a state institution or any other suitable facility for observation and examination as it may designate for a

period not to exceed 30 days. If the defendant objects to the psychiatrist chosen by the state, the court for good cause shown may direct the state to select a different psychiatrist.

COMMENTARY

In its original form in Preliminary Draft No. 4, § 42 was designed basically to do two things: first, in subsection (1) it codified the holding in *State v. Phillips*, 245 Or 466 (1967), which established the right of the state to have a psychiatrist examine the defendant who gives notice of relying on the insanity defense; second, in subsection (2) it codified in a very broad fashion the holding in *Shepard v. Bowe,* 86 Or Adv Sh 981 (1968), which established the rule that at the examination by the state's psychiatrist the defendant has the Fifth Amendment right not to answer questions the answers to which might be incriminating. Subsection (2) further expanded *Shepard v. Bowe* by giving the defendant the right to have his lawyer and a psychiatrist of his own choosing present.

Opposition to the section centered on the Fifth Amendment provisions embodied in subsection (2) and, as a result, subsection (2) was eliminated. The effect expected is that the decisional law in *Shepard v. Bowe* will continue to extend Fifth Amendment rights to the defendant within the confines of that decision or of future decisions as they may develop.

The codification of *State v. Phillips* contained in subsection (1) of the original version of § 42 remains in the language of the draft now adopted. It is intended that the examination of the defendant by the state may include an examination by psychiatrists, psychologists, neurologists or other appropriate experts. The section also extends to the defendant the right to challenge the appointment of the psychiatrist the state proposes for its examination of the defendant. The language to achieve this is found in the last sentence of the section.

Section 43. Form of verdict following successful defense excluding responsibility. When the defendant is acquitted on grounds of mental disease or defect excluding responsibility as defined in section 36 of this Act, the verdict and judgment shall so state.

COMMENTARY

This section is based on the provisions on form of verdict found in Model Penal Code § 4.03 (3). The language in this section states more economically the same policy already in existence in Oregon under that portion of ORS 136.730 dealing with form of verdict. ORS 136.730 reads as follows:

> "If the defense is the insanity of the defendant, the jury shall be instructed to state, if it finds him not guilty on that ground, that fact in the verdict, and the court shall thereupon, if it deems his being at large dangerous to the public peace or safety, order him to be committed to any hospital or institution, authorized by the state to receive and keep such persons, until he becomes sane or is otherwise discharged therefrom by authority of law."

(The portion of ORS 136.730 relating to possible commitment of the defendant is dealt with in §§ 44 to 49).

The present form of the verdict entered pursuant to ORS 136.730 consists of the simple phrase, "not guilty by reason of insanity." This will no longer be appropriate or accurate under this article. The new phrase should be stated by the court to avoid the word "insanity" which is no longer found in this article. The appropriate part of the verdict form should read, "not guilty by reason of mental disease or defect excluding responsibility."

Section 44. Acquittal by reason of mental disease or defect excluding responsibility; court orders. After entry of judgment of not guilty by reason of mental disease or defect excluding responsibility, the court shall, on the basis of the evidence given at the trial or at a separate hearing, if requested by either party, make an order as provided in section 45, 46 or 47 of this Act, whichever is appropriate.

COMMENTARY

See commentary under § 49 infra.

Section 45. Order of discharge. If the court finds that the person is no longer affected by mental disease or defect, or, if so affected, that he no longer presents a substantial danger to himself or the person of others and is not in need of care, supervision or treatment, the court shall order him discharged from custody.

COMMENTARY

See commentary under § 49 infra.

Section 46. Release on supervision. (1) If the court finds that the person is affected by mental disease or defect and that he presents a substantial danger to himself or the person of others, but he can be controlled adequately and given proper care, supervision and treatment if he is released on supervision, the court shall order him released subject to such supervisory orders of the court as are appropriate in the interests of justice and the welfare of the defendant. Conditions of release in such orders may be modified from time to time and supervision may be terminated by order of the court as provided in section 45 or section 49 of this Act.

(2) At any time within five years of the original entry of the order of release on supervision made pursuant to this section 46 the court may, upon notice to the prosecution and such person, conduct a hearing to determine if the person is affected by mental disease or defect. If the court determines that the person continues to be affected by mental disease or defect and is a substantial danger to himself or the person of others but can be controlled adequately if released on supervision, the court may release him on further supervision, as provided in subsection (1) of this section. If the court determines that the person is affected by mental disease or defect and presents a substantial danger to himself or to the person of others and cannot adequately be controlled if release on supervision is continued, it may at that time make an order committing the person to the Superintendent of the Oregon State Hospital for custody, care and treatment. At such hearing the state shall bear the burden of proof by a preponderance of the evidence that the defendant is suffering from a mental disease or defect and is a substantial danger to himself or the person of others so as to warrant his commitment or his continued supervised release.

(3) Any person subject to the provisions of this section 46 may apply to the circuit court of the county from which he is on release on supervision, for a hearing upon his petition for discharge from or modification of an order upon which he was released upon the supervision of the court on the ground that he has recovered from

his mental disease or defect or, if affected by mental disease or defect, no longer presents a substantial danger to himself or the person of others and no longer requires supervision, care or treatment. The hearing on an application for such discharge or modification shall be held on notice to the district attorney of the county. The petitioner must prove by a preponderance of the evidence his fitness for discharge or modification of the original order for supervision.

(4) If the state wishes to continue any person on supervised release beyond five years from the entry of the original order, the state must prove by a preponderance of the evidence that the person on supervised release continues to be affected by a mental disease or defect and continues to be dangerous to himself or the person of others but can be controlled and given proper care, supervision and treatment if continued on release on supervision.

COMMENTARY

See commentary under § 49 infra.

Section 47. Order of commitment; procedure for discharge. (1) If the court finds that the person is affected by mental disease or defect and presents a substantial risk of danger to himself or the person of others and that he is not a proper subject for release on supervision, the court shall order him committed to the Superintendent of the Oregon State Hospital for custody, care and treatment.

(2) If, after at least 90 days from the commitment of any person to the custody of the Superintendent of the Oregon State Hospital, the Superintendent is of the opinion that the person is no longer affected by mental disease or defect, or, if so affected, that he no longer presents a substantial danger to himself or the person of others, the Superintendent may apply to the court which committed the person for an order of discharge. The application shall be accompanied by a report setting forth the facts supporting the opinion of the Superintendent. Copies of the application and the report shall be transmitted by the clerk of the court to the district attorney of the county. If the state opposes the recommendation of the Superintendent, the state has the burden of proof by a preponderance of the evidence that the person continues to be affected by a mental disease or defect and continues to be a substantial danger to himself or the person of others and should remain in the custody of the Oregon State Hospital.

(3) Any person who has been committed to the Oregon State Hospital for custody, care and treatment, after the expiration of 90 days from the date of the order of commitment, may apply to the circuit court of the county from which he was committed for an order of discharge upon the grounds:

(a) That he is no longer affected by mental disease or defect; or

(b) If so affected, that he no longer presents a substantial danger to himself or the person of others.

(4) Application made under subsection (3) of this section shall be accompanied by a report of the Superintendent which shall be prepared and transmitted as provided in subsection (2). The applicant must prove by a preponderance of the evidence his fitness for discharge under the standards of subsection (3). Application for an order of discharge shall not be filed oftener than once every six months.

COMMENTARY

See commentary under § 49 infra.

Section 48. Hearings on applications; orders of court. (1) The court shall conduct a hearing upon any application for discharge, release or supervision or modification filed pursuant to section 46 or 47 of this Act. If the court finds that the person is no longer suffering from mental disease or defect, or, if so affected, that he no longer presents a substantial danger to himself or the person of others, the court shall order him discharged from custody or from supervision. If the court finds that the person is still affected by a mental disease or defect and is a substantial danger to himself or to the person of others, but can be controlled adequately if he is released on supervision, the court shall order him released on supervision as provided in section 46 of this Act. If the court finds that the person has not recovered from his mental disease or defect and is a substantial danger to himself or the person of others and cannot adequately be controlled if he is released on supervision, the court shall order him remanded for continued care and treatment.

(2) In any hearing under this section 48 the court may appoint one or more psychiatrists to examine the person and to submit reports to the court. Reports filed with the court pursuant to such appointment shall include, but need not be limited to, an opinion as to the mental condition of the person and whether the person presents a substantial danger to himself or the person of others. To facilitate the psychiatrist's examination of the person, the court may order the person placed in the temporary custody of any state institution or other suitable facility.

(3) If neither the prosecuting attorney nor counsel for the defendant contests the finding of the report filed with the court, the court may make the determination on the basis of such report. If the report is contested, the court shall hold a hearing on the issue. If the report is received in evidence in such hearing, the party who contests the report shall have the right to summon and to cross examine the psychiatrist or psychiatrists who submitted the report and to offer evidence upon the issue. Other evidence regarding the defendant's mental condition may be introduced by either party.

COMMENTARY

See commentary under § 49 infra.

Section 49. Persons on released supervision or in confinement for five years; procedure for review. (1) Any person who, pursuant to section 46 or 47, has been in the custody of the Superintendent of the Oregon State Hospital or on release on supervision by the court, or both, for a total period of five years shall, in any event, be discharged at the end of the five year period if he is no longer affected by mental disease or defect. He shall also be discharged if he is affected by mental disease or defect but he does not present a substantial danger to himself or to the person of others.

(2) If the person is in confinement in the Oregon State Hospital at the time the total five year period expires, the Superintendent shall notify the committing court of the expiration of the five year period. Such notice shall be given at least 30 days prior to the expiration of the five year period. Upon receipt of notice the court shall order a hearing.

(3) The notice provided in subsection (2) of this section shall contain a recommendation by the Superintendent either:

(a) That the person is still affected by a mental disease or defect but is no longer a substantial danger to himself or the person of others and should be discharged; or

(b) That the person confined continues to be affected by a mental disease or defect and is a substantial danger to himself or to the person of others and should continue in confinement; or

(c) That the person confined is no longer affected by a mental disease or defect and should be discharged.

(4) If the recommendation of the Superintendent is that the person should continue in confinement, the person seeking discharge has the burden at the hearing of proving by a preponderance of the evidence that he:

(a) Is no longer affected by a mental disease or defect; or

(b) If so affected, is no longer a substantial danger to himself or to the person of others.

(5) If the state wishes to challenge the recommendation of the Superintendent for discharge, the state has the burden of proving by a preponderance of the evidence that the person seeking release continues to be affected by a mental disease or defect and is a substantial danger to himself or to the person of others.

(6) Any person who is confined or remains on supervised release after the hearing at the end of the five years may be discharged subsequently in the same manner as provided in subsections (2) and (3) of section 46 of this Act and subsections (2) and (3) of section 47 of this Act.

COMMENTARY TO SECTIONS 44 TO 49

ORS 136.730 presently gives the trial court discretion to discharge a defendant completely following a verdict of not guilty by reason of insanity. It also provides that the court may "if it deems his being at large dangerous to the public peace or safety, order him to be committed to any hospital or institution, authorized by the state to receive and keep such persons, until he becomes sane or is otherwise discharged therefrom by authority of law." The draft sections generally continue this policy. However, ORS 136.730 lacks details covering matters of extreme importance to the individual defendant, concerned with his personal rights, and the community at large, concerned with its safety in the event of the defendant's release. The draft sections are designed to deal with the details essential to a complete commitment and release statute. As noted in the following comments, some Oregon law and procedure will be changed.

Section 44. Disposition of defendant. Following the verdict of not guilty due to mental disease or defect the court may conduct a special hearing (or rely instead on evidence presented at the trial if sufficient) to determine what to do with the defendant. Provision is also made for either party to obtain a hearing upon request. A separate hearing on this issue is sometimes not necessary because the defendant's present mental condition is often the subject of evidence given at the trial as is his mental condition at the time of the act charged.

Section 45. Release; defendant recovered or not dangerous. This section authorizes the release of a defendant when it appears that the person acquitted because of his mental condition is no longer mentally affected or in need of custodial treatment. An order for discharge may not be made if the defendant is not free from mental disease or defect unless the court is of the opinion that the defendant is not dangerous to himself or the person of others and is not in need of care, supervision or treatment. If the evidence indicates that the defendant requires and is a fit subject for community psychiatric services, the court has the authority to impose supervisory or custodial restraints as provided in the sections which follow.

Section 46, subsection (1). Release on supervision. ORS 136.730 presently offers the court two alternatives when a defendant has been found not guilty by reason of insanity: release, or commitment to a state hospital. In actual practice, commitment is often the procedure; for understandable reasons, summary release is rarely granted. The lack of any alternative disposition through the use of local institutions, facilities and resources for the care and treatment of the mentally ill is attributable to the fact that until recent years, local means for caring for the mentally ill person were inadequate. Problems still exist, but this provision allows use of existing local facilities where adequate. The section permits administration of the release program and the supervision of persons released pursuant to its provisions may be performed by any department or agency. Orders of release and the conditions of release remain within the continuing jurisdiction of the court for modification or termination.

Section 46, subsection (2). Termination of supervision and commitment to the Superintendent of the Oregon State Hospital. This subsection together with section 49 establishes a provisional maximum period of release subject to supervision of five years. It authorizes commitment of a person so released to the Superintendent of the Oregon State Hospital at any time during the five year period that the person's mental condition has regressed to the point where he is dangerous to himself or to the person of others.

Section 46, subsection (3). Supervisory release; petition for modification or discharge. Procedure is provided by this subsection through which the person released on supervision may initiate action for his release upon a showing that he has recovered and is a fit subject for discharge or modification of the conditions of his release.

The standard for release set up in this subsection affects a change in the present Oregon law. ORS 136.730 was recently construed in *Newton v. Brooks*, 246 Or 484 (1967), where the court laid down the requirements that before a person in confinement following commitment after a not guilty by reason of insanity verdict is entitled to discharge, he must prove by a preponderance of evidence (1) that he has the mental capacity to understand the difference between right and wrong, *and* (2) that with reasonable probability he will control his behavior so that his liberty will not be a danger to the public.

This subsection (and § 47, also) changes the focus somewhat, although it achieves what is believed to be the goal of the holding in *Newton v. Brooks*. Thus, a person committed to the Oregon State Hospital following a successful defense of insanity under this subsection is entitled to release if he has "recovered" from his mental disease or defect (i.e., is sane within the definition of § 36) which is in accord with the first part of the rule in *Newton v. Brooks*. Under the subsection even if the person in custody cannot prove he is sane within the definition of § 36, if he can show he no longer presents a substantial danger to himself or the person of others, he is entitled to discharge. This is a variation from *Newton* which requires the defendant to prove his sanity *and* that he is no longer a danger to the public. The subsection places the burden of proof of fitness for discharge or modification of order on the petitioner in accordance with the rule announced in *Newton v. Brooks*.

Section 47. Commitment to the Superintendent of the Oregon State Hospital. This section authorizes commitment to the Superintendent of the Oregon

State Hospital of those persons acquitted by reason of mental disease or defect whose potential dangerousness indicates that release or release under supervision involves risk that the individual may be dangerous to himself or the person of others.

Section 47, subsection (2). Procedure for release. The Superintendent of the Oregon State Hospital, by the provisions of this subsection, may initiate proceedings for the release of a committed person, after the expiration of 90 days, if such release is consistent with the welfare of the individual and the public safety. The criteria for release changes present law as explained in the comment above. The section also changes important administrative procedures. First, the subsection requires that a person committed to the State Hospital must be held a minimum of 90 days before he can be discharged at the instance of the Superintendent. No such minimum is presently required. Second, the Superintendent may not, as under present practice, discharge a person without a court order. Under the section the Superintendent must now apply to the designated court for an order of discharge. This has the beneficial effect of relieving the Superintendent of the considerable pressures of final decision on discharge. Because of this, the Superintendent might feel less reluctant to recommend release in cases where he is fairly sure in his appraisal of the person's dangerousness but might not be sure enough to take the responsibility entirely on himself. Furthermore, the original order of commitment was the result of the legal process—determination of the court based on all evidence, medical or otherwise. The same policy obtains here for a discharge; it is left to the court as a legal matter rather than to the Superintendent as a purely medical matter.

As to the burden of proof it seems just that if the Superintendent is willing to recommend the discharge but the state, for reasons of public policy perhaps, wishes to oppose the discharge, the state ought to bear the burden of proof that the person is still a danger to himself or to the person of others.

Section 47, subsections (3) and (4). Committed person; procedure for release; petition by the person. These provisions provide means for the initiation of release proceedings by the committed person and changes the criteria of release prescribed in ORS 136.730 as construed in *Newton v. Brooks,* explained above. The burden of proof is placed on the applicant in accord with *Newton v. Brooks.* To eliminate frivolous applications, the person seeking discharge may do so no more frequently than once in six months. This procedure is not intended to preempt or take the place of existing habeas corpus procedures.

Section 48. Hearing on petition for release. This is a general procedural section which describes the form of the proceedings to be followed in any action for the release or discharge of a person subject to an order of supervisory release or commitment. It restates the flexible powers of the court to make appropriate disposition of the persons subject to its orders and provides for the appointment of psychiatric experts should their assistance be needed.

Section 49. Release from custody or supervision; maximum period. This section establishes a maximum period of five years for supervised release or commitment to the Superintendent of the Oregon State Hospital and requires discharge at the end of that term unless the mentally disordered offender is found to be dangerous to himself and others. It is the purpose of the draft to limit indefinite commitments only to those cases where release will give rise to problems of public safety. The choices to be made here tend to be arbitrary but the problem does not lend itself easily to solutions that will command ready acceptance. The draft attempts to minimize whatever arbitrary factors it includes by keeping the door open to continuing judicial review.

The hearing provided for in this section is automatic. It becomes necessary, therefore, to reevaluate the question of burden of proof. The policy of the section is that the notice of expiration of the five year period required of the Superintendent must also contain his recommendation for either continued confinement or release. Recommendation of confinement leaves the burden with the person in confinement. Opposition by the state of a recommendation for release places the burden on the state.

Section 50. Mental disease or defect excluding fitness to proceed. (1) If before or during the trial in any criminal case the court has reason to doubt the defendant's fitness to proceed by reason of incompetence, the court may order an examination in the manner provided in section 51 of this Act.

(2) A defendant may be found incompetent if, as a result of mental disease or defect, he is unable:

(a) To understand the nature of the proceedings against him; or

(b) To assist and cooperate with his counsel; or

(c) To participate in his defense.

COMMENTARY

The test for competency in this section is made applicable to all proceedings in order to embrace preliminary examinations and other pretrial matters as well as the trial itself. The criteria for determining competency are more particularized than those set out presently in ORS 136.150 which reads as follows:

"If before or during trial in any criminal case the court has reasonable ground to believe that the defendant . . . is insane or mentally defective to the extent that he is unable to understand the proceedings against him or to assist in his defense, the court shall immediately fix a time for a hearing to determine the defendant's mental condition."

The particularization in the draft section may be legally unnecessary, but it is believed that precision in definition here will be helpful in obtaining precision in expert testimony at the hearing on the issue.

Section 51. Procedure for determining issue of fitness to proceed. (1) Whenever the court has reason to doubt the defendant's fitness to proceed by reason of incompetence as defined in section 50 of this Act, the court may call to its assistance in reaching its decision any witness and may appoint a psychiatrist to examine the defendant and advise the court.

(2) If the court determines the assistance of a psychiatrist would be helpful, the court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period not exceeding 30 days or such longer period as the court determines to be necessary for the purpose. The report of the examination shall include, but is not necessarily limited to, the following:

(a) A description of the nature of the examination;

(b) A statement of the mental condition of the defendant;

(c) If the defendant suffers from a mental disease or defect, an opinion as to whether he is incompetent within the definition set out in section 46 of this Act.

(3) Except where the defendant and the court both request to the contrary, the report shall not contain any findings or conclusions as to whether the defendant as a result of mental disease or defect was responsible for the criminal act charged.

(4) If the examination by the psychiatrist cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether such unwillingness of the defendant was the result of mental disease or defect affecting his competency to proceed.

(5) The report of the examination shall be filed in triplicate with the clerk of the court, who shall cause copies to be delivered to the district attorney and to counsel for defendant.

(6) The court, when it has ordered a psychiatric examination, shall order the county wherein the original proceeding was commenced to pay:

(a) A reasonable fee if the examination of the defendant is conducted by a psychiatrist in private practice; and

(b) All costs including transportation of the defendant if the examination is conducted by a psychiatrist in the employ of the Oregon State Hospital.

COMMENTARY

This section is based largely on Model Penal Code § 4.05. In general it reflects the presently existing policies embodied in ORS 136.150. There are important differences, however.

Subsection (1). When the court has reason to doubt the defendant's competency to stand trial (within the test set out in § 50) the court is authorized to call such witnesses as it deems advisable including a psychiatrist. This reflects the current policy in Oregon as provided in ORS 136.150.

Subsections (2)–(5). It is the typical practice in Oregon when an incompetency examination is ordered for the psychiatrist also to examine the defendant as to his mental condition at the time of the crime. The psychiatrist then gives his opinion not only on the defendant's competency to stand trial but also his mental condition at the time of the crime. Copies of this report routinely are given to both the state and the defendant. As a practical matter this dual response of the psychiatrist is welcomed by both the state and the defendant in many cases. The defendant, apparently more often than the state, requests the competency examination knowing that he will get an opinion also on his responsibility. The indigent defendant to whom funds may not be available by this procedure gets free expert advice upon which to determine whether to pursue the insanity defense.

Prior to *Shepard v. Bowe* (for a discussion of the case see the commentary following § 42) this dual response by the psychiatrist conducting the incompetency examination posed no problem. Now, however, it seems inadvisable to allow this practice to continue unless the defendant, knowing he has the right not to incriminate himself at the examination by answering questions concerning the crime, requests that the psychiatrist also examine him and give an opinion as to his mental capacity at the time of the crime. As a safeguard, however, against the harmful effects of such a request from a defendant who is obviously not competent to understand the danger of the request on the issue of self-incrimination, the section also requires that the court join in the request for the opinion on insanity as well as competency. This permits the court to act in the best interests of a defendant where justified.

The provisions of subsection (2) dealing with the contents of the psychiatric report are considerably more explicit than existing statutory provisions which frequently give the examining expert little or no guidance as to what his report must contain, and which thus fail to assure the parties and the court that the report will be adequate for the purpose for which the examination and report were ordered.

Subsection (6). This subsection reflects the provisions on fees and costs for the examination found in subsection (3) of ORS 136.150.

Section 52. Determination of fitness to proceed; effect of finding of unfitness; proceedings if fitness is regained; pretrial legal objections by defense counsel. (1) When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the finding of the report filed by a psychiatrist under section 51 of this Act, the court may make the determination on the basis of such report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence upon such hearing, the party who contests the finding thereof shall have the right to summon and to cross examine the psychiatrist or psychiatrists who submitted the report and to offer evidence upon the issue. Other evidence regarding the defendant's fitness to proceed may be introduced by either party.

(2) If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in subsection (4) of this section, and the court shall commit him to the custody of the Superintendent of the Oregon State Hospital or shall release him on supervision as provided in subsection (3) of this section for so long as such unfitness shall endure. When the court, on its own motion or upon the application of the Superintendent of the Oregon State Hospital or either party, determines,

after a hearing, if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceeding, the court on motion of either party may dismiss the charge and may order the defendant to be discharged or, subject to the law governing the civil commitment of persons suffering from mental illness, order the defendant to be committed to an appropriate mental institution. The trial court shall conduct such proceedings in the manner provided in ORS 426.070 to 426.170.

(3) If the court determines that care other than commitment for incompetency to stand trial would better serve the defendant and the community, the court may release the defendant on such conditions as the court deems appropriate including requirements that the defendant regularly report to a specified institution or other facility for examination to determine if the defendant has regained his competency to stand trial.

(4) The fact that the defendant is unfit to proceed does not preclude any objection through counsel and without the personal participation of the defendant on the grounds that the indictment is insufficient, that the statute of limitations has run, that double jeopardy principles apply or upon any other ground at the discretion of the court which the court deems susceptible of fair determination prior to trial.

COMMENTARY

Subsection (1). The subsection is based on Model Penal Code § 4.06 and in general it reflects the same policies that presently obtain in Oregon under ORS 136.160. The draft continues the policy that the court, rather than the jury, hears and determines the issue of fitness to proceed.

The last sentence of subsection (1) may be interpreted as creating or at least allowing for an exception to the hearsay rule in connection with receiving in evidence the report of the examining experts without requiring that they appear and testify, thus obviating the necessity for taking the testimony of these experts in every case where a report is contested. The defendant is assured, however, of the right to summon and cross examine such experts if he wishes. The defendant and the state also have the right to bring in other witnesses.

Subsection (2) continues substantially the present Oregon requirement that the court hold another hearing if the custodian of the person previously declared unfit indicates to the court he believes the person is fit for proceeding.

The provision in subsection (2) permitting the court on motion of either party to dismiss the prosecution if because of the lapse of time it would be unjust to continue it is new to Oregon and novel in American law but not in actual practice, except that the result is usually reached by motion of the district attorney. The important provision here is that the defendant is given the right to move for a dismissal and the court may grant the motion if it sees fit. There is value in vesting such a power in the court, to be exercised either where because of the lapse of time a defendant is unable to produce certain witnesses or other evidence once available which is essential to his defense, or where because of the length of the intervening period which he has spent in a mental institution subsequent to the alleged wrongful conduct it seems unjust to subject him to trial and punishment.

Subsection (3) of this section permits the court to release the defendant on condition as an alternative to commitment when supervision will serve the purpose. This reflects the policy presently in effect pursuant to ORS 136.160 (3).

Subsection (4). The fact that the defendant is unfit to proceed should not preclude his counsel from making any legal objection to the prosecution which is susceptible of fair determination prior to trial and without the personal participation of the defendant. Subsection (4) so provides. This provision is aimed

at motions readily determinable prior to trial without unfairness to the state, and which do not require participation by the defendant including the following: that the indictment is insufficient; that the statute of limitations has run; that double jeopardy principles apply; such other motions as the court in its discretion deems fair.

Although there is much to be said for according the defendant who is unfit to proceed an opportunity to defeat an unfounded criminal charge through the determination of issues of fact ordinarily disposed of at the trial stage, it does not seem feasible or advisable to give the defendant the right to put the prosecution to its proof in a proceeding, which, if it results adversely to the defendant, would not be binding on him.

Section 53. Incapacity due to immaturity. (1) A person who is tried as an adult in a court of criminal jurisdiction is not criminally responsible for any conduct which occurred when the person was under 14 years of age.

(2) Incapacity due to immaturity, as defined in subsection (1) of this section, is a defense.

COMMENTARY

The purpose of this section is to cover two groups of persons. Group one includes those who commit a criminal act before reaching age 18 but who, for one reason or another, are not apprehended until after reaching age 18 at which time the Oregon juvenile court loses all opportunity for acquiring jurisdiction. Group two includes those persons who commit a criminal act prior to reaching age 18 and who have come under the custody of the juvenile court but have been remanded to the criminal courts pursuant to ORS 419.533.

To illustrate the group one situation: the offender is 13 when he commits the criminal act but his part in the crime does not come to the attention of the authorities until the offender is 18 or over. Since he is not apprehended until he has reached age 18, he cannot be made a ward of the juvenile court. See ORS 419.476. Nor is there any sound policy reason for disposition of such person as a ward of the juvenile court. The philosophy of juvenile court treatment is to keep one of tender years away from the criminal process, because it is believed he may be rehabilitated more readily in such case. But since the offender has reached at least age 18 at the time of his apprehension, reasons for treating him as a juvenile lose force. Nevertheless the fact that the act was committed at a tender age dictates that the offender be dealt with in a manner substantially different from offenders who were of fairly mature age at the time of a criminal act. Under the draft section the offender in the illustration above would be entitled at trial in a criminal court to the conclusive presumption that he was not responsible because he was below the age of responsibility—14—when he committed the act.

The second group to be covered by the section is illustrated as follows: the youth commits the criminal act at age 13 but is not brought into custody of the juvenile court until he is 16 or 17 years old. If the juvenile court elects to remand the offender to the criminal courts, as it may under ORS 419.533, the offender when tried in the criminal court will have a conclusive presumption of incapacity in his favor. It will be readily seen from this illustrative case that it is unlikely as a practical matter that there will be a remand at all.

Subsection (2). Burden of proof. Under the common law the burden of proving capacity of young offenders to commit crimes was on the prosecution. The draft section continues this policy. The defendant must first present evidence to raise the defense. The prosecution then has the burden of proving capacity beyond a reasonable doubt.

ARTICLE 6. INCHOATE CRIMES

Section 54. Attempt; definition. (1) A person is guilty of an attempt to commit a crime when he intentionally engages in conduct which constitutes a substantial step toward commission of the crime.

(2) An attempt is a:

(a) Class A felony if the offense attempted is murder or treason;

(b) Class B felony if the offense attempted is a Class A felony;

at motions readily determinable prior to trial without unfairness to the state, and which do not require participation by the defendant including the following: that the indictment is insufficient; that the statute of limitations has run; that double jeopardy principles apply; such other motions as the court in its discretion deems fair.

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(a) Class A felony if the offense attempted is murder or treason;

(b) Class B felony if the offense attempted is a Class A felony;

(c) Class C felony if the offense attempted is a Class B felony;

(d) Class A misdemeanor if the offense attempted is a Class C felony or an unclassified felony;

(e) Class B misdemeanor if the offense attempted is a Class A misdemeanor;

(f) Class C misdemeanor if the offense attempted is a Class B misdemeanor;

(g) Violation if the offense attempted is a Class C misdemeanor or an unclassified misdemeanor.

COMMENTARY

A. Summary

This section deals with two of the major problems arising out of the crime of attempt—what intent is required for the crime of attempt and at what point is the attempt criminal, i.e., when does mere preparation cease.

Illinois requires a "specific intent" to commit a crime. This is an oversimplification and this method of dealing with the problem is criticized in the Model Penal Code. See the discussion beginning on page 27, Tent. Draft No. 10 (1960). The draftsmen of the tentative version of a proposed California code agreed with the Model Penal Code and comment as follows:

> "The intent requirement should be satisfied where the defendant intends to engage in the conduct which will constitute the crime. He need not necessarily contemplate all of the surrounding circumstances included in the definition of the crime. Assume that raping a fifteen year old girl is a more aggravated crime than raping a seventeen year old. Assume also that negligence as to the age of the victim suffices for that element of the crime. Is there not an aggravated attempt where a fifteen year old is attacked, even if it can be shown that the defendant was only negligent as to the age of the victim?
>
> "The draft deals with this problem by requiring an intent to engage in conduct which constitutes the crime rather than a specific intent to commit the crime. In doing this, it follows the Model Penal Code and the Wisconsin statute (§ 939.32) which requires that the defendant intend 'to perform acts and attain a result which, if accomplished, would constitute the crime'. The other new codes ignore this problem." California Tent. Draft, 2 (1968).

This section also deals with the always troublesome problem of distinguishing acts of preparation from an attempt. The draft makes this distinction by requiring that conduct to constitute an attempt must be a "substantial step" toward the commission of the offense. This leaves with the courts and juries the duty to decide what as a matter of fact is a substantial step. It is felt that specificity beyond this would be self-defeating. However, the Model Penal Code does engage in an effort to supply at least a partial explanation of what it means by "substantial step." In § 5.01 (2), the Model Penal Code states that to be a substantial step the act must be "strongly corroborative of the actor's criminal purpose." The Model Penal Code then proceeds to list the kinds of acts which could be held to be substantial in light of the "strongly corroborative" provision. The Commission believes that the listing of these specific kinds of acts more properly belongs in the section comments as a matter of legislative history. In keeping with this view the Model Penal Code examples of acts which should not be held insufficient as a matter of law to constitute a substantial step are approved and are set out as follows:

> "(a) lying in wait, searching for or following the contemplated victim of the crime;
>
> "(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
>
> "(c) reconnoitering the place contemplated for the commission of the crime;
>
> "(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
>
> "(e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;
>
> "(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
>
> "(g) soliciting an innocent agent to engage in conduct constituting an element of the crime."

It should be noted here that the attempt to commit the principal offense need not fail as a prerequisite to conviction on an attempt charge. The rule to the contrary arose historically out of unrelated problems of merger of misdemeanors in

felonies. These early English merger restrictions have long since lost their relevancy to the modern law of attempt. See Perkins, *Criminal Law*, 552-57 (1969), for a full discussion and criticism of the development of the old rule to the effect that an attempt, to be indictable, had to fail. In at least one Oregon statute it is suggested that the attempt must fail if an accused is to be found guilty of attempt (ORS 161.090). *State v. Taylor*, 47 Or 455 (1906), in dictum apparently attaches this meaning to the statute. See also *State v. Harvey*, 119 Or 512 (1926). This rule, if in fact it is the law in Oregon, is abolished by the draft section and § 64 (1) of this Act.

B. Derivation

The language of this section is taken largely from the proposed formulation in § 800 of the California Tentative Draft. It also is similar to the language and concept of the Model Penal Code with respect to intent.

C. Relationship to Existing Law

ORS 161.090 and 161.100 deal generally with the crime of attempt but are very sketchy on the elements of the offense. The sections read:

> 161.090. "Any person who attempts to commit a crime, and in the attempt does any act towards the commission of the crime but fails or is prevented or intercepted in the perpetration thereof, shall be punished upon conviction, when no other provision is made by law for the punishment of such attempt, as follows:
>
> "(1) If the crime so attempted is punishable by imprisonment in the penitentiary or county jail, the punishment for the attempt shall be by like imprisonment for a term not more than half the longest period prescribed as a punishment for the crime but in no event more than 10 years. If the crime so attempted is punishable by imprisonment for life, the punishment for the attempt shall be by imprisonment in the penitentiary for not more than 10 years.
>
> "(2) If the crime so attempted is punishable by fine, the punishment for the attempt shall be by a fine not exceeding half the amount of the largest fine prescribed as a punishment for the crime."
>
> 161.100. "ORS 161.090 shall not be construed to protect a person who, in attempting unsuccessfully to commit a crime, accomplishes a different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed."

Both statutes would be repealed.

State v. Taylor, 47 Or 455 (1906), says that two necessary elements must be present under this statute to constitute the crime of attempt: (1) intent to commit a crime, and (2) a direct ineffectual act done toward its commission. The very few Oregon attempt cases found indicate that the language of the draft section both as to intent and the nature of the act is generally in accord with existing Oregon law. (In addition to Taylor see especially State v. Moore, 194 Or 232 (1952); State v. Elliott, 206 Or 82 (1955); and State v. Wilson, 218 Or 575 (1959)). Only one existing Oregon statute was found which seems to be in conflict with the proposed "substantial step" approach. ORS 164.090 makes it a crime to attempt to burn certain property but goes much further by designating anyone guilty who "commits any act preliminary" to an attempt to burn property. This seems to say that a mere act of preparation, contrary to the general rule in the law of attempt, will constitute an attempt. This aberration on the law of attempt would be abandoned under the proposed draft.

One notable change worked by the draft section is that it eliminates as an element of the crime of attempt that the attempt must be unsuccessful. Section 64 (3), infra, deals with the situation where the state seeks conviction on both the inchoate and the principal offense by prohibiting conviction for both.

Section 55. Attempt; impossibility not a defense. In a prosecution for an attempt, it is no defense that it was impossible to commit the crime which was the object of the attempt where the conduct engaged in by the actor would be a crime if the circumstances were as the actor believed them to be.

COMMENTARY

A. Summary

The law of attempt is now recognized as being more properly directed at the dangerousness of the actor—the threat of the actor's personality to society at large. The emphasis in the older view was that the nature of the act should be determinative of the guilt of the actor. Pursuant to this view it has been held, for instance, that if an actor tried to receive property he believed stolen when the property was in fact not stolen, his act was not legally criminal

because it was impossible to commit the crime of attempt to conceal that which was not stolen. His act was viewed objectively as no threat to society because it was a "legal impossibility." Yet viewed from the subjective standpoint of the actor, the intent and purpose were criminal and but for the actor's mistaken understanding of the circumstances the crime would have been committed.

The Model Penal Code comment on situations of this kind is well expressed as follows:

> "In all of these cases (1) criminal purpose has been clearly demonstrated, (2) the actor has gone as far as he could in implementing that purpose, and (3) as a result, the actor's 'dangerousness' is plainly manifested." Model Penal Code comment to § 5.01, Tent. Draft No. 10, at 31 (1960).

This section would make the actor liable in all "impossibility" situations. This includes in addition to the "legal" impossibility cases the so-called "factual" impossibility situations. The case where the actor attempts to steal from the pocket of another when the pocket is empty or where the actor shoots into an empty bed believing it occupied by the intended victim are common examples of "factual" impossibility. Also encompassed within this section is a prohibition on a defense of "inherent" impossibility. Thus it would be no defense if black magic is the means chosen for the attempt, e.g., the actor makes a doll and repeatedly stabs it with pins believing that the intended victim thereby will be killed. Although the means chosen is clearly ineffective the personality of the actor is potentially dangerous. In such cases it may very well occur to the black magic practitioner, after repeated failures of legerdemain, that other more effective means to kill are available.

Some observers make the point that in extreme cases of "inherently" impossible conduct it is unlikely that prosecution would result. In some of the cases of this kind there may be a serious question of responsibility raised. It is unnecessary to try to draft an exception for these kinds of extreme cases, relying instead on the discretion of prosecutors to ignore situations where the actor is either clearly irresponsible or truly does not constitute a threat to society because of his personality.

What if the actor performs an act, a substantial step, in a scheme of conduct toward an end he believes is criminal but which in law and fact is not criminal? Is "impossibility" a defense here? The answer clearly is yes, but in a different sense. The Model Penal Code sums this up in the following language:

> "Of course, it is still necessary that the result intended by the actor constitute a crime. If, according to his beliefs as to facts and legal relationships, the result desired or intended is not a crime, the actor will not be guilty of an attempt even though he firmly believes that his goal is criminal." Model Penal Code comment to § 5.01, Tent. Draft No. 10, at 31–2 (1960).

B. Derivation

The language chosen is similar to that of the Illinois provision on impossibility. The Model Penal Code provision on impossibility accomplishes the same policy as that announced in the draft section but employs cumbersome language in the effort; but the basic policy of the Model Penal Code is retained. Michigan has pursued the same course in its draft.

C. Relationship to Existing Law

No Oregon statute presently covers whether factual or legal impossibility is a defense. However, on at least one occasion the Oregon Supreme Court has held that factual impossibility is no defense to the crime of attempt. In *State v. Elliott*, 206 Or 82 (1955), the defendant, a chiropractor, appealed from a conviction of the crime of attempt to commit manslaughter by abortion. The defendant had inserted instruments into the woman's womb in an effort to remove the fetus. The defendant had supposed the fetus to be in the womb while in fact it was in a Fallopian tube. The defendant argued, therefore, that what he attempted was impossible because the fetus was not in the womb. The Oregon Court refused the defendant's argument and relied on the "empty pocket" (a not inappropriate term) and other such classical cases where liability was found in spite of the asserted factual impossibility. The court subscribed to the view that punishment of the accused was just as essential to the safety of society as if the crime could in fact have been committed. In other words the accused clearly and unequivocally evidenced a dangerous personality and would have committed a crime had the circumstances been as he supposed them to be.

Though the Oregon law that factual impossibility is no defense seems settled by the *Elliott* case, no Oregon decision was found dealing with legal impossibility. The two are not really different as a policy matter. The draft section, like all the other modern codes, treats legal impossibility the same as factual impossibility and allows neither as a defense.

Section 56. Attempt; renunciation a defense. (1) A person is not liable under section 54 of this Act if, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, he avoids the commission of the crime attempted by abandoning his

criminal effort and, if mere abandonment is insufficient to accomplish this avoidance, doing everything necessary to prevent the commission of the attempted crime.

(2) The defense of renunciation is an affirmative defense.

COMMENTARY

A. Summary

Subsection (1) of the section provides that complete voluntary abandonment of the course of criminal conduct even after it has reached the stage where it constitutes an attempt, as defined in § 54, is a defense. According to Perkins this is contrary to the weight of authority.

> "The accepted view seems to have been that a criminal attempt is a 'complete offense' in the sense that one who has carried a criminal effort to the point of punishability can no more wipe out his criminal guilt by an abandonment of his plan than a thief can obliterate a larceny by restoration of the stolen chattel. As said in one case, it is a rule, founded in reason and supported by authority that if a man resolves on a criminal enterprise and proceeds so far in it that his act amounts to an indictable attempt, it does not cease to be such though he voluntarily abandons the evil purpose." Perkins, *Criminal Law* 589 (1969).

It does not advance the understanding of the basic policy question to argue whether the crime of attempt is a complete offense or not. As Perkins correctly points out it is better to view it as complete in one sense and incomplete in another. The crime of attempt never exists in any form other than as part of a larger plan and is always a part of the ultimate harm intended. If the ultimate harm intended is a crime, observes Perkins, the attempt is an "incomplete offense" in the sense that it is a part of it.

In accepting the policy that renunciation is to be a defense to the crime of attempt it is useful to bear in mind the explanation supporting this view in the Model Penal Code which suggests there are two basic reasons for allowing the defense.

> "First, renunciation of criminal purpose tends to negative dangerousness. As previously indicated, much of the effort devoted to excluding early 'preparatory' conduct from criminal attempt liability is based on the desire not to punish where there is an insufficient showing that the actor has a firm purpose to commit the crime contemplated. In cases where the actor has gone beyond the line drawn for preparation, indicating *prima facie* sufficient firmness of purpose, he should be allowed to rebut such a conclusion by showing that he has plainly demonstrated his lack of firm purpose by completely renouncing his purpose to commit the crime.
>
> "This line of reasoning, however, may prove unsatisfactory where the actor has proceeded far toward the commission of the contemplated crime, or has perhaps committed the 'last proximate act.' It may be argued that, whatever the inference to be drawn where the actor's conduct was in the area near the preparation-attempt line, in cases of further progress the inference of dangerousness from such an advanced criminal effort outweighs the countervailing inference arising from abandonment of the effort. However, it is in this latter class of cases that the second of the two policy considerations comes most strongly into play.
>
> "A second reason for allowing renunciation of criminal purpose as a defense to an attempt charge is to encourage actors to desist from pressing forward with their criminal designs, thereby diminishing the risk that the substantive crime will be committed. While under the proposed subsection, such encouragement is held out at all stages of the criminal effort, its significance becomes greatest as the actor nears his criminal objective and the risk that the crime will be completed is correspondingly high. At the very point where abandonment least influences a judgment as to the dangerousness of the actor—where the last proximate act has been committed but the resulting crime can still be avoided—the inducement to desist stemming from the abandonment defense achieves its greatest value.
>
> "On balance, it is concluded that renunciation of criminal purpose should be a defense to a criminal attempt charge because, as to the early stages of an attempt, it significantly negatives dangerousness of character, and, as to later stages, the value of encouraging desistance outweighs the net dangerousness shown by the abandoned criminal effort. And, because of the importance of encouraging desistance in the final stages of the attempt, the defense is allowed even where the last proximate act has occurred but the criminal result can be avoided—e.g., where the fuse has been lit but can still be stamped out. If, however, the actor has gone so far that he has put in motion forces which he is powerless to stop, then the attempt has been completed and cannot be abandoned. In accord with existing law, the actor can gain no immunity for this com-

pleted effort (e.g., firing at the intended victim and missing); all he can do is desist from making a second attempt." (Tent. Draft No. 10, at 71–3 (1960)).

To qualify for the defense of renunciation, however, the section requires that the renunciation must be completely voluntary. It is not sufficient if the actor is frightened into abandoning his conduct because of the imminence of police interference, or because he decides to wait until a later time to continue his activity, or because a means he has chosen for accomplishing the crime has proved inadequate.

Not only must the renunciation and abandonment be voluntary, it must effectively preclude the commission of the intended crime. In this, the New York statute, the California Tentative Draft, and the proposed Michigan draft agree. Thus, if the actor leaves a time bomb to kill his victim and immediately thereafter decides to abandon his criminal plan, he must remove the danger of the time bomb before the victim is injured for the renunciation to qualify as a defense. As another example, if the actor has solicited another to commit the crime and the person solicited has gotten to the point where a substantial step toward commission of the crime has been taken thus making the person solicited guilty of attempt as well as the original actor, on principles of complicity, the actor must, to effectively raise the defense of renunciation, prevent his associate from completing the crime.

Subsection (2) of this section deals with the question of proof of the defense of renunciation. The Model Penal Code and the proposed Michigan code require the defendant to raise the defense initially and introduce some evidence on the issue. The prosecution must then prove beyond a reasonable doubt that no renunciation has occurred. The draft of the section suggested here and the New York provision go further by requiring that the defendant must raise the issue of renunciation as an "affirmative defense" which requires proof by the defendant by a preponderance of the evidence.

At the outset this is believed to be justified because if renunciation is raised it does not involve the issue of guilt or innocence. The very fact that it is raised as a defense admits, practically speaking, that an attempt, as defined in § 54, has occurred. Further, the knowledge of the renunciation seems to be that kind of evidence peculiarly within the knowledge of the defendant which he is best qualified to present initially. By requiring not only initial presentation but also the burden of proof by a preponderance, it is felt that the defendant is treated fairly in that the defense is so highly subjective that the state might be unfairly burdened if it must negate the defense beyond a reasonable doubt.

B. Derivation

The language in subsection (1) of the section is taken largely from the final draft version of the Michigan code, but it reflects the policy of the New York law, the Model Penal Code and the California draft on the subject. Illinois makes no provision in its code for the defense of renunciation. The derivation of subsection (2) is explained immediately above.

C. Relationship to Existing Law

The provisions in this section are new law in Oregon, but the establishment of the defense seems clearly justified. Subsection (2), making the defendant responsible to introduce the issue as an affirmative defense and carry the burden of proof by a preponderation, is similar to the existing Oregon statute (ORS 136.390) relating to evidential burdens when the defense of insanity is raised. This policy is continued in the draft of the responsibility article. (See § 38).

Section 57. Solicitation; definition. (1) A person commits the crime of solicitation if with the intent of causing another to engage in specific conduct constituting a crime punishable as a felony or as a Class A misdemeanor or an attempt to commit such felony or Class A misdemeanor he commands or solicits such other person to engage in that conduct.

(2) Solicitation is a:

(a) Class A felony if the offense solicited is murder or treason;

(b) Class B felony if the offense solicited is a Class A felony;

(c) Class C felony if the offense solicited is a Class B felony;

(d) Class A misdemeanor if the offense solicited is a Class C felony;

(e) Class B misdemeanor if the offense solicited is a Class A misdemeanor.

COMMENTARY

A. Summary

The need for a general criminal solicitation statute is well stated in the Model Penal Code comments:

> "We have no doubt ourselves upon the issue posed, which arises—it is well to note—not only in relation to inchoate crime but also (though less controversially) in dealing with complicity. Purposeful solicitation presents dangers calling for preventive intervention and is sufficiently indicative of a disposition towards criminal activity to call for liability. Moreover, the fortuity that the person solicited does not agree to commit or attempt to commit the incited crime plainly should not relieve the solicitor of liability, when otherwise he would be a conspirator or an accomplice." Model Penal Code comment to § 5.02, Tent. Draft No. 10, at 82 (1960).

Pursuant to this section where *A* solicits *B* to commit a crime specified by *A* (or where *A* solicits *B* to solicit *C* to commit such crime), *A's* act constitutes the crime of solicitation whether or not *B* (or *C*, as the case may be) actually commits the crime or attempts to commit the crime. If after the solicitation by *A* the person solicited actually commits the crime, or attempts to commit the crime within the definition of a criminal attempt, *A* is also guilty of the completed crime or the attempt on the basis of criminal complicity. (See Model Penal Code § 2.06 on complicity.) It should be remembered, however, that § 64 discussed, infra, would establish the policy that *A* could not be convicted of more than one inchoate offense relating to the same contemplated crime. See the comments following § 64, infra.

A solicitation is almost always for the commission of the complete substantive offense. The definition, of course, covers this, but it also covers the unusual situation where the solicitor actually solicits an attempted crime. This would occur in the case where the crime contemplated could not be completed because of a "legal impossibility" discussed earlier in connection with § 55 which bars the defense of impossibility in the crime of attempt. To illustrate, *A* solicits *B* to commit the crime of receiving stolen property. *B* receives the property and conceals it believing, as does *A*, that the property is stolen. In actuality the property is not stolen thus rendering commission of the crime "legally impossible." Under the definition of attempt in §§ 54 and 55, *B* nevertheless is guilty of the crime of attempt to receive stolen property; under the rules of complicity in Model Penal Code § 2.06, as well as the existing general rule of law on the point, *A* is also guilty of the attempt; under the definition of solicitation in this section, *A* also is guilty of soliciting conduct which constitutes an attempt. Again, it should be recalled that *A* could be prosecuted for both solicitation and attempt and could be convicted of either but under the policy of § 64, infra, could not be convicted of both the inchoate offenses.

The requirement of an *actus reus*—that to be guilty of solicitation the actor must "command or solicit" another to engage in criminal conduct—is chosen for the reason stated in the comment to the Michigan Revised Criminal Code:

> "The Committee believes that the definition of the *actus reus* should be narrowly drawn to prevent the imposition of liability based on casual remarks. Of course, the *mens rea* requirement serves as a formidable safeguard in this area, but it was felt that terms like 'request' and 'encourage' might be too open-ended. The term 'solicits' was therefore used because it is an historic legal term that would carry with it the traditional limitations that are intended. It should be noted in this regard that while 'solicits' is commonly used with reference to one who seeks another out in the first instance, neither its dictionary nor legal definition is so limited. The term 'commands' has been added because technically it might not fall within the dictionary meaning of solicitation, i.e., entreating, importuning, etc., yet it certainly involves the same form of affirmative promotion." (Comment to § 1010).

The section further requires that the criminal conduct solicited must be "specific conduct." This requirement serves two purposes. First, it describes with precision the kind of *mens rea* required in the offense. Second, it is designed to allay some of the problems with respect to encroachment on traditional free speech concepts. As put by the comment to the Model Penal Code section, the problem is in preventing legitimate agitation of an extreme or inflammatory nature from being misinterpreted as soliciting to crime. (See comment to § 5.02, Tent. Draft No. 10, at 87–8 (1960)). It is said aptly in the Michigan comment to its solicitation definition section:

> "A general exhortation to 'go out and revolt' does not constitute solicitation, although it may in particular circumstances constitute incitement to riot. It is necessary in the context of the background and position of the intended recipient that the solicitation carry meaning in terms of proposing some concrete course of conduct that it is the actor's object to incite." (Comment to § 1010, 94 (1967)).

The section policy follows a middle ground with respect to the kind of crimes to which solicitation attaches. In the Model Penal Code and the Michigan code solicitation to do any criminal act—misdemeanor or felony—constitutes the crime of solicitation. The Commission concludes, however, that only the more serious crimes, those punishable as felonies

and the higher classes of misdemeanor, should be involved.

B. Derivation

The language of the section comes from § 1010 (1) of the Michigan code and from Model Penal Code § 5.02 (1). The policy expressed in the Model Penal Code is incorporated except that the section is limited to the more serious substantive crimes—felonies and the higher classes of misdemeanor. Language believed to be more precise is borrowed from the Michigan formulation particularly with respect to the description of the act of solicitation—one who "commands and solicits," instead of the Model Penal Code version—one who "commands, encourages or requests."

C. Relationship to Existing Law

A mere solicitation, even if accompanied by such acts as offer of payment for commission of the crime or the supplying of materials by the solicitor to commit the crime, does not ordinarily constitute an attempt in the majority view. See Perkins, *Criminal Law* 584–86 (1969), and Model Penal Code comment to § 5.02, Tent. Draft No. 10, at 85–6 (1960). Solicitation may in a very limited number of crimes also constitute an attempt to commit the crime. Examples are solicitation to sodomy and solicitation to bribery. See Perkins at 584–86.

The case of *State v. Taylor*, 47 Or 455 (1906), involved an indictment for attempted arson under Oregon's sketchy general attempt section, now ORS 161.090, which provides that if any person "attempts to commit any crime and in such attempt does any act towards the commission of such crime" he is guilty of attempt. The facts of the case, however, clearly show that the defendant had not himself intended to set fire to the victim's barn but instead had solicited one McGrath to do the job for him. At the time of the defendant's solicitation of McGrath Oregon had no general solicitation statute. Nor was it possible to fall back on the crime of solicitation recognized in the common law, because Oregon had abandoned all common law crimes except those enacted in its statutes. Thus, for justice to reach the defendant in the *Taylor* case, the general attempt statute was employed.

The Oregon Supreme Court held that the defendant's solicitation was in fact an attempt to commit arson, because by hiring McGrath to commit the crime and giving McGrath materials to set the fire, the defendant had done the last acts possible for him to do under the scheme. Thus, concluded the court, the defendant's act was not mere preparation but was an act constituting an attempt.

The position of the Oregon Court in *State v. Taylor*, in effect making solicitation the equivalent of a criminal attempt, is cited by the Model Penal Code as being the minority view and is criticized as bad policy. Although Perkins does not cite the *Taylor* case specifically in his discussion, other cases cited as being in the minority, of which he also is critical, are almost identical on their facts to *Taylor*.

Section 58. Solicitation; renunciation a defense. (1) It is a defense to the crime of solicitation that the person soliciting the crime, after soliciting another person to commit a crime, persuaded the person solicited not to commit the crime or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal intent.

(2) The defense of renunciation is an affirmative defense.

COMMENTARY

The language of this section is derived largely from Model Penal Code § 5.02 (3). The New York and Michigan codes also provide a defense of renunciation. The comments pertinent to renunciation as a defense to criminal attempt are generally applicable here. See § 56 supra.

Section 59. Conspiracy; definition. (1) A person is guilty of criminal conspiracy if with the intent that conduct constituting a crime punishable as a felony or a Class A misdemeanor be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

(2) Criminal conspiracy is a:

(a) Class A felony if an object of the conspiracy is commission of murder, treason or a Class A felony;

(b) Class B felony if an object of the conspiracy is commission of a Class B felony;

(c) Class C felony if an object of the conspiracy is commission of a Class C felony;

(d) Class A misdemeanor if an object of the conspiracy is commission of a Class A misdemeanor.

COMMENTARY

Special Note: The Model Penal Code, Tent. Draft No. 10, at 96–155, contains an excellent and exhaustive discussion of the issues and policies relating to the crime of conspiracy. Since the following sections on conspiracy follow closely the Model Penal Code provisions contained in § 5.03, the comments here are drawn largely from that material through paraphrase and examples. Exceptions to this are those instances where the Oregon law of conspiracy is discussed. Regarding the discussion of the Oregon cases, the reader should remember that until 1937 with the enactment of chapter 362 of the session laws of that year (now ORS 161.320) there was no general crime of conspiracy defined in Oregon. Nevertheless much insight into the "law" of conspiracy can be gained from Oregon cases decided prior to 1937 on such issues as the scope of conspiracies, the nature of the agreement required and the duration of conspiracies. The pre-1937 cases discuss these issues not as a result of indictments on charges of conspiracy to commit substantive crimes, but as a result of indictments to commit substantive crimes where two or more persons were involved in the crimes. The Oregon courts in such early cases applied the rules of evidence as to declarations, admissions and hearsay developed in conspiracy cases. Only two Oregon Supreme Court cases have been found since 1937 which arise specifically on indictments for the crime of conspiracy under the 1937 statute. Unfortunately in neither case is there much useful information defining and discussing the problems and issues concerning conspiracy as a crime in its own right.

A. Summary

1. The objective of the conspiracy. The section proscribes concerted action where the objective is a crime punishable as a felony or a serious misdemeanor. Some states still employ the common law provision in which a conspiracy is defined as a combination formed to do either an unlawful act or a lawful act by unlawful means. This definition fails to provide a sufficiently definite standard of conduct to have any place in a penal code. The present Oregon definition eschews the common law formulation and, in accord with the Model Penal Code draft, proscribes the conspiracy only when it has a crime as its object. But Oregon's present formulation is more restricted than the formulation in the Model Penal Code in that Oregon prohibits only conspiracies whose objects are felonies; the Model Penal Code version extends also to conspiracies to commit misdemeanors, but the proposed draft will include only serious misdemeanors.

2. The conspiratorial relationship; the unilateral approach.

Of this aspect the Model Penal Code says:

> "The definition of the Draft departs from the traditional view of conspiracy as an entirely bilateral or multilateral relationship, the view inherent in the standard formulation cast in terms of 'two or more persons' agreeing or combining to commit a crime. Attention is directed instead to each individual's culpability by framing the definition in terms of the conduct which suffices to establish the liability of any given actor, rather than the conduct of a group of which he is charged to be a part—an approach which in this comment we have designated 'unilateral'." Comment, Tent. Draft No. 10, at 104 (1960).

The general Oregon conspiracy statute (ORS 161.320) follows the standard formulation cast in terms of "two or more persons" agreeing to commit any felony. Interestingly enough the Oregon code of military justice contains a formulation in ORS 398.312, enacted in 1961, which adopts the Model Penal Code unilateral formula. The same unilateral approach is adopted in ORS 474.020 relating to narcotic drug offenses.

The purpose of the unilateral approach is to make it immaterial to the guilt of a conspirator that one or all the persons he has conspired with have not been or cannot be convicted. Present general law (no Oregon cases were found) frequently holds otherwise, reasoning that if the definition of a conspiracy reads "agreement by two or more persons" to commit a crime, this means there must be at least two

guilty conspirators. The draft section will avoid this result. The following examples are illustrative:

(a) *A* conspires with *X* to commit a crime. *X*, however, is insane, or is innocent of the purpose of *A*, or is irresponsible due to immaturity. *A* nevertheless is guilty of conspiracy under the draft. (The result in this and the following examples is implicit in this draft section; it is stated explicitly in § 63, infra. See the commentary to § 10.)

(b) *A* conspires with *X* to commit a crime. *X*, unknown to *A*, is a policeman, or is working with the police and has no intention of going through with the crime. *A*, under the draft, is guilty of conspiracy.

(c) *A* conspires with *X* to commit a crime but *X* has not been apprehended, or is unknown to the grand jury, or *X* is known but not yet indicted, or *X* has been granted immunity. Under present general law (no Oregon cases were found), *A* is amenable to conviction for conspiracy, and the draft continues this policy.

(d) *A* has conspired with *X*, and *X* has been tried and acquitted prior to *A's* trial on the same conspiracy. *A* may still be convicted under the unilateral approach of the draft. This is contrary to the decided cases (none found in Oregon) but is justified on the following basis: it is recognized that inequalities in the administration of laws are, to some extent, inevitable; that they may reflect unavoidable differences of proof, and that, in any event, they are a lesser evil than granting immunity to one criminal because justice has miscarried in dealing with another.

The requirement of purpose. The draft endeavors to solve several problems not heretofore confronted in language of the statutes, except in the very newest codes, but dealt with instead almost entirely in court opinions. The traditional definition in the statutes says nothing about the actor's state of mind except as to the concept of agreement. The draft endeavors to provide more precise standards by requiring "an intent that conduct constituting a crime be performed."

An example demonstrates the problem. *A* is a retail grocer who sells large quantities of sugar and yeast to persons whom he knows are using the materials to make illegal whiskey. *A* is motivated largely by a desire to make a normal profit on the sale of the sugar and yeast. Is it enough to make him guilty of a conspiracy to make illegal whiskey if he merely has knowledge that he is facilitating the crime?

The decisions are in conflict. New York answers the above in the affirmative pursuant to passage recently of a law defining the crime of "criminal facilitation." The New York statute declares that this crime is committed by any person who "believing it probable that he is rendering aid to a person who intends to commit a crime" provides such person with the means or opportunity to commit the crime. New York Rev Penal Law, §§ 115.00–115.15.

In the above example, however, *A*, under the draft section, would not be guilty of conspiracy. Not only must *A* have knowledge, he must engage in the sale of the commodities used in the crime with the intent of facilitating the crime. Under the draft the intent need not be express. It can be inferred in the proper circumstances, some of which might include large sales, the seller's initiative or encouragement, continuity of the relationship and, perhaps, though not in the example given, the contraband nature of the material sold.

The effect of the "intent" clause on Oregon law is difficult to state depending on how one reads the decision in *State v. Boloff*, 138 Or 568 (1932), where the defendant was being tried for violation of the criminal-syndicalism act—advocating use of violence as a means of effecting political and industrial change. (The statute was repealed in 1937 in the same Act which created the present conspiracy formulation now found in ORS 161.320.) The majority for the court seems to say that defendant by joining the Communist Party, having available the printed goals of the party, having listened to speeches and plans to foment unrest, *etc.*, thereby had knowledge of the common design which was a conspiracy to cause violent change. This "knowledge" was enough to find he was part of the conspiracy for purposes of introducing evidence not otherwise admissible against the defendant. The dissent points out, however, that the defendant was an uneducated common laborer who really had no idea of the aims of the Communist Party and who could not even read or write. The dissent found that the defendant had joined simply because he heard it was a workingman's party trying to improve wages and conditions.

The *Boloff* case seems to hold that knowledge of the criminal scheme plus facilitation of it through paid membership is enough to constitute the required *mens rea* for conspiracy. If this is the correct view of what the case holds, then the draft section would reverse the holding, because it is doubtful that Boloff had formed an intent to facilitate the crime.

3. No overt act required. The draft section follows the Model Penal Code very closely except for the Model Penal Code provision as to an overt act. The Model Penal Code in § 5.03 (5) requires that if the criminal objective of the conspiracy constitutes only a felony of the third degree or a misdemeanor, an overt act must be proved in addition to the agreement to commit the crime. Most modern statutes, including Oregon's, require proof of an overt act in all conspiracy cases. The common law of conspiracy contained no such requirement.

The gravamen of a conspiracy is recognized as the

combination, the coming together of two or more persons which may greatly increase the chance that the substantive crime contemplated will be consummated. The comment in the Michigan proposed code is appropriate here as to the efficacy of the overt act requirement:

> "The Committee could find no value in adding such a requirement, particularly since the insignificance of the acts that will meet the requirement render it almost meaningless." (Comment to § 1015, 99 (1967)).

The argument is sometimes heard that the requirement of an overt act before the conspiracy is indictable affords a *locus poenitentiae*, meaning roughly a place and time for a repentance and change of mind, which might have the effect of encouraging the disbandment of the conspiracy. This *locus poenitentiae* argument is obviated in part, at least, by the provision in § 61, infra, which establishes a defense based on a complete and voluntary renunciation of the conspiracy by a participant if the renunciation frustrates the accomplishment of the criminal objective.

B. Derivation

The language of § 1015 (1) of the Michigan draft is followed except that the section applies only to conspiracies to commit only the more serious kinds of crime. The Michigan draft closely parallels the Model Penal Code policy in § 5.03 (1).

C. Relationship to Existing Law

The present Oregon statutory definition of the crime of conspiracy is found in ORS 161.320 which reads as follows:

> "If two or more persons conspire to commit any felony defined and made punishable by the laws of this state and one or more parties does any act to effect the object of the conspiracy, each of the parties to the conspiracy, upon conviction, shall be punished by imprisonment in the state penitentiary for not more than three years or by a fine of not more than $1,000, or both."

As discussed above, this definition is considerably expanded and changed by the draft section. For instance, no overt act is required in the draft. Under the draft section conspiracy to commit the more serious misdemeanors as well as felonies is made a crime. The draft takes the unilateral approach in its definition—"when one person conspires with another"—as compared to the usual formulation as exemplified in the Oregon statute—"when two or more persons agree to commit a felony." The draft section requires an agreement between conspirators with the "purpose of promoting or facilitating" the commission of the crime. The Oregon statute is silent on this issue and the Oregon case law seems to say that aid with mere knowledge that a criminal course of action will be pursued suffices to constitute a conspiracy. The draft makes more specific the *mens rea* element in the definition of conspiracy with the effect that it is criminal only as a conspiracy if the actor has the intent with others of committing a certain crime. Aid with mere knowledge of the existence of the conspiracy does not constitute the crime of conspiracy under the draft.

Section 60. Scope of conspiratorial relationship. If a person is guilty of conspiracy, as defined in section 59 of this Act, and knows that a person with whom he conspires to commit a crime has conspired or will conspire with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.

COMMENTARY

Of this section and § 59 the Model Penal Code says:

> "The Draft relies upon the combined operation of [§§ 59 and 60] to delineate the identity and scope of a conspiracy. All . . . provisions focus upon the culpability of the individual actor. [Sections 59 and 60] limit the scope of his conspiracy (a) in terms of its criminal objects, to those crimes which he had the purpose of promoting or facilitating and (b) in terms of parties, to those with whom he agreed, except where the same crime that he conspired to commit is, to his knowledge, also the object of a conspiracy between one of his co-conspirators and another person or persons." (Tent. Draft No. 10, at 119–20 (1960)).

1. Party and object dimensions. Illustrative of the problem here is the following simplified fact situation based on *U. S. v. Bruno*, 105 F2d 921 (2d Cir 1939). A group of dope smugglers imported narcotics into New York and sold them in New York to distributor middlemen, who in turn sold the drugs to retailers in other states, one group in Louisiana and one in Texas. The holding in the *Bruno* case was that all smugglers, middlemen and retailers (some 85 defendants) were part of the same conspiracy. A different result would probably obtain under the

concept advanced by the draft section. Of this the Model Penal Code says:

"With the conspiratorial objectives characterized as the particular crimes and the culpability of each participant tested separately, it would be possible to find in a case such as *Bruno*—considering for the moment only each separate chain of distribution—that the smugglers conspired to commit the illegal sales of the retailers but that the retailers did not conspire to commit the importing of the smugglers. Factual situations warranting such a finding may easily be conceived: the smugglers might depend upon and seek to foster their retail markets while the retailers might have many suppliers and be indifferent to the success of any single source. The court's approach in *Bruno* does not admit of such a finding, for in treating the conspiratorial objective as the entire series of crimes involved in smuggling, distributing and retailing requires either a finding of no conspiracy or a single conspiracy in which all three links in the chain conspired to commit all of each other's crimes.

"It would also be possible to find, with the inquiry focused upon each individual's culpability as to each criminal objective, that some of the parties in a chain conspired to commit the entire series of crimes while others conspired only to commit some of these crimes. Thus the smugglers and the middlemen in *Bruno* may have conspired to commit, promote or facilitate the importing and the possession and sales of all of the parties down to the final retail sale; the retailers might have conspired with them as to their own possession and sales but might be indifferent to all the steps prior to their receipt of the narcotics. In this situation, a smuggler or a middleman might have conspired with all three groups to commit the entire series of crimes, while a retailer might have conspired with the same parties but to commit fewer criminal objectives. Such results are conceptually difficult to reach under existing doctrine not only because of the frequent failure to focus separately upon the different criminal objectives, but because of the traditional view of the agreement as a bilateral relationship between each of the parties, congruent in scope both as to its party and its objective dimensions.

"Of course, the major difficulty in finding any conspiracy which includes as parties both the smugglers and the retailers is the absence of direct communication or cooperation between them. Despite such absence an agreement may be inferred from mutual facilitation and evidence of a mutual purpose. [Section 59] of the Draft would not preclude the inference, though it is more specific than the present law on the purpose requirement. But the present concept of agreement and even the more specific criteria embodied in [§ 59] tend to become somewhat ambiguous when applied to a relationship that involves no direct communication or cooperation. Consequently, [§ 60] of the draft has been designed to facilitate the inquiry in such cases.

"[Section 60] extends the party dimension of a defendant's conspiracy beyond those with whom he agreed but at the same time preserves the basic limitation that the defendant must have conspired with someone to pursue the particular objective within the meaning of [§ 59]. He must have agreed with someone with the purpose of promoting or facilitating the commission of a particular crime; if to his knowledge others have conspired with his co-conspirator to commit the *same* crime he is also guilty of conspiring with them to commit that crime. In each chain of the *Bruno* case, for example, where actual cooperation and communication were established only between the middlemen and the retailers, separate conspiracies might easily be found under [§ 59] between each of these pairs of groups; and the objectives of each such conspiracy might consist of any or all of the crimes directly committed by its members. The smugglers and the retailers could then be drawn into a single conspiracy under [§ 60] only as to objectives common to both such conspiracies, if each had knowledge of the other's conspiracy with the middlemen to commit these crimes. Absent such knowledge on the part of, say, the retailers, it would be possible for the smugglers to have conspired with the retailers through the middlemen to commit these crimes while the retailers conspired only with the middlemen. In this case there would be separate conspiracies congruent as to objective but differing as to parties." (Model Penal Code supra at 121–23).

The fact situation described above might be likened to a chain conspiracy. A different though related problem is presented in the situation where the conspiracy resembles a wheel. For example, *A*, representing the hub of the wheel, conspires individually with *B*, *C*, *D*, *E* and *F*, who may be seen as the spokes of the wheel, to obtain fraudulent loans for each of the "spokes." The "spokes" of the wheel are entirely unknown to each other. Under the draft there would be separate conspiracies between *A* and each one of the "spokes" but no conspiracy as to all, since, under § 59, each individual "spoke" has an agreement only with *A* and cannot be said, under § 60, to have known that *A* would conspire with others to commit the same kind of crime. The same result is reached in a case with similar facts. *Kotteakos v. U. S.*, 328 US 750 (1946).

2. Changes in personnel; liability of adherents. On this issue the Model Penal Code says:

"Somewhat more troublesome is the question raised by changes in personnel. Although con-

ceptual objections might be advanced against the notion of a single agreement in which parties are added or dropped, present law recognizes that the unity of a conspiracy may be unimpaired by the fact of withdrawal of some of the participants or the addition of new ones. The existence of a continuing nucleus of participants is stressed, and the addition or withdrawal of some participants at various times is held not to affect the continuing conspiratorial relationship maintained by this nucleus.

"Further, it is submitted that the unilateral approach of the draft toward each actor's culpability tends to minimize any conceptual difficulty involved in finding a single conspiracy despite changes of personnel, and, assuming such a finding, facilitates the inquiry as to the scope of responsibility of each participant. Since the scope of each person's conspiracy will be measured separately, those who participated in the entire series of crimes could be found guilty of a conspiracy the objectives of which include all these crimes, while the conspiracy of those who joined later would include as objectives only the crimes committed after they joined." (Tent. Draft No. 10, at 130 (1960)).

B. Derivation

The language of § 60 follows Model Penal Code § 5.03 (2).

C. Relationship to Existing Law

The provisions of § 60 are new to Oregon law.

Section 61. Conspiracy; renunciation of criminal purpose. (1) It is a defense to a charge of conspiracy that the actor, after conspiring to commit a crime, thwarted commission of the crime which was the object of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. Renunciation by one conspirator does not, however, affect the liability of another conspirator who does not join in the renunciation of the conspiratorial objective.

(2) The defense of renunciation is an affirmative defense.

COMMENTARY

A. Summary

The explanation of this provision in the Model Penal Code comments reads as follows:

"The test adopted in [§ 61] is consistent with those in the attempt and solicitation drafts. First, the circumstances must manifest renunciation of the actor's criminal purpose. Second, he must take action sufficient to prevent consummation of the criminal objective. The kind of action that will suffice to this end varies for the three different inchoate crimes. Since attempt involves only an individual actor, abandonment will generally prevent completion of the crime, although in some cases the actor may have to put a stop to forces which he has set in motion and which would otherwise bring about the substantive crime independently of his will. The solicitor, on the other hand, has incited another person to commit the crime (unless the solicitation is uncommunicated or rejected); consequently, the draft requires that he either persuade the other person not to do so or otherwise prevent the commission of the crime. Since conspiracy involves preparation for crime by a plurality of agents, the objective will generally be pursued despite renunciation by one conspirator; and the draft accordingly requires for a defense of renunciation that the actor thwart the success of the conspiracy.

"The means required to thwart the success of the conspiracy will of course vary in particular cases, and it would be impractical to endeavor to formulate a more specific rule. As a general matter timely notification to law enforcement authorities will suffice, and this result accords with the similar means of exoneration allowed an accomplice who terminates his complicity to the commission of the substantive crime. (§ 2.06 (5) (c) (ii)). Notification of the authorities which fails to thwart the success of the conspiracy because not timely or because of a failure on their part will not sustain a defense to the charge of conspiracy but will commence the running of time limitations as to the actor under [§ 62]." (Tent. Draft No. 10 at 144).

It should be noted here that renunciation must take place before the performance of any of the criminal conduct contemplated by the conspiracy. Renunciation after that point may relieve the defendant from liability for future substantive offenses committed pursuant to the conspiracy but will not relieve his liability for the conspiracy charge itself

or for offenses committed prior to his renunciation. Noteworthy, also, is the fact that liability of the other conspirator or conspirators is not affected by the renunciation by one of the conspirators. Although the renunciation has thwarted the accomplishment of the conspiratorial objectives for all in on the scheme, only the renunciator has indicated clearly that he no longer has the dangerous purpose at which the law aims its proscription. The other conspirators remain unregenerate.

Renunciation as affirmative defense. The comments to § 56, supra, relating to renunciation being an affirmative defense with the burden of proof on the defendant are applicable here.

B. Derivation

The first sentence of subsection (1) comes from Model Penal Code § 5.03 (6). The last sentence in subsection (1) is adopted from § 1015 of the Michigan revision. The burden of proof allocation follows the policy in the New York law.

C. Relationship to Existing Law

No Oregon cases were found discussing the subject of renunciation. The general rule is that renunciation is not a defense; the crime is complete with the agreement, and no subsequent action can exonerate the conspirator. As pointed out in the quoted portion of the Model Penal Code above, the rule may be defended only if the act of agreement itself is considered sufficiently undesirable and indicative of the actor's dangerousness in spite of subsequent renunciation and action to thwart the goals of the conspiracy. This rule and rationalization do not seem supportable. It is clearly contrary to the renunciation provision in the attempt and solicitation drafts, supra. To disallow the defense of renunciation here would be contrary to the important policy of encouraging persons, wherever possible, to desist from criminal designs.

Section 62. Duration of the conspiracy. For the purpose of application of ORS 131.110:

(1) Conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object are completed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired.

(2) Abandonment is presumed if neither the defendant nor anyone with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitation.

(3) If an individual abandons the agreement, the conspiracy is terminated as to him only if and when he advises those with whom he conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy and of his participation therein.

COMMENTARY

A. Summary

This section relates only to the perplexing question of when the conspiracy ends for purposes of applying the statute of limitations. Not covered in this provision are the related but different problems of the duration of the conspiracy for the purpose of introduction at the trial of hearsay evidence or vicarious admissions or for the purpose of holding the defendant liable for the substantive crimes committed by his coconspirators. The former is purposely not dealt with in this draft because it is essentially a matter of the law of evidence. The vicarious admission rule in conspiracy may depend on factors that are not pertinent to the measure of the conspiracy's duration for the purpose of computing time limitation. The latter problem is viewed in the Model Penal Code as a problem of complicity and is dealt with in Model Penal Code § 2.06. See the comments to the section in Tent. Draft No. 1, at 20–24 (1953).

In passing it might be noted here that Oregon cases dealing with the duration problem as it relates to admission of hearsay evidence generally hold that when the crime is committed, which was the object of the conspiracy, the introduction of vicarious admissions and hearsay made after that point in time will not be allowed. *State v. Magone*, 32 Or 206, 51 P 453 (1897), (charge was grave robbing which grew

out of a conspiracy; excluded hearsay statements made some time after completion of the crime). See also *State v. Tice*, 30 Or 457 (1897). But when the crime is not yet complete statements made by a coconspirator are readily admissible in Oregon. *State v. Gardner*, 225 Or 376, 358 P2d 557 (1961); *State v. Johnson*, 143 Or 395, 22 P2d 879 (1933); *State v. Goodloe*, 144 Or 193, 24 P2d 28 (1933). In two of these cases, *Gardner* and *Goodloe*, the court held that the conspiracy continued up to the time of the distribution of the fruits of the crime.

This section provides that the conspiracy terminates for purposes of the statute of limitation as to all parties to the conspiracy when the object of the conspiracy, the crime, has been committed or when the conspiracy has been abandoned by all as evidenced by a lack of any overt act during the time limitation period. The conspiracy terminates for the purpose of time limitation for the individual conspirator if he expresses his wish to abandon either to his coconspirators or if he tells the police of the existence of the conspiracy and his intention to abandon it. Note here that this does not necessarily constitute a renunciation as provided in § 61, supra. Abandonment starts the limitation statute running but is not otherwise a defense to a charge of conspiracy. To achieve the renunciation defense, the defendant must have prevented the crime from being committed which was the object of the conspiracy.

B. Derivation

The language of the section follows exactly the language of Model Penal Code § 5.03 (7).

C. Relationship to Existing Law

No Oregon cases were found dealing with the specific problem of the statute of limitations. This section fills a void and would seem useful for this reason if for no other. Subsections (1) and (2) of the draft, relating to abandonment by all the conspirators, represents the generally accepted view, according to the comments to the Model Penal Code section. With respect to subsection (3), abandonment by the individual conspirator, the cases are fewer and the law less well settled. The major problem turns on what the individual is required to do before he can show he has abandoned. The choice of the Model Penal Code, as reflected in the draft section, seems reasonable. By requiring him to inform his coconspirators of his intention to abandon the scheme, the policy goal is served whereby the coconspirators may be discouraged and dissuaded by the announced defection. If the individual chooses instead to tell the police of his desire to abandon, it is obviously more likely that the conspiracy will be smashed before its criminal goal can be achieved.

Section 63. Solicitation and conspiracy; availability of certain defenses. (1) Except as provided in subsection (2) of this section, it is immaterial to the liability of a person who solicits or conspires with another to commit a crime that:

(a) He or the person whom he solicits or with whom he conspires does not occupy a particular position or have a particular characteristic which is an element of such crime, if he believes that one of them does; or

(b) The person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime, or, in the case of conspiracy, has feigned the agreement; or

(c) The person with whom he conspires has not been prosecuted for or convicted of the conspiracy or a crime based upon the conduct in question, or has previously been acquitted.

(2) It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice under sections 12 to 15 of this Act.

COMMENTARY

A. Summary

Subsection (1) (a) is designed to apply in the following situations: a public official who accepts a bribe violates ORS 162.230. This section, however, applies only to the public official with the result that the coconspirator who is not a public official cannot be prosecuted under the section. Nevertheless, under the draft section, his lack of capacity (not being a public official) to commit the crime under that particular section of the statutes will not be a defense to conspiracy to commit that offense. The doctrine is clear upon principle, for an agreement to aid another to commit a crime is not rendered less dangerous than any other conspiracy by virtue of the fact that one party cannot commit it so long as the other party can. The draft provision reflects a sizable number of case holdings to this effect in other jurisdictions (no Oregon cases were found). The draft does exceed the general doctrine in one aspect, however. Even if the person to be bribed is in fact not a public official but the actor believes he is, the actor can be held to a conspiracy or solicitation charge and may not assert a defense on the issue. This accords with the general principle governing all inchoate crimes that the defendant's culpability is to be measured by the circumstances as he believes them to be. See, e.g., § 55, supra.

Subsection (1) (b) makes it immaterial to the liability of the solicitor or conspirator that the person he solicits or conspires with is immune from prosecution for the substantive crime, or is an innocent agent, or is legally incapacitated because of age. The fact that the agreement of one of the parties was feigned (where the "coconspirator" is a policeman or an agent working toward the arrest of the actor) is also immaterial as a defense.

Decisions in other jurisdictions occasionally have held that the instigator in such cases could not be held because of the traditional concept of the definition of conspiracy—an agreement between two or more persons. This strictly doctrinal approach insisting on the bilateral relationship is rejected in draft § 59, supra, defining conspiracy. The draft measures the culpability of each defendant individually. This concept and policy is also consistent with basic views of liability arising out of complicity as reflected in § 2.06 (2) of the Model Penal Code.

Subsection (1) (c) makes it immaterial to the defendant that a coconspirator has not been or is not being prosecuted, or has not yet been convicted, or has previously been acquitted. This makes explicit the policy announced above that culpability in all cases should be measured by a unilateral or individual standard.

Subsection (2) establishes the policy that a "victim" of a crime, although he has participated in its completion, and who cannot be held for the substantive crime, cannot be held for soliciting the crime or conspiring to commit the crime. Examples would be crimes for which the consenting behavior of more than one person is inevitably incident, such as statutory rape, abortion, bribery or unlawful sales. This policy in this subsection is consistent with the Model Penal Code section on complicity, § 2.06 (5), and the policy adopted in that complicity section is applicable here: the Legislature is left with deciding in each particular offense whether more than one participant ought to be subject to liability.

This subsection (2) rejects the old doctrine known as *Wharton's* rule, announced in a Pennsylvania case in 1850 and still followed in many jurisdictions (no Oregon cases on the point were discovered). This doctrine holds that "when to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a nature that it is aggravated by a plurality of agents, cannot be maintained." Classical *Wharton* rule cases are those involving dueling, adultery, bigamy and incest, but the rule has been expanded to cover gambling and the giving and receiving of bribes. The rule is supportable only insofar as it avoids the possibility of cumulative punishment for the crime and the conspiracy to commit the crime. This becomes immaterial as a reason under the draft presented here which, in § 64, infra, prohibits conviction for both the conspiracy and the crime which is the object of the conspiracy. Abolition of the *Wharton* rule again emphasizes the individual or unilateral concept of culpability in conspiracy adopted by the Model Penal Code and reflected in this draft.

B. Derivation

The language of the draft follows Model Penal Code § 5.04 fairly closely except for subsection (1) (c). This provision is derived from the proposed California draft, § 813 (1) (c). It makes more specific a policy probably included within present language of the Model Penal Code section but added here for purposes of clarity.

C. Relationship to Existing Law

No Oregon cases were found dealing with the subject covered in this draft section. The draft formulation largely follows the majority view but departs from it in one or two particulars, e.g., subsection (1) (c) provides it is no defense if a coconspirator has been acquitted of the same conspiracy and that it is no defense if the alleged coconspirator merely feigned agreement to the criminal proposal. The emphasis in the section is consistent with the

definition of conspiracy proposed in § 59, supra, in that it stresses the individual conspirator's culpability and refuses to consider his culpability in light of his coconspirator's relation to the scheme and possible immunity or incapacity to commit any crime.

Section 64. Multiple convictions barred in inchoate crimes. (1) It is no defense to a prosecution under section 54, 57 or 59 of this Act that the offense the defendant either attempted to commit, solicited to commit, or conspired to commit was actually committed pursuant to such attempt, solicitation or conspiracy.

(2) A person shall not be convicted of more than one offense defined by sections 54, 57 and 59 of this Act for conduct designed to commit or to culminate in commission of the same crime.

(3) A person shall not be convicted on the basis of the same course of conduct of both the actual commission of an offense and an attempt to commit that offense or solicitation of that offense or conspiracy to commit that offense.

(4) Nothing in this section shall be construed to bar inclusion of multiple counts charging violation of the substantive crime and sections 54, 57 and 59 of this Act in a single indictment or information, provided the penal conviction is consistent with subsections (2) and (3) of this section 64.

COMMENTARY

A. Summary

Subsection (1) of this section is designed to permit prosecution for inchoate crimes even if the substantive crime has been completed. It should be noted here that although prosecution for the inchoate crime, as well as for the substantive offense, is permitted by this draft section, subsection (3) prohibits conviction for both the inchoate crime and the substantive offense.

Subsection (2) precludes conviction of more than one inchoate crime defined by this article for conduct designed to commit or to culminate in the commission of the same crime. The provision reflects the policy, frequently stated in these comments, of finding the evil of preparatory action in the danger that it may culminate in the substantive offense that is its object. Thus conceived, there is no warrant for cumulating convictions of attempt, solicitation and conspiracy to commit the same offense.

Subsection (3) precludes conviction of both an inchoate crime and the substantive offense.

Subsection (4) is included to emphasize that subsections (2) and (3) deal only with convictions, not with prosecutions. It should be clear, therefore, that the prosecution may be for one or more inchoate offenses as well as for the substantive offense.

B. Derivation

Subsections (1), (3) (with the exception set out below) and (4) are based on the language of the Michigan revision, § 1020. The language of subsection (2) is based on Model Penal Code § 5.05 (3). The departure from the Michigan section mentioned parenthetically above relates to the crime of conspiracy. The Michigan draft does not bar a defendant from being convicted of both conspiracy to commit a crime and the commission of the crime. The language effecting a contrary result in this draft section appears in subsection (3). It implements a policy choice of particular interest which will be discussed in the final portion of this comment.

C. Relationship to Existing Law

At the common law all three of the inchoate crimes defined in this article were deemed to merge into the completed crime. The effect was that there could not be cumulative conviction for the inchoate and the substantive crime. Although this rule of law continues in most jurisdictions with respect to the inchoate crimes of attempt and solicitation, most jurisdictions have by statute permitted conviction for both conspiracy and the crime which is the object of the conspiracy. Oregon has no general solicitation statute presently, but does provide in ORS 135.900 that a defendant convicted or acquitted of a substantive crime may not be convicted for an attempt to commit the crime. This, in effect, is a merger provision with respect to attempt. As an

adjunct of this *State v. Harvey*, 119 Or 512, 249 P 172 (1926), held that a defendant may be indicted and convicted of an attempt to commit a substantive offense even though the facts show that the substantive crime was in fact completed. This Oregon rule is in accord with the policy adopted in subsection (1) of the draft section. Oregon's position on whether there can be a conviction for both a conspiracy to commit a crime and for the substantive crime itself apparently has not been the subject of statutory or decisional treatment. Under the draft such a conviction would be prohibited.

ARTICLE 7. CLASSES OF OFFENSES

Section 65. Offenses; definition. An offense is conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law or ordinance of a political subdivision of this state. An offense is either a crime or a violation.

COMMENTARY

See commentary under § 73 infra.

Section 66. Crimes; definition. (1) A crime is an offense for which a sentence of imprisonment is authorized.

(2) A crime is either a felony or a misdemeanor.

COMMENTARY

See commentary under § 73 infra.

Section 67. Felonies; definition. Except as provided in sections 73 and 83 of this Act, a crime is a felony if it is so designated in any statute of this state or if a person convicted under a statute of this state may be sentenced to a maximum term of imprisonment of more than one year.

COMMENTARY

See commentary under § 73 infra.

Section 68. Felonies; classifications. (1) Felonies are classified for the purpose of sentence into the following categories:

(a) Class A felonies;

(b) Class B felonies;

(c) Class C felonies; and

(d) Unclassified felonies.

(2) The particular classification of each felony defined in this Code, except murder under section 88 and treason under section

217, is expressly designated in the section defining the crime. An offense defined outside this Code which, because of the express sentence provided is within the definition of section 67 of this Act, shall be considered an unclassified felony.

COMMENTARY

See commentary under § 73 infra.

Section 69. Misdemeanors; definition. A crime is a misdemeanor if it is so designated in any statute of this state or if a person convicted thereof may be sentenced to a maximum term of imprisonment of not more than one year.

COMMENTARY

See commentary under § 73 infra.

Section 70. Misdemeanors; classification. (1) Misdemeanors are classified for the purpose of sentence into the following categories:

(a) Class A misdemeanors;

(b) Class B misdemeanors;

(c) Class C misdemeanors; and

(d) Unclassified misdemeanors.

(2) The particular classification of each misdemeanor defined in this Code is expressly designated in the section defining the crime. An offense defined outside this Code which, because of the express sentence provided is within the definition of section 69 of this Act, shall be considered an unclassified misdemeanor.

(3) An offense defined by a statute of this state, but without specification as to its classification or as to the penalty authorized upon conviction, shall be considered a Class C misdemeanor.

COMMENTARY

See commentary under § 73 infra.

Section 71. Violations; definition. An offense is a violation if it is so designated in the statute defining the offense or if the offense is punishable only by a fine, forfeiture, fine and forfeiture or other civil penalty. Conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime.

COMMENTARY

See commentary under § 73 infra.

Section 72. Violations; classification. (1) Any violation defined in this Code is expressly designated in the section defining the offense. Any offense defined outside this Code which is punishable as provided in section 71 of this Act shall be considered a violation.

(2) Violations are not classified.

COMMENTARY

See commentary under § 73 infra.

Section 73. Crimes; classification determined by punishment. (1) When a crime punishable as a felony is also punishable by imprisonment for a maximum term of one year or by a fine, the crime shall be classed as a misdemeanor if the court imposes a punishment other than imprisonment under subsection (1) of ORS 137.124.

(2) Notwithstanding the provisions of section 67 of this Act, upon conviction of a crime punishable as described in subsection (1) of this section, the crime is a felony for all purposes until one of the following events occurs, after which occurrence the crime is a misdemeanor for all purposes:

(a) Without granting probation, the court imposes a sentence of imprisonment to a correctional facility other than the penitentiary or the Oregon State Correctional Institution.

(b) Without granting probation, the court imposes a fine.

(c) Upon revocation of probation, the court imposes a sentence of imprisonment to a correctional facility other than the penitentiary or the Oregon State Correctional Institution.

(d) Upon revocation of probation, the court imposes a fine.

(e) The court declares the offense to be a misdemeanor, either at the time of granting probation, upon suspension of imposition of sentence, or on application of defendant or his probation officer thereafter.

(f) The court grants probation to the defendant without imposition of sentence upon conviction and defendant is thereafter discharged without sentence.

(g) Without granting probation and without imposing sentence, the court declares the offense to be a misdemeanor and discharges the defendant.

COMMENTARY TO SECTIONS 65 TO 73

A. Summary

Section 65 defines the term "offense." An offense includes both crimes and violations.

Section 66 defines a "crime."

Section 67 defines one of the two kinds of crime, *i.e.*, a "felony."

Section 68 classifies felonies into four separate categories for purposes of sentence. Subsection (2) of this section is to provide for offenses defined outside the criminal code itself that might, because of the penalties imposed, come within the definition of felony.

Section 69 defines the other kinds of crime, *i.e.*, a "misdemeanor."

Section 70 classifies misdemeanors into four sep-

arate categories for purposes of sentence. Subsection (2) of this section is the misdemeanor counterpart of the felony provision.

Section 71 defines a "violation" for which imprisonment is not authorized and which does not constitute a crime.

Section 72 covers offenses outside the criminal code which come within the definition of violation. There are no separate categories for violations.

Section 73 is designed to cover the "indictable misdemeanor" type of crime in which a crime that is punishable as a felony is classed as a misdemeanor because the court imposes a lesser sentence. Subsection (2) spells out the different alternatives that will be available to the sentencing court.

Paragraph (a) covers a sentence of imprisonment to a facility other than the penitentiary or OSCI with no probation involved.

Paragraph (b) deals with another situation involving no probation but merely the imposition of a fine.

Paragraph (c) covers the probation revocation situation in which a jail sentence other than to the penitentiary or OSCI is imposed.

Paragraph (d) covers imposition of a fine following revocation of probation.

Paragraph (e) treats the case in which the court expressly declares the crime to be a misdemeanor.

Paragraph (f) covers probation without imposition of sentence and a subsequent discharge of the defendant without sentence.

Paragraph (g) is similar to (f) except no probation is involved. Note that the court could initially discharge the defendant, or suspend imposition of sentence and subsequently discharge the defendant.

B. Derivation

Section 65 is based on § 135(a) of Michigan Revised Criminal Code.

Section 66 partly restates ORS 161.020 and 161.030 except that the definition is limited to offenses punishable by imprisonment.

Section 67 is similar to § 135(d) of Michigan Revised Criminal Code and, in its effect, is basically the same as ORS 161.030 (2).

Section 68 is based on Michigan Revised Criminal Code § 1201 (1) and § 26 of the Connecticut Penal Code (1969).

Section 69(1) is derived from Michigan Revised Criminal Code § 135(c) and, in its effect, is substantially the same as the existing Oregon definition in ORS 161.030(3). Subsection (2) is similar to Michigan § 1205 (3).

Section 70 is based on Michigan Revised Criminal Code § 1201 (2) and § 27 of the Connecticut Penal Code (1969).

The source of the concept of a noncriminal classification termed a violation in § 71 is § 1.04 (5) of the Model Penal Code and § 135(b) of the Michigan Revised Criminal Code. "Violation" in the Michigan code means an offense for which a sentence to a term not in excess of 15 days is authorized, or for which no sentence of imprisonment can be imposed. Section 71 makes no provision for imprisonment, following the reasoning of the Model Penal Code.

> "If a sentence of imprisonment is authorized . . . it is an inadmissible semantic manipulation to declare that the offense is not a crime. Imprisonment, it is submitted, ought not be available as a punitive sanction, unless the conduct that gives rise to it warrants the type of social condemnation that is and ought to be implicit in the concept of 'crime.'" [Tent. Draft No. 2 at 8 (1954)].

The proposed § 71 thus follows the recommendation of the Model Penal Code.

Section 72 is based on Connecticut Penal Code § 28.

Section 73 continues the somewhat unusual feature of Oregon law which gives the sentencing judge discretion to sentence for certain crimes either to the penitentiary (or to the Oregon State Correctional Institution) or to the county jail for a term of a year or less, and which classifies the crime as a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the penitentiary or in the Oregon State Correctional Institution is generally continued. ORS 161.030 (2). This plan is followed by present California and Idaho law. California Penal Code, § 17; Idaho Code, § 18.111. On the other hand, Iowa, Washington and Massachusetts (apparently representing a majority of the states) determine the classification of a specific crime as a felony or misdemeanor by the punishment that may be given and not by what is actually given. See for example *State v. Sayward*, 65 Wash2d 698, 404 P2d 783 (1965). The reference to the county jail has been deleted with the idea in mind that the Code should anticipate the use of county correctional camps and perhaps state correctional facilities (other than the penitentiary and Oregon State Correctional Institution) for minor offenders.

Paragraph (e) of subsection (2) of § 73 is derived from the 1963 amendment to § 17 of the California Penal Code.

Paragraph (f) of subsection (2) of § 73 is derived from § 609.13 of the Minnesota Criminal Code of 1963. It provides an additional reward for successful completion of probation and should have a definite rehabilitative effect.

Paragraph (g) of subsection (2) of § 73 is based on Rubin, *The Law of Criminal Correction* 173–174 (West 1963).

> "One form or another of outright discharge should be available to a sentencing judge for use. Outright discharge, like suspended sentence and probation, adds to judicial authority, eases the correctional processes, and better protects public safety by affording the judge a wider selection of sentences."

If the court discharges the defendant without probation and without sentence and without a declaration that the crime is a misdemeanor, then the conviction is a felony conviction. The subsection simply gives the judge the power to declare the conviction to be for a misdemeanor if he deems it appropriate or expedient. The criteria for discharge of a defendant is set forth in § 84 infra.

C. Relationship to Existing Law

These sections retain the traditional felony-misdemeanor classification but add a noncriminal offense termed a violation.

Section 73 retains the feature of Oregon law which provides that certain crimes may be prosecuted as felonies but that the sentencing judge may sentence as for a misdemeanor, and that the crime shall be deemed a misdemeanor for all purposes, after judgment imposing a punishment other than imprisonment in the penitentiary or in the Oregon State Correctional Institution. The section would clarify existing law by providing, in crimes which are felonies or misdemeanors at the discretion of the sentencing judge, that the judge shall, if he grants probation, at the time of granting probation declare the offense to be a felony or, in the discretion of the court, declare the offense to be a misdemeanor. ORS 161.020 and 161.030 would be repealed. (See also § 83 infra).

The new classification of violation is to allow flexibility in the sentencing provisions of the Code. The violation category is added for the further reason that the Commission believes that the use of the criminal law as an attempted cure-all for every social problem has been notoriously ineffective and has tended to bring the criminal law into disrepute. In a day when major crime is increasing at a sobering rate we should direct our scarce and overburdened police and correctional resources to areas of real concern and not to enforcement of regulatory measures.

It should be noted that present law, ORS 137.510, does not expressly authorize discharge without sentence and without probation. This statute would be repealed and ORS 137.010 amended.

The technique of classifying felonies and misdemeanors into separate categories for grading and sentencing purposes follows the approach recommended by the Model Penal Code, New York Revised Penal Law, Michigan Revised Criminal Code and other recent state criminal law revisions. This method of classifying the crimes represents a departure from the traditional legislative technique of providing a separate and distinct penalty for each individual offense. The existing method results in unnecessary duplication of penalties, inconsistencies among penalties imposed for similar crimes and disparate sentences.

Each of the specific offenses defined by the proposed Code can be assigned to one of the felony or misdemeanor categories, with the sentencing and penalty options for each category set forth in Articles 8 and 9.

As Judge William Beckett observed, as of 1960 there were 466 "penalty types" and 1,413 separate criminal penalties provided for in Oregon Revised Statutes. He defines "penalty" as meaning "a statement of a precise penalty whether the statement appears in the statutory section establishing the conduct to which the penalty applies or whether it is set forth in a separate section stating penalty limits for conduct described in another section (or sections)." He defines the term "penalty type" as denoting "a penalty that is distinct from all other penalties and that may be prescribed for one or many crimes." See, Beckett, Criminal Penalties in Oregon, 40 *Or L Rev* 1 (Dec. 1960).

The proposed crime classification system will, of course, greatly reduce the number of "penalty types." This, consequently, will more precisely proportion the penalty to the offense (and to the offender) and reduce the possibility of disparity among sentences imposed for similar offenses. The problem of unnecessary duplication of offenses has been remedied to a great extent by the proposed Code's articles on specific offenses which attempt to substitute a single definition of criminal conduct for a multiplicity of definitions and to recommend repeal of all statutes which needlessly duplicate the criminal code provisions.

Classifying the crimes, assigning a range of penalties for each category of crimes and then assigning each specific offense to one of the categories is in accord with the ultimate objective of the revision project—a comprehensive and consistent criminal code.

ARTICLE 8. AUTHORIZED DISPOSITION OF OFFENDERS

Section 74. Sentence of imprisonment for felonies; ordinary terms. The maximum term of an indeterminate sentence of imprisonment for a felony is as follows:

(1) For a Class A felony, 20 years;

(2) For a Class B felony, 10 years;

(3) For a Class C felony, 5 years;

(4) For an unclassified felony as provided in the statute defining the crime.

COMMENTARY

A. Summary

This section establishes the maximum terms for the four categories of felonies. The length of the term is to be fixed by the court within the applicable limits set forth above. The section does not require the court to impose either a statutory minimum nor a statutory maximum sentence. This will permit the court to be flexible in tailoring its sentence to the individual factors involved in the case.

The authorized sentences for the respective categories reflect the substantial differences in gravity of the crimes that are classified into each group. The only felonies that are not so classified are the crimes of murder and treason which carry their own penalty, life imprisonment, and are treated as special cases apart from the other felonies.

The Class A category includes those crimes, other than murder and treason, that the Commission believes should be designated as the most serious felonies. They are: (1) attempting to commit murder or treason, (2) soliciting murder or treason, (3) conspiracy to commit murder, treason or a Class A felony, (4) kidnapping in the first degree, (5) rape in the first degree, (6) sodomy in the first degree, (7) robbery in the first degree and (8) arson in the first degree.

Approximately 16 felonies are classified in the Class B category, and some 40 felonies fall into the Class C category. As a result of the recommended grading of the felonies, it is apparent that the maximum term of imprisonment for a majority of the proposed Code's felonies will be five years.

B. Derivation

The section is patterned after Michigan Revised Criminal Code § 1401 which uses an "A, B, C" categorization with maximum terms of 20, 10 and 5 years, respectively. The fourth category, "unclassified felony," is borrowed from Connecticut Penal Code § 26 (1969).

Classifying crimes into separate sentencing categories is a technique that is being used in most new criminal codes. The American Bar Association strongly recommends this approach. [Sentencing Alternatives and Procedures, ABA Project on Minimum Standards for Criminal Justice § 2.1 (Approved Draft, Sept. 1968)]. See also Model Penal Code §§ 6.01, 6.06 and Model Sentencing Act §§ 7–9.

C. Relationship to Existing Law

The proposed section represents a marked departure from the traditional legislative technique employed in Oregon of providing a separate and distinct penalty for each individual offense. Naturally, this has created in the past a multiplicity of penalties and a resultant inconsistency among the criminal statutes. See Beckett, Criminal Penalties in Oregon, 40 *Or L Rev* 1, 71 (1960).

The section is not intended to disturb the provisions of ORS 137.120 regarding indeterminate sentences, but rather to complement them. This state's legislative policy regarding the use of the indeterminate sentence has been on the books since 1939 when Oregon abolished mandatory minimum periods of imprisonment for felonies. The statute allows the court to fix a maximum term of imprisonment within the legislatively established limits. Compared to most other states, Oregon indeed has shown an enlightened approach to this particular aspect of sentencing.

The only exception to this "no mandatory minimum" policy is in the case of murder. A life sentence is, of course, mandatory for first degree murder under ORS 163.010 (3), and as a result of ORS 144.230 (1), a person convicted thereof is not eligible for parole until he has served at least 10 years of his sentence. Subsection (2) of the latter statute requires a person serving a sentence for second degree murder to serve at least seven years before he becomes eligible for parole. The maximum punishment for murder in the second degree is 25 years imprisonment; however, this is not mandatory under 163.020 (4). The Commission recommends that ORS 144.230 be repealed to do away with the minimum term requirement for parole eligibility. [See the report of

the National Council on Crime and Delinquency, *A Balanced Correctional System for Oregon*, 7.10 (1966)]. ORS 137.010 will be amended.

Oregon Cases:

Mitchell v. Gladden, 229 Or 192, 195, 366 P2d 907 (1961), held that the imposition of a sentence for a fixed period is to be construed as fixing the maximum period which is to be served under an indeterminate sentence.

In *State v. Montgomery*, 237 Or 593, 392 P2d 642 (1964), the court, relying on ORS 137.120, held that the trial court's discretion in sentencing a defendant to confinement is limited to a determination of the maximum term under which a prisoner may be held.

The duty of determining the extent of the penalty to be imposed in a criminal case, with the exception of murder in the first degree, is by law imposed upon the trial judge. The extent of that punishment is legislative, limited only by the constitutional prohibition against cruel and inhuman punishment. *State v. Hoffman*, 236 Or 98, 385 P2d 741 (1963).

The court is strictly limited to the provisions of the applicable statute in imposing sentence. Any sentence that deviates from the mode of punishment, extent or place of confinement is void. *State v. Cotton*, 240 Or 252, 400 P2d 1022 (1965); *State v. Nelson*, 246 Or 321, 424 P2d 223 (1968).

Section 75. Sentence of imprisonment for misdemeanors. Sentences for misdemeanors shall be for a definite term. The court shall fix the term of imprisonment within the following maximum limitations:

(1) For a Class A misdemeanor, 1 year;

(2) For a Class B misdemeanor, 6 months;

(3) For a Class C misdemeanor, 30 days;

(4) For an unclassified misdemeanor, as provided in the statute defining the crime.

COMMENTARY

A. Summary

The purpose of § 75 is to establish the maximum terms for the four categories of misdemeanors. Sentences for misdemeanors will be for definite terms fixed by the court. Since the periods prescribed are maximums, they should provide ample flexibility in dealing with any category of misdemeanor.

B. Derivation

The section is based on Michigan Revised Criminal Code § 1415 and Connecticut Penal Code § 38.

C. Relationship to Existing Law

As with the proposed sections regarding felonies, this section represents a departure from the existing practice of providing a separate penalty for each individual misdemeanor. The classification system should result in more uniformity of maximum sentences among the different offenses with a greater likelihood of having similar sentences imposed for similar offenses.

The section does not require the imposition of a mandatory minimum as is the case now with many misdemeanors; however, it does not prevent mandatory minimums for statutes outside the Code. Under subsection (4) the court will sentence for unclassified misdemeanors in accordance with the statute defining the crime. Statutes located in the motor vehicle code, for example, will not be affected, but should the Legislature decide later to classify such statutes to conform to the Code, it will have guidelines for doing so.

Although misdemeanor sentences are not now indeterminate, the State Board of Parole and Probation presently has authority under ORS 144.050 to establish rules and regulations under which any prisoner who is confined in a county jail for six months or more may be paroled.

Section 76. Fines for felonies. (1) A sentence to pay a fine for a Class A, B or C felony shall be a sentence to pay an amount, fixed by the court, not exceeding $2,500.

(2) A sentence to pay a fine for an unclassified felony shall be a sentence to pay an amount, fixed by the court, as provided in the statute defining the crime.

(3) If a person has gained money or property through the commission of a felony, then upon conviction thereof the court, in lieu of imposing the fine authorized for the crime under subsections (1) or (2) of this section, may sentence the defendant to pay an amount, fixed by the court, not exceeding double the amount of the defendant's gain from the commission of the crime.

(4) As used in this section, "gain" means the amount of money or the value of property derived from the commission of the felony, less the amount of money or the value of property returned to the victim of the crime or seized by or surrendered to lawful authority before the time sentence is imposed. "Value" shall be determined by the standards established in section 131 of this Act.

(5) When the court imposes a fine for a felony the court shall make a finding as to the amount of the defendant's gain from the crime. If the record does not contain sufficient evidence to support a finding the court may conduct a hearing upon the issue.

(6) This section shall not apply to a corporation.

COMMENTARY

See commentary under § 78 infra.

Section 77. Fines for misdemeanors and violations. (1) A sentence to pay a fine for a misdemeanor shall be a sentence to pay an amount, fixed by the court, not exceeding:

(a) $1,000 for a Class A misdemeanor;

(b) $500 for a Class B misdemeanor;

(c) $250 for a Class C misdemeanor.

(2) A sentence to pay a fine for an unclassified misdemeanor shall be a sentence to pay an amount, fixed by the court, as provided in the statute defining the crime.

(3) A sentence to pay a fine for a violation shall be a sentence to pay an amount, fixed by the court, not exceeding $250.

(4) If a person has gained money or property through the commission of a misdemeanor or violation, then upon conviction thereof the court, instead of imposing the fine authorized for the offense under subsections (1), (2) or (3) of this section, may sentence the defendant to pay an amount fixed by the court, not exceeding double the amount of the defendant's gain from the commission of the offense. In that event, subsections (4) and (5) of section 76 of this Act apply.

(5) This section shall not apply to corporations.

COMMENTARY

See commentary under § 78 infra.

Section 78. Criteria for imposition of fines. In determining whether to impose a fine and its amount, the court shall consider:

(1) The financial resources of the defendant and the burden that payment of a fine will impose, with due regard to the other obligations of the defendant; and

(2) The ability of the defendant to pay a fine on an instalment basis or on other conditions to be fixed by the court.

COMMENTARY TO SECTIONS 76 TO 78

A. Summary

Sections 76 and 77 establish guidelines for the court to follow in imposing fines for felonies, misdemeanors and violations. If a person has gained money or property through the commission of an offense, the court may take that into account and impose a greater fine than would otherwise be authorized. A separate schedule of fines for corporate defendants is set up under § 79 infra.

Section 78 sets forth certain criteria for the court to follow in determining whether to impose a fine on a particular defendant.

B. Derivation

Sections 76 and 77 are based on Michigan Revised Criminal Code §§ 1501, 1505. Section 78 is based on recommendations contained in the ABA Standards on Sentencing Alternatives and Procedures § 2.7 (Tent. Draft 1968).

C. Relationship to Existing Law

An examination of existing statutory punishments shows that in the vast majority of instances the courts have been empowered to impose a fine not to exceed a specific amount in addition to or instead of imprisonment.

The following table prepared by Judge Beckett classifies the penalties and penalty types according to the alternative uses of fine and imprisonment.

Alternatives	*Penalty Types*	*Penalties*
Fine only	60	332
Imprisonment only	29	147
Fine or imprisonment in the alternative	84	136
Fine or imprisonment, or both	239	727
Fine "and" imprisonment (where both appear to be required)	12	21
Total	424	1,363

See Beckett, Criminal Penalties in Oregon, 40 *Or L Rev* 1, 21 (Footnotes omitted). The author examines these five alternative uses of fine and imprisonment in great detail in trying to determine how maximum imprisonment sentences compare with maximum fines, particularly in those instances in which one or the other, but not both, may be imposed and in those instances where the court may impose one or both of these two alternatives. He observes:

> "Initially, one would expect imprisonment and fine to be roughly equivalent in these instances. However, the Legislature may have intended otherwise; for example, it may be the intention of the Legislature:
>
> "(a) that imprisonment be the preferred penalty and that a fine may be prescribed as additional punishment;
>
> "(b) that imprisonment be the preferred penalty but that, where the imprisonment sentence is suspended, a token fine may be exacted;
>
> "(c) that a fine be the preferred penalty and that imprisonment may be prescribed as an additional penalty.
>
> "Other possibilities may be suggested. Whatever the intent of the Legislature, however, the guiding principle or principles adopted should be clear and should be consistently followed by the Legislature. If the Legislature . . . has in mind an equivalency concept, then it is apparent that the imprisonment maximum should somehow be equated to the fine maximum." At 21, 22.

Sections 76 and 77 adopt an equivalency concept, making the maximum range of fines for each category of crimes correspond to the maximum range of imprisonment sentences available for each category. In other words, the seriousness of a particular crime, as determined by the Legislature, will be reflected not only by the authorized imprisonment sentence

for that crime, but also by the authorized fine that may be imposed for it. A "guiding principle" can be adopted that can be consistently followed in the grading of the various offenses. Legislative intent should, consequently, be more clearly discernible, thereby enabling the trial judges to implement that intent through the imposition of more consistent sentences, whether they be fines, imprisonment or both.

Section 79. Fines for corporations. (1) A sentence to pay a fine, when imposed on a corporation for an offense defined in this Code or for an offense defined outside this Code for which no special corporate fine is specified, shall be a sentence to pay an amount, fixed by the court, not exceeding:

(a) $50,000 when the conviction is of a felony;

(b) $5,000 when the conviction is of a Class A misdemeanor or of an unclassified misdemeanor for which a term of imprisonment of more than six months is authorized;

(c) $2,500 when the conviction is of a Class B misdemeanor or of an unclassified misdemeanor for which the authorized term of imprisonment is not more than six months;

(d) $1,000 when the conviction is of a Class C misdemeanor or an unclassified misdemeanor for which the authorized term of imprisonment is not more than 30 days;

(e) $500 when the conviction is of a violation.

(2) A sentence to pay a fine, when imposed on a corporation for an offense defined outside this Code, if a special fine for a corporation is provided in the statute defining the offense, shall be a sentence to pay an amount, fixed by the court, as provided in the statute defining the offense.

(3) If a corporation has gained money or property through the commission of an offense, then upon conviction thereof the court, in lieu of imposing the fine authorized for the offense under subsections (1) or (2) of this section, may sentence the corporation to pay an amount, fixed by the court, not exceeding double the amount of the corporation's gain from the commission of the offense. In that event, subsections (4) and (5) of section 76 of this Act apply.

COMMENTARY

When a corporation is convicted of an offense, the only penal sanction that can be used is a fine. Section 79 sets up a schedule of fines for corporations that authorizes larger fines than can be imposed upon natural persons.

The section is based on New York Revised Penal Law § 80.10 and has no counterpart in existing Oregon law.

Section 80. Costs. (1) The court may require a convicted defendant to pay costs.

(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of

government agencies that must be made by the public irrespective of specific violations of law.

(3) The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

(4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment thereof may at any time petition the court which sentenced him for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under section 81 of this Act.

COMMENTARY

A. Summary

Section 80 authorizes the court to impose costs in a criminal case, but does not require it. Subsections (2) and (3) establish criteria to be followed in assessing costs. Subsection (4) allows the defendant, if his situation deserves it, to apply to the court for remission of the payment of costs.

B. Derivation

The section is derived from Michigan Revised Criminal Code § 1525.

C. Relationship to Existing Law

ORS 137.200 provides that costs and disbursements in a criminal action shall be taxed against a defendant upon conviction. ORS 137.205 provides for taxation against a defendant for the cost of legal assistance furnished to him. Both statutes would be repealed by the instant proposal.

Section 81. Time and method of payment of fines and costs. (1) When a defendant is sentenced to pay a fine or costs, the court may grant permission for payment to be made within a specified period of time or in specified instalments. If no such permission is included in the sentence the fine shall be payable forthwith.

(2) When a defendant sentenced to pay a fine or costs is also placed on probation or imposition or execution of sentence is suspended, the court may make payment of the fine or costs a condition of probation or suspension of sentence.

COMMENTARY

This section is intended to permit the sentencing court to be flexible in the manner in which it requires payment of fines and costs to be made. Instalment payments would be authorized.

There is no comparable existing statute, but ORS 137.540 (8) provides that one of the conditions of probation that a court may impose is that a defendant "pay his fine, if any, in one or several sums."

The section is drawn from Model Penal Code § 302.1 (1) and (2) and Michigan Revised Criminal Code § 1530.

Section 82. Consequences of nonpayment of fines or costs. (1) When a defendant sentenced to pay a fine defaults in the payment thereof or of any instalment, the court on motion of the district attorney or upon its own motion may require him to show cause why his default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for his appearance.

(2) Unless the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment, the court may find that his default constitutes contempt and may order him committed until the fine, or a specified part thereof, is paid.

(3) When a fine is imposed on a corporation or unincorporated association, it is the duty of the person authorized to make disbursement from the assets of the corporation or association to pay the fine from those assets, and his failure to do so may be held to be contempt unless he makes the showing required in subsection (2) of this section.

(4) The term of imprisonment for contempt for nonpayment of fines shall be set forth in the commitment order, and shall not exceed one day for each $10 of the fine, 30 days if the fine was imposed upon conviction of a violation or misdemeanor, or one year in any other case, whichever is the shorter period. A person committed for nonpayment of a fine shall be given credit toward payment for each day of imprisonment at the rate specified in the commitment order.

(5) If it appears to the satisfaction of the court that the default in the payment of a fine is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount thereof or of each instalment or revoking the fine or the unpaid portion thereof in whole or in part.

(6) A default in the payment of a fine or costs or any instalment thereof may be collected by any means authorized by law for the enforcement of a judgment. The levy of execution for the collection of a fine shall not discharge a defendant committed to imprisonment for contempt until the amount of the fine has actually been collected.

COMMENTARY

Section 82 sets up procedures for dealing with convicted defendants who are in default in payment of fines. The section follows Model Penal Code § 203.2 and Michigan Revised Criminal Code § 1535, and embodies the rationale that default in payment of fines should be considered essentially a civil obligation owed to the state. Default in payment of *costs* would be treated strictly as a civil obligation.

If the court finds the defendant in contempt for non-payment it may order him committed to jail until payment is satisfied. Subsection (4) places a limit on the period of imprisonment.

ORS 137.150 provides that a judgment that a defendant pay a fine shall also direct that he be imprisoned until the fine is satisfied, not exceeding one day for every $5 of the fine. This statute would be repealed.

ORS 169.160 permits an indigent who has been in jail 30 days solely for nonpayment of a fine or fine

and costs to petition the court for release. This statute would no longer be needed if the procedures recommended by this article were adopted.

ORS 137.180 states: "A judgment that the defendant pay money, either as a fine or as costs and disbursements of the action, or both, shall be docketed as a judgment in a civil action and with like effect, as provided in ORS 18.320, 18.350 and 18.400." This statute would be retained and would be ancillary to subsection (6) of the proposed section. Except for subsection (6), § 82 does not apply to nonpayment of costs.

ARTICLE 9. AUTHORITY OF COURT IN SENTENCING

Section 83. Reduction of Class C felony or criminal activity in drugs to misdemeanor; authority of court. Notwithstanding section 67 of this Act, when a person is convicted of any Class C felony or of the crime of criminal activity in drugs under section 274 of this Act, if the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that it would be unduly harsh to sentence the defendant for a felony, the court may enter judgment of conviction for a Class A misdemeanor and make disposition accordingly.

COMMENTARY

A. Summary

This section would empower the court with authority to reduce certain felonies to misdemeanors. As observed in the Model Penal Code commentary:

> "However carefully offenses are defined, it is inevitable that cases will arise where a conviction and a disposition in accordance with the Code will seem unduly harsh to those responsible for its administration. Such cases are now dealt with typically by a plea of guilty or conviction of a lesser degree or grade of crime than the defendant actually has committed. In some jurisdictions, the Court is authorized in its discretion to impose either a state prison sentence or a jail sentence and when the Court pursues the latter course, the conviction in some states stands as for a misdemeanor rather than a felony." (Tent. Draft No. 2 at 28-29 (1956)).

B. Derivation

The section is based on Model Penal Code § 6.12 and Connecticut Penal Code § 37; however, the section proposed is limited to Class C felonies, and one Class B felony, the crime of criminal activity in drugs.

C. Relationship to Existing Law

Section 83 would replace the so-called "indictable misdemeanor" treatment that is now allowed for certain crimes under ORS 161.030 (2):

> ". . . When a crime punishable by imprisonment in the penitentiary is also punishable by a fine or imprisonment in the county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes, after a judgment imposing a punishment other than imprisonment in the penitentiary or in the Oregon State Correctional Institution."

There are roughly 65 crimes in the criminal code chapters of ORS whose penalty sections provide for optional felony-misdemeanor treatment by the court. These include negligent homicide (163.091), assault with a dangerous weapon (163.250), third degree arson (164.040), shoplifting (164.390) and larceny in a building (164.320), to mention a few.

The section is limited to Class C felonies, with one exception, the crime of criminal activity in drugs. The Commission believes that this particular offense should be graded as a Class B felony, which would authorize imprisonment up to 10 years for selling narcotics or dangerous drugs. However, in view of the action of the 1969 Legislature in allowing the court to impose a misdemeanor sentence for possession it was decided to continue that option under the proposed Code.

The power of the court to treat the crime as a Class A misdemeanor would exist not only at the initial sentencing stage, but would be a continuing authority through any probationary or suspended sentence stage. For example, if a defendant is convicted for criminal activity in drugs for possession of marihuana, the court may suspend imposition of sentence, place the defendant on probation, and if probation were later revoked, the court could exercise its discretion under this section at that time.

Section 84. Criteria for discharge of defendant. (1) Any court empowered to suspend imposition or execution of sentence or to place a defendant on probation may discharge the defendant if:

(a) The conviction is for an offense other than murder, treason or a Class A or B felony; and

(b) The court is of the opinion that no proper purpose would be served by imposing any condition upon the defendant's release.

(2) If a sentence of discharge is imposed for a felony, the court shall set forth in the record the reasons for its action.

(3) If the court imposes a sentence of discharge, the defendant shall be released with respect to the conviction for which the sentence is imposed without imprisonment, fine, probationary supervision or conditions.

(4) If a defendant pleads not guilty and is tried and found guilty, a sentence of discharge is a final judgment on a conviction for all purposes, including an appeal by the defendant.

(5) If a defendant pleads guilty, a sentence of discharge is not appealable, but for all other purposes is a final judgment on a conviction.

COMMENTARY

A. Summary

The sentence of discharge provides the court with the means to make an appropriate disposition of a case where it does not have any reason to impose any conditions or to otherwise keep a "string" on a defendant. If the court believes that the fact of conviction itself constitutes sufficient punishment, it can use this section to permit the defendant to go hence without any conditions and without the possibility of later bringing him back before the court on the original conviction. The court in felony cases is required to state its reasons for the record. Discharges in felony cases would be limited to Class C felonies.

B. Derivation

Section 84 is based on New York Revised Penal Law § 65.20 and Michigan Revised Criminal Code § 1335.

C. Relationship to Existing Law

The courts now have the power to suspend the imposition of sentence in a criminal case under ORS 137.510. Suspension of the imposition of sentence is an authorized disposition most closely approximating discharge of the defendant.

If a defendant pleads not guilty and is tried and found guilty, he may appeal the conviction even though the court suspends the imposition of sentence and places him on probation. *State v. Gates*, 230 Or 84, 368 P2d 605 (1962). However, if he pleads guilty and the imposition of sentence is suspended, he cannot appeal because under ORS 138.050 the only grounds for appeal from a sentence on a plea of guilty are the imposition of an excessive fine or excessive, cruel or unusual punishment.

Subsections (4) and (5) are in accord with *Gates* and ORS 138.050, and are intended to allow the defendant to appeal on the merits if he is tried and convicted following a plea of not guilty, even though the court imposes a sentence of discharge. However, if the defendant pleads guilty and is discharged by the court, there would be no grounds for appeal since no fine or other "punishment" would be imposed.

Section 84 is not meant to be an annulment of the conviction or a means to expunge the record, so for all other purposes a sentence of discharge under either subsection (4) or (5) would be a judgment on a conviction. As a result, the section would enable the court to make a final disposition instead of suspending imposition of sentence in those cases where it has good reason to believe that the defendant will not be back.

As observed in the commentary under § 73 supra, the court could discharge the defendant at the initial sentencing stage, or suspend imposition of sentence and later discharge the defendant at a subsequent appearance before the court.

and costs to petition the court for release. This statute would no longer be needed if the procedures recommended by this article were adopted.

ORS 137.180 states: "A judgment that the defendant pay money, either as a fine or as costs and disbursements of the action, or both, shall be docketed as a judgment in a civil action and with like effect, as provided in ORS 18.320, 18.350 and 18.400." This statute would be retained and would be ancillary to subsection (6) of the proposed section. Except for subsection (6), § 82 does not apply to nonpayment of costs.

ARTICLE 9. AUTHORITY OF COURT IN SENTENCING

Section 83. Reduction of Class C felony or criminal activity in drugs to misdemeanor; authority of court. Notwithstanding section 67 of this Act, when a person is convicted of any Class C felony or of the crime of criminal activity in drugs under section 274 of this Act, if the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that it would be unduly harsh to sentence the defendant for a felony, the court may enter judgment of conviction for a Class A misdemeanor and make disposition accordingly.

COMMENTARY

A. Summary

This section would empower the court with authority to reduce certain felonies to misdemeanors. As observed in the Model Penal Code commentary:

> "However carefully offenses are defined, it is inevitable that cases will arise where a conviction and a disposition in accordance with the Code will seem unduly harsh to those responsible for its administration. Such cases are now dealt with typically by a plea of guilty or conviction of a lesser degree or grade of crime than the defendant actually has committed. In some jurisdictions, the Court is authorized in its discretion to impose either a state prison sentence or a jail sentence and when the Court pursues the latter course, the conviction in some states stands as for a misdemeanor rather than a felony." (Tent. Draft No. 2 at 28-29 (1956)).

B. Derivation

The section is based on Model Penal Code § 6.12 and Connecticut Penal Code § 37; however, the section proposed is limited to Class C felonies, and one Class B felony, the crime of criminal activity in drugs.

C. Relationship to Existing Law

Section 83 would replace the so-called "indictable misdemeanor" treatment that is now allowed for certain crimes under ORS 161.030 (2):

> ". . . When a crime punishable by imprisonment in the penitentiary is also punishable by a fine or imprisonment in the county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes, after a judgment imposing a punishment other than imprisonment in the penitentiary or in the Oregon State Correctional Institution."

There are roughly 65 crimes in the criminal code chapters of ORS whose penalty sections provide for optional felony-misdemeanor treatment by the court. These include negligent homicide (163.091), assault with a dangerous weapon (163.250), third degree arson (164.040), shoplifting (164.390) and larceny in a building (164.320), to mention a few.

The section is limited to Class C felonies, with one exception, the crime of criminal activity in drugs. The Commission believes that this particular offense should be graded as a Class B felony, which would authorize imprisonment up to 10 years for selling narcotics or dangerous drugs. However, in view of the action of the 1969 Legislature in allowing the court to impose a misdemeanor sentence for possession it was decided to continue that option under the proposed Code.

The power of the court to treat the crime as a Class A misdemeanor would exist not only at the initial sentencing stage, but would be a continuing authority through any probationary or suspended sentence stage. For example, if a defendant is convicted for criminal activity in drugs for possession of marihuana, the court may suspend imposition of sentence, place the defendant on probation, and if probation were later revoked, the court could exercise its discretion under this section at that time.

Section 84. Criteria for discharge of defendant. (1) Any court empowered to suspend imposition or execution of sentence or to place a defendant on probation may discharge the defendant if:

(a) The conviction is for an offense other than murder, treason or a Class A or B felony; and

(b) The court is of the opinion that no proper purpose would be served by imposing any condition upon the defendant's release.

(2) If a sentence of discharge is imposed for a felony, the court shall set forth in the record the reasons for its action.

(3) If the court imposes a sentence of discharge, the defendant shall be released with respect to the conviction for which the sentence is imposed without imprisonment, fine, probationary supervision or conditions.

(4) If a defendant pleads not guilty and is tried and found guilty, a sentence of discharge is a final judgment on a conviction for all purposes, including an appeal by the defendant.

(5) If a defendant pleads guilty, a sentence of discharge is not appealable, but for all other purposes is a final judgment on a conviction.

COMMENTARY

A. Summary

The sentence of discharge provides the court with the means to make an appropriate disposition of a case where it does not have any reason to impose any conditions or to otherwise keep a "string" on a defendant. If the court believes that the fact of conviction itself constitutes sufficient punishment, it can use this section to permit the defendant to go hence without any conditions and without the possibility of later bringing him back before the court on the original conviction. The court in felony cases is required to state its reasons for the record. Discharges in felony cases would be limited to Class C felonies.

B. Derivation

Section 84 is based on New York Revised Penal Law § 65.20 and Michigan Revised Criminal Code § 1335.

C. Relationship to Existing Law

The courts now have the power to suspend the imposition of sentence in a criminal case under ORS 137.510. Suspension of the imposition of sentence is an authorized disposition most closely approximating discharge of the defendant.

If a defendant pleads not guilty and is tried and found guilty, he may appeal the conviction even though the court suspends the imposition of sentence and places him on probation. *State v. Gates*, 230 Or 84, 368 P2d 605 (1962). However, if he pleads guilty and the imposition of sentence is suspended, he cannot appeal because under ORS 138.050 the only grounds for appeal from a sentence on a plea of guilty are the imposition of an excessive fine or excessive, cruel or unusual punishment.

Subsections (4) and (5) are in accord with *Gates* and ORS 138.050, and are intended to allow the defendant to appeal on the merits if he is tried and convicted following a plea of not guilty, even though the court imposes a sentence of discharge. However, if the defendant pleads guilty and is discharged by the court, there would be no grounds for appeal since no fine or other "punishment" would be imposed.

Section 84 is not meant to be an annulment of the conviction or a means to expunge the record, so for all other purposes a sentence of discharge under either subsection (4) or (5) would be a judgment on a conviction. As a result, the section would enable the court to make a final disposition instead of suspending imposition of sentence in those cases where it has good reason to believe that the defendant will not be back.

As observed in the commentary under § 73 supra, the court could discharge the defendant at the initial sentencing stage, or suspend imposition of sentence and later discharge the defendant at a subsequent appearance before the court.

Section 85. Criteria for sentencing of dangerous offenders. The maximum term of an indeterminate sentence of imprisonment for a dangerous offender is 30 years, if the court finds that because of the dangerousness of the defendant an extended period of confined correctional treatment or custody is required for the protection of the public and if it further finds, as provided in section 86 of this Act, that one or more of the following grounds exist:

(1) The defendant is being sentenced for a Class A felony, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity;

(2) The defendant is being sentenced for a felony that seriously endangered the life or safety of another, has been previously convicted of a felony not related to the instant crime as a single criminal episode, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity.

(3) As used in this section, "previously convicted of a felony" means:

(a) Previous conviction of a felony in a court of this state;

(b) Previous conviction in a court of the United States, other than a court-martial, of an offense which at the time of conviction of the offense was and at the time of conviction of the instant crime is punishable under the laws of the United States by death or by imprisonment in a penitentiary, prison or similar institution for a term of one year or more; or

(c) Previous conviction by a general court-martial of the United States or in a court of any other state or territory of the United States, or of the Commonwealth of Puerto Rico, of an offense which at the time of conviction of the offense was punishable by death or by imprisonment in a penitentiary, prison or similar institution for a term of one year or more and which offense also at the time of conviction of the instant crime would have been a felony if committed in this state.

(4) As used in this section, "previous conviction of a felony" does not include:

(a) An offense committed when the defendant was less than 16 years of age:

(b) A conviction rendered after the commission of the instant crime;

(c) It is the defendant's most recent conviction described in subsection (3) of this section, and the defendant was finally and unconditionally discharged from all resulting imprisonment, probation or parole more than seven years before the commission of the instant crime; or

(d) The conviction was by court-martial of an offense denounced only by military law and triable only by court-martial.

(5) As used in this section, "conviction" means an adjudication of guilt upon a plea, verdict or finding in a criminal proceeding in a court of competent jurisdiction, but does not include an adjudication which has been expunged by pardon, reversed, set aside or otherwise rendered nugatory.

COMMENTARY

A. Summary

Section 85 establishes the criteria for identifying dangerous offenders. An offender may be sentenced as dangerous if he fits into any one of two categories: (1) commission of a Class A felony, and propensity to commit crime; (2) commission of a felony (such as arson) which, intended or not, seriously endangered the life or safety of another, previous criminal conviction and propensity to commit crime.

Subsections (3), (4) and (5) are similar to definitions in the habitual criminal act.

The section authorizes commitment of dangerous offenders for a period up to 30 years, a period long enough to protect the public and to allow sufficient time for treatment and reformation. As with the ordinary term authorized for felonies under the proposed Code, the extended term under this section would be an indeterminate sentence—the statutory maximum is not mandatory and the court may fix the maximum at any period less than 30 years. The court is permitted to invoke the provisions of the section if one or more of the two grounds exist; however, it is not mandatory under the section, thereby affording the sentencing judge flexibility to use this as a sentencing tool in appropriate cases.

B. Derivation

The section is based an § 5 of the Model Sentencing Act (1963) with substantial changes in subsection (1) and deletion of a subsection dealing with organized crime.

C. Relationship to Existing Law

Oregon, like most states, has a number of statutes that provide for enhanced penalties for certain offenses and offenders. ORS ch 168 (the habitual criminal act) now permits the court to impose extended terms of imprisonment up to life for second, third and fourth felony offenders. Before amendment by the Legislature in 1967 the imposition of an enhanced penalty was mandatory upon a finding by the court that the defendant who was convicted had been formerly convicted of one or more felonies. The trial court cannot proceed to act until an information has been filed by the district attorney and served on the defendant pursuant to ORS 168.055. ORS 168.085, which sets forth the terms of imprisonment that may be imposed for subsequent convictions, does not attempt to distinguish between dangerous and nondangerous felonies. The habitual criminal act would be repealed by §§ 85 and 86 of this Act.

Under the provisions of ORS 137.111 to 137.119 any persons convicted under ORS 163.210 (rape), ORS 167.040 (sodomy), ORS 163.220 (rape of sister, daughter or stepdaughter), ORS 163.270 (assault with intent to rob or commit rape or mayhem), ORS 167.035 (incest) or ORS 167.045 (removal, detention or inducement of child with intent to commit certain sex offenses) may be sentenced to an indeterminate term not exceeding his natural life if:

(1) The offense involved a child under 16; and

(2) The court finds that the person has a mental or emotional disturbance, deficiency or condition predisposing him to the commission of any of the abovementioned sex offenses.

ORS 167.050 provides for an enhanced penalty for the second conviction of any of the same sex offenses. (See commentary, Article 13, for further discussion of the above statutes.) ORS 137.111 to 137.119 and ORS 167.050 would be repealed by the draft. ORS 137.075, 137.120, 137.124 will be amended.

ORS 166.230 provides for enhanced penalties for committing or attempting to commit a felony while armed with a firearm. The degree structure of the Code's specified crimes, i.e., robbery in the first degree, burglary in the first degree, assault in the first degree, etc., take into account whether or not the felony is committed by a person who is armed in determining the grade of offense and maximum penalty. Therefore, additional enhancement of the penalties beyond that already built into the definitions of the crimes seems unnecessary. Furthermore, many of such offenses with firearms would fall within the purview of subsection (1) of the proposed section and permit sentencing as a dangerous offender.

For a critical analysis of sex offender and habitual criminal legislation see ABA Standards Relating to Sentencing at 100-107, 160-171 (Tent. Draft 1968).

Section 86. Dangerous offenders; procedure and findings. (1) Whenever, in the opinion of the court, there is reason to believe that the defendant falls within section 85 of this Act, the court shall order a presentence investigation and a psychiatric examination. The court may appoint one or more qualified psychiatrists to examine the defendant or may order that he be taken by the sheriff

to a state hospital designated by the Mental Health Division for the examination.

(2) When the examination is conducted at a state hospital the superintendent shall notify the sheriff upon completion of the examination, and the sheriff shall return the defendant to the county in which he was convicted. The defendant shall remain in the custody of the sheriff subject to further order of the court. All costs connected with the examination shall be paid by the county in which the defendant was convicted.

(3) The psychiatric examination shall be completed within 30 days, subject to additional extensions not exceeding 30 days on order of the court. The psychiatrist shall file with the court a written report of his findings and conclusions, including an evaluation of whether the defendant is suffering from a severe personality disorder indicating a propensity toward criminal activity.

(4) The immunities granted under ORS 137.075 are applicable to the psychiatric examination made under this section 86.

(5) Upon receipt of the psychiatric examination and presentence reports the court shall set a time for a presentence hearing, unless the district attorney and the defendant waive the hearing. At the presentence hearing the district attorney and the defendant may examine the psychiatrist who filed the report regarding the defendant.

(6) If, after considering the presentence report, the psychiatric report and the evidence in the case or on the presentence hearing, the court finds that the defendant comes within section 85 of this Act, the court may sentence the defendant as a dangerous offender.

(7) In determining whether a defendant has been previously convicted of a felony, the court shall consider as prima facie evidence of the previous conviction:

(a) A copy of the judicial record of the conviction which copy is authenticated under ORS 43.110 or 43.120;

(b) A copy of the fingerprints of the subject of that conviction which copy is authenticated under ORS 43.330; and

(c) Testimony that the fingerprints of the subject of that conviction are those of the defendant.

(8) Subsection (7) of this section does not prohibit proof of the previous conviction by any other procedure.

COMMENTARY

A. Summary

Section 86 establishes the procedures for determining whether a defendant comes within the dangerous offender provision of § 85. The purposes of the section are to provide procedural safeguards for the defendant, while at the same time furnishing the court with as much information as can be obtained on which to base an intelligent decision.

B. Derivation

The section is derived from Model Sentencing Act § 6, but ORS 137.112 to 137.115 is the source of most of the language regarding the time and manner for conducting the psychiatric examination and presentence hearing. These are essentially the same procedures outlined in the statutes for utilization of the indeterminate sentence procedures for certain sex offenders. Subsections (7) and (8) are from ORS 168.080.

C. Relationship to Existing Law

See commentary to § 85 supra.

PART II. SPECIFIC OFFENSES

OFFENSES INVOLVING DANGER TO THE PERSON

ARTICLE 10. CRIMINAL HOMICIDE

Section 87. Criminal homicide. (1) A person commits criminal homicide if, without justification or excuse, he intentionally, knowingly, recklessly or with criminal negligence causes the death of another human being.

(2) "Criminal homicide" is murder, manslaughter or criminally negligent homicide.

(3) "Human being" means a person who has been born and was alive at the time of the criminal act.

COMMENTARY

A. Summary

Subsection (1). The definitions set out trace the limits of the homicide provisions of the Code. Subsection (1) provides that criminal homicide consists of intentionally, knowingly or recklessly killing another. This portion reflects traditional concepts. Criminal homicide also can be committed negligently by the terms of this subsection, but the general definition of negligence elsewhere in this Code makes it clear that "mere" or "civil" negligence will not constitute criminal homicide. The negligence must be creation of a "substantial and unjustifiable risk" of causing death of which the actor should be aware. And the risk must be "of a nature and degree that the actor's failure to perceive it" involves "substantial culpability." To further distinguish it from tort law negligence, it is referred to as criminal negligence.

Homicides are sometimes committed intentionally or knowingly where no criminal liability attaches (*e.g.*, in a case of self-defense). Subsection (1) recognizes situations of this kind by requiring that to be criminal the homicide must be committed without justification or excuse (as provided in Articles 2 to 5 of the Code dealing with culpability, complicity, justification and responsibility.)

Subsection (2). Criminal homicide is broken into three branches—murder, manslaughter and criminally negligent homicide.

Subsection (3). The definition of "human being" as one who has been born and was alive at the time of the criminal act excludes the crime of abortion from the operation of this article. Abortion is covered under ORS 435.405 to 435.990 which were enacted by the 55th Legislative Assembly. (Ch 684, Oregon Laws 1969). The proposed Code does not change the existing abortion law.

B. Derivation

The definitions are a mixture of the language from the Model Penal Code § 210.0 and 210.1, New York Revised Penal Law § 125.00 and the Michigan Revised Criminal Code § 2001. The phrase "without justification or excuse" does not appear in any of the sections above referred to but is clearly within the purview of their meaning. The Model Penal Code indicates that the qualification is intended to be included in the Model Penal Code draft. (Tent. Draft No. 9, at 25).

C. Relationship to Existing Law

No similar provisions appear in ORS but the definitions set out in this section are largely in line with the intent and operation of present provisions in Oregon law.

Section 88. Murder. (1) Except as provided in subsection (2) of section 89 of this Act, criminal homicide constitutes murder when:

(a) It is committed intentionally or knowingly; or

(b) It is committed recklessly under circumstances manifesting extreme indifference to the value of human life; or

(c) It is committed by a person, acting either alone or with one or more persons, who commits or attempts to commit arson in

the first degree, burglary in the first degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree or sodomy in the first degree and in the course of and in furtherance of the crime he is committing or attempting to commit, or the immediate flight therefrom, he, or another participant if there be any, causes the death of a person other than one of the participants.

(2) It is an affirmative defense to a charge of violating paragraph (c) of subsection (1) of this section that the defendant:

(a) Was not the only participant in the underlying crime; and

(b) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid in the commission thereof; and

(c) Was not armed with a dangerous or deadly weapon; and

(d) Had no reasonable ground to believe that any other participant was armed with a dangerous or deadly weapon; and

(e) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death.

(3) It is a defense to a charge of murder that the defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this subsection (3) shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter or any other crime.

(4) A person convicted of murder shall be punished by imprisonment for life.

COMMENTARY

A. Summary

This section defining murder is novel in at least two ways. First, it abolishes the degree distinction in murder which has traditionally been employed in many states since the early adoption of this device by Pennsylvania upon whose statute most murder degrees came to be based. Second, the murder definition continues to recognize the felony-murder doctrine but makes important changes in it.

Subsection (1). Pursuant to the definition in the section a person commits murder when he intentionally or knowingly kills another; or when he kills recklessly with extreme indifference to human life; or when a person, other than a participant in the crime, is killed in the course of the more violent and potentially dangerous felonies—arson, burglary, rape, robbery, escape, kidnapping and forced sodomy.

The exception appearing in subsection (1) of the draft section refers to the kind of circumstances which will have the effect of reducing the homicide to manslaughter which would otherwise constitute murder. Although the formula in the draft section on manslaughter is considerably different, an exception similar in purpose is firmly established in Oregon law which deals with the concept in traditional terms of killing as the result of a "sudden heat of passion." (ORS 163.040).

Subsection (2). With respect to a murder charge arising out of one of these felonies, subsection (2) of the section establishes a defense if the person asserting it can prove by a preponderance of the evidence that he was not alone in the crime, that he did not commit the act of killing or solicit it, that he was not armed with a deadly weapon and did not have reason to think a co-felon was so armed and that he had no reasonable ground to believe any other participant in the underlying felony was likely to engage in conduct likely to result in death.

Subsection (3). Subsection (3) creates a partial defense involving suicide where the defendant has caused or aided another to commit suicide. If the defendant intentionally causes or aids the crime without duress or deception, he may at most be held for manslaughter (see § 89, infra). Where duress or deception is employed, however, the crime is raised to murder. Under this defense the defendant has the burden of introducing evidence but the proof of intent beyond a reasonable doubt stays with the state. Of course, if the defendant actually kills the

victim at the victim's request it is murder (or possibly manslaughter).

B. Derivation

Subsection (1) is derived largely from § 210.2 (1) of the Model Penal Code. The draft departs from the Model Penal Code treatment of felony-murder and causing or aiding suicide in favor of the policy approach and language of New York Revised Penal Law § 125.25 which is also followed closely in the Michigan draft, § 2005 (4).

C. Relationship to Existing Law

Oregon presently provides for first and second degree murder. Murder in the first degree (ORS 163.010) has three branches: any killing done "purposely and of deliberate and premeditated malice" is the first branch; a killing arising in the course of committing rape, arson, robbery or burglary (the felony-murder doctrine) is the second branch of first degree murder; the third branch is a killing of a police officer without justification when the officer is acting in the line of duty.

Second degree murder (ORS 163.020) has four categories: the first category is anyone killing "purposely and maliciously but without deliberation"; the second category is a killing arising out of "any felony other than rape, arson, robbery or burglary"; the third branch of second degree murder is killing by an act "imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any design to effect the death of any particular individual"; the fourth category is a killing as the result of a duel.

The draft section makes substantial changes in existing law. Only one degree of murder is recognized. The chief distinction presently between first and second degree murder in Oregon, and elsewhere generally, is the element of premeditation. This is the embodiment of the common law concept of *mens rea* in a term of art that has come to have little useful meaning in a state which no longer employs capital punishment. The principal reason for degrees of murder historically has been to permit mercy in sentencing to those defendants who have aroused the sympathy of the jury. Thus if the defendant did not premeditate (further explained in ORS 163.120 which describes as evidence of malice and premeditation killing by poison, or lying in wait or some other proof that "the design was formed and nurtured in cold blood") he cannot be held for first degree murder. Where capital punishment exists this means he will not be subject to execution.

The court decisions in Oregon, as well as most other states, have rendered the test based on premeditation virtually useless. The term has come to mean that any prior design to kill, though it be formed only an instant before the act, may be sufficient to constitute premeditation. See *State v. Ogilvie*, 180 Or 365, 175 P2d 454 (1947); *State v. Morey*, 25 Or 241, 35 P 655 (1894). As a result it becomes a fairly metaphysical exercise to distinguish between premeditation constituting murder in the first degree in Oregon and reckless killing described as murder in the second degree in ORS 163.020. But a more basic objection to breaking murder into degrees is the belief that no single factor or list of factors can satisfactorily form the basis of sentencing distinctions. A man who lies in wait to kill his wife's lover is probably not as dangerous to society at large as the man who fires a pistol into a crowded room without intending to kill any particular person. Yet the betrayed husband is guilty under present law of first degree murder while the second actor is guilty of second degree murder. Since Oregon has no capital punishment it seems wiser to charge each simply with murder and let the judge treat each man according to his dangerousness through imposition of appropriately different sentences.

The draft section makes no special murder category for the killing of a policeman or killing as a result of a duel. The former is adequately covered under the general language of the section. So is the latter even in the event that this picturesque though thoroughly outmoded method for settling arguments should be employed today.

Although most of the recently drafted criminal codes have abolished degrees of murder, an exception is that of Michigan which retains two degrees. Michigan provides first degree murder to consist of "intentional" (as defined in terms similar to the purpose and knowledge culpability levels of the Model Penal Code) killings and killings arising out of the more dangerous felonies. Second degree murder is defined, first, in the old common law tradition as consisting of causing the death of another arising out of an assault with the intent to cause serious physical injury, and second, the causing of death under circumstances manifesting extreme indifference to human life. It is probable that one of the strong motivating factors leading to the two degree treatment has to do with plea bargaining.

The draft section makes no mention of murder defined at the common law as death caused by one intentionally inflicting serious bodily harm on another. It is believed that these kinds of situations are more satisfactorily judged by the standards of recklessness and extreme recklessness as to causing death.

The draft defines murder in terms of intentionally or knowingly causing the death of another. These terms were developed by the Model Penal Code (and adopted elsewhere for this Code) and are a vast improvement over the cumbersome *mens rea* descriptions developed for murder under the common law. The draft also describes as murder the killing of another "recklessly under circumstances manifest-

ing extreme indifference to the value of human life." This corresponds fairly closely in policy to the language in ORS 163.020 which defines such killing as second degree murder. The draft section is meant to cover situations such as one shooting into a crowd or an occupied house or automobile. Where a jury is convinced that the reckless act is not one showing extreme indifference to human life, it can find the accused guilty of manslaughter (see § 89, infra).

The draft section follows the modern trend away from the common law felony-murder rule pursuant to which almost any killing occurring during the commission of some other felony renders all participants in the underlying crime guilty also of murder. This has had some highly questionable results in cases where a co-felon had no idea that force would be used or where the death is that of a co-felon slain by police or the victim.

The draft extends a defense to the felony-murder doctrine in what constitutes a novel change. The comment following the New York section, upon which this section is based, reads as follows:

> "Finally, the most novel change appears in the exception extending a defendant an opportunity to fight his way out of a felony murder charge by persuading a jury, by way of affirmative defense, that he not only had nothing to do with the killing itself but was unarmed and had no idea that any of his confederates was armed or intended to engage in any conduct dangerous to life. This phase of the provision is based upon the theory that the felony murder doctrine, in its rigid automatic envelopment of all participants in the underlying felony, may be unduly harsh in particular instances; and that some cases do arise, rare though they may be, where it would be just and desirable to allow a non-killer defendant of relatively minor culpability a chance of extricating himself from liability for murder, though not, of course, from liability for the underlying felony."

It is not anticipated that this defense will often be successful. The defendant has the burden of affirmatively asserting the defense and proving it by a preponderance of the evidence.

The proposed draft also erases the felony-murder provision found in ORS 163.020 (1) which provides that death resulting from the commission of any felony, other than those described in the first degree murder statute, is second degree murder. Several other states presently have a provision similar to Oregon's, but all recent criminal codes have deleted it.

Only a few cases were found in Oregon arising under the second degree felony-murder doctrine, and these cases all involved what were clearly potentially dangerous felonies. For instance in *State v. Morris*, 83 Or 429, 163 P 567 (1917), the defendant was committing larceny in a dwelling house when he strangled his victim. In *State v. Reyes*, 209 Or 595, 303 P2d 519 (1957), the defendant was committing the felony of assaulting an officer with a deadly weapon (he was holding the officer at bay so he could escape) when he shot and killed a third party.

Whether the Oregon court would find a way to limit the second degree felony-murder doctrine should a case involving death arise out of a "non-dangerous" felony remains open to conjecture. The language of the present statute would seem to allow second degree murder convictions without reference to the degree of danger created in the commission of the underlying felony. This seems inadvisable as a policy matter and the opportunity for such a result is forestalled in the draft section.

Subsection (3). Suicide. ORS 163.050 presently defines as manslaughter the deliberate and purposeful procuring by one person of another to commit suicide. This reflects the law as it generally exists in most states and which will be contained in principle in this Code (see § 89, infra). The Oregon law is silent on whether it is possible for the crime of murder to exist if the suicide is intentionally caused or aided through duress or deception. The only Oregon case found dealing with the general subject is not useful because the facts indicate in *State v. Bouse*, 199 Or 676, 264 P2d 800 (1953), that the defendant himself actually killed his wife although he claims she sought his aid and that it was pursuant to a suicide pact. The court said that even if the defendant's story was believed it would not necessarily reduce the crime to manslaughter.

Situations where a person deliberately forces the victim to pull the trigger which results in death of the victim or where the defendant gets the victim to kill himself as a result of a suicide pact deceptively induced by the defendant clearly constitute the crime of murder and are treated as such under this section. Only where there are mitigating factors—the absence of duress or deception—should the defendant be allowed a defense which would have the effect, if successful, of reducing the crime to no more than manslaughter.

The Model Penal Code has a provision in § 210.5 (1) which defines as murder the purposeful causing of the death of another by suicide "by force, duress or deception." Though not stated, it is clearly within the concept of this section that the defendant has a defense to murder under the section if he can negate force, duress and deception. What is implied in the Model Penal Code is made explicit in subsection (3) of the draft section.

Subsection (4) requires a mandatory sentence of life imprisonment of a person convicted of murder, the same penalty now imposed under ORS 163.010 (3) for first degree murder. However, in view of the fact that the draft section abolishes the distinction

between first and second degree murder, the Commission recommends the repeal of ORS 144.230 which requires a person convicted of first degree murder to serve a minimum of 10 years before he becomes eligible for parole, and a person convicted of second degree murder to serve a minimum of seven years. Repeal of the statute would mean that parole eligibility of a person convicted under § 88 of the Code would be determined by the State Board of Parole and Probation in the same manner as for any other convicted offender.

SUPPLEMENTARY COMMENTARY: ORS 163.-130 now requires: "if upon an indictment for murder the defendant is convicted upon his own confession in open court, the court shall hear the proof and determine the degree of murder and give judgment accordingly." This statute would be repealed by the proposed draft for three reasons: First, because the degree of murder would be abolished by the proposal. Second, because the Commission believes that a court in accepting a guilty plea to a charge of murder or any other crime is required to meet the standards imposed by *McCarthy v. U.S.*, 394 US 459 (1968) and *Boykin v. Alabama*, 395 US 238 (1969). Third, the subject of guilty pleas will be thoroughly examined by the Commission as part of its work on a revised criminal procedural code.

It should be noted, also, that it is not the Commission's intent to change the present requirement of a unanimous verdict in first degree murder cases, notwithstanding the fact that § 88 of the Act abrogates the technical distinctions between first and second degree murder. A unanimous verdict of the jury would be required in any prosecution under § 88. See § 11, Art. I, Oregon Constitution; ORS 136.610 (2).

Section 89. Manslaughter. (1) Criminal homicide constitutes manslaughter when:

(a) It is committed recklessly; or

(b) A homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation and excuse. The reasonableness of such explanation and excuse shall be determined from the standpoint of a person in the actor's situation under the circumstances as he believes them to be; or

(c) A person intentionally causes or aids another person to commit suicide.

(2) Manslaughter is a Class B felony.

COMMENTARY

A. Summary

Subsection (1). The crime of manslaughter is defined under paragraph (a) to consist of reckless killing. Recklessness is defined elsewhere in this Code (and in the Model Penal Code) as consisting of a conscious disregard for a substantial and unjustifiable risk. The risk disregarded must be one that involves a gross deviation from the standard of conduct that a law abiding person would otherwise observe in the actor's situation. If the reckless act on the facts also evidences an extreme indifference for the value of human life, the crime then falls within the definition of murder in § 88 of the draft.

Of this recklessness formula for manslaughter the Model Penal Code says:

> "There also is a departure from existing norms in the abandonment of the conception that a homicide is ipso facto manslaughter if it resulted from an otherwise unlawful act, the misdemeanor-manslaughter analogue of the felony-murder rule. There must be a substantial and unjustifiable risk of homicide to establish either recklessness or negligence. See Section 2.02. Given such risk, the character of the defendant's conduct is relevant, of course, in determining recklessness or negligence and its unlawfulness may warrant the conclusion that the risk created was unjustified; that is a matter to be dealt with by the courts in framing charges with respect to recklessness and negligence."

A second part of the manslaughter definition contained in paragraph (b) encompasses those kinds of cases which would otherwise be murder (intentionally or knowingly killing another). The draft reframes the test for reduction of murder to manslaughter which in present law turns on the "heat of passion" and "adequate provocation" tests. Instead the decisive question asked under the draft is

whether the homicide was committed "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse" and adding that the "reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." Section 90 of this Act makes important restrictions on this defense.

Paragraph (c) of subsection (1) defines as manslaughter the intentional causing or aiding another to commit suicide. All cases of intentionally causing or aiding a suicide are prosecutable as manslaughter under this provision but, as noted in the commentary to § 88, supra, those cases in which "duress or deception" is used by the defendant are also prosecutable as murder.

B. Derivation

The section follows the language of Model Penal Code § 201.3 but adds the New York provision on suicide.

C. Relationship to Existing Law

The section makes major changes in the law of manslaughter in Oregon. First, it changes the basic test in what is now the voluntary manslaughter statute. Voluntary manslaughter is defined in ORS 163.040 (1) as the killing of another intentionally without malice and deliberation "upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible." This traditional formula is replaced by the more subjective concept embodied in paragraph (b) of the draft section which treats on a parity with provocation cases in the classic sense, situations where the provocative circumstance is something other than an injury inflicted by the deceased on the actor but nonetheless is an event calculated to arouse extreme mental or emotional disturbance. The draft section also introduces a larger element of subjectivity, though it is only the actor's "situation" and "the circumstances as he believes them to be," not the defendant's scheme of moral values, that are thus to be considered. The ultimate test, however, is objective; there must be "reasonable" explanation or excuse for the actor's disturbance. Thus, the draft retains a certain degree of the objective standard but turns away from the present Oregon law which apparently gauges the accused's acts on a purely reasonable man test without reference to the accused's circumstances or relevant personal characteristics.

The comment in the Model Penal Code on the new formula reads as follows:

> "Though it is difficult to state a middle ground between a standard which ignores all individual peculiarities and one which makes emotional distress decisive regardless of the nature of its cause, we think that such a statement is essential. For surely if the actor had just suffered a traumatic injury, if he were blind or were distraught with grief, if he were experiencing an unanticipated reaction to a therapeutic drug, it would be deemed atrocious to appraise his crime for purposes of sentence without reference to any of these matters. They are material because they bear upon the inference as to the actor's character that it is fair to draw upon the basis of his act. So too in such a situation as *Gounagias*, supra, where lapse of time increased rather than diminished the extent of the outrage perpetrated on the actor, as he became aware that his disgrace was known, it was shocking in our view to hold this vital fact to be irrelevant.
>
> "We submit that the formulation in the draft affords sufficient flexibility to differentiate between those special factors in the actor's situation which should be deemed material for purposes of sentence and those which properly should be ignored. We say that there must be a 'reasonable explanation or excuse' for the extreme disturbance of the actor; and that the reasonableness of any explanation or excuse 'shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.' There will be room, of course, for interpretation of the breadth of meaning carried by the word 'situation', precisely the room needed in our view. There will be room for argument as to the reasonableness of the explanations or excuses offered; we think again that argument is needed in these terms. The question in the end will be whether the actor's loss of self-control can be understood in terms that arouse sympathy enough to call for mitigation in the sentence. That seems to us the issue to be faced." (Comment, Tent. Draft No. 9 at 48).

A second major change the draft effects in the Oregon law is the abolition of the involuntary manslaughter definition in ORS 163.040 (2). This ORS section defines as manslaughter the killing of another "in the commission of an unlawful act" (the misdemeanor-manslaughter doctrine), or the killing of another while performing "a lawful act without due caution or circumspection."

In limiting the crime of manslaughter in terms of recklessness the draft rejects the misdemeanor-manslaughter rules insofar as they base liability on an unlawful act even though it entails no substantial risk of death. Such a rule is inconsistent with the general concepts of culpability which should animate a modern criminal law code imparting with respect to homicide, as distinguished from the underlying misdemeanor, a form of strict liability. It is difficult to tell from the few Oregon decisions on the point whether a strict liability policy obtains under the Oregon statute. All the cases found dealing with the

unlawful act doctrine involved misdemeanors which were of the inherently dangerous kind: *State v. Trent*, 122 Or 444, 252 P 975 (1927), defendant fired gun to frighten off suspected trespassers, killing one of them; *State v. Boag*, 154 Or 354, 59 P2d 396 (1936), and *State v. Miller*, 119 Or 409, 243 P 72 (1926), both involved dangerous operation of cars (drunken driving and speeding, respectively) resulting in deaths.

Suppose instead that the accused has a disagreement with the victim and pushes the victim through a screen door. The victim cuts his finger slightly on the screen, contracts tetanus and dies. The act is clearly unlawful but the results can hardly be anticipated—the nature of the act is not very dangerous within the understanding of the reasonable man. A strict application of the Oregon statute would hold the accused guilty of manslaughter asking only if the act was unlawful. The draft section would ask instead, was the act of the accused so reckless as to create a substantial and unjustifiable homicidal risk. Thus under the draft section only if the unlawful act (misdemeanor) is reckless will a conviction for manslaughter be proper. It will be seen in the discussion of § 91 of this Act that the performance of an unlawful act may result in criminal homicide if deemed criminally negligent. But "mere" negligence or even "gross" negligence of the civil variety will not result in a conviction for manslaughter under the draft section.

The second branch of Oregon's involuntary manslaughter provision also is abolished in the draft section. This branch defines as manslaughter a killing resulting from the performance of a lawful act "without due caution or circumspection." On its face the present statute refuses the strict liability doctrine which apparently attaches to the unlawful act manslaughter doctrine. But the words "due caution or circumspection" can hardly be equated with homicidal risk created due to recklessness or criminal negligence. In fact the Oregon cases apparently equate the phrase with civil negligence. See *State v. Clark*, 99 Or 629, 196 P 360 (1921), where the defendant mistook his companion for a deer and shot and killed him. The trial court instructed in terms of "gross" negligence, but the supreme court seems to say that mere negligence is enough and that the instruction went farther than it need have in protecting the defendant. Accord: *State v. Metcalf*, 129 Or 577, 278 P 974 (1929).

Under the draft section the question again is whether the lawful act resulting in death was performed in a manner which recklessly created a substantial and unjustifiable homicidal risk (or under § 91 of this Act whether the performance of the lawful act created a criminally negligent degree of risk which might result in conviction for criminally negligent homicide).

Paragraph (c) of subsection (1) makes no change in present Oregon law. ORS 163.050 currently reads as follows:

> "Any person who purposely and deliberately procures another to commit self-murder or assists another in the commission thereof, is guilty of manslaughter."

The Model Penal Code has a provision identical in purpose with this subsection. Section 210.5 differs however, in that it creates a separate offense for this kind of criminal activity. The sanction in that section is the same, however, as it is for manslaughter. In explanation of its choice the comment reads as follows:

> "We think, therefore, the wiser course is to maintain the prohibition [against intentionally causing or aiding suicide of another] and rely on mitigation of sentence when the ground for it appears. To facilitate such mitigation in cases where it is proper, we follow the legislation that treats the crime as a distinct offense, although the sanction we propose is the same as that for manslaughter." (Tent. Draft No. 9 at 57).

Section 90. Expert testimony; notice required. (1) The defendant shall not introduce in his case in chief expert testimony regarding extreme mental or emotional disturbance under section 89 of this Act unless he gives notice of his intent to do so.

(2) The notice required shall be in writing and shall be filed at the time the defendant pleads not guilty. The defendant may file such notice at any time after he pleads but before trial when just cause for failure to file the notice at the time of his plea is made to appear to the satisfaction of the court.

(3) If the defendant fails to file notice he shall not be entitled to introduce evidence for the purpose of proving extreme mental or emotional disturbance under section 89 of this Act unless the court, in its discretion, permits such evidence to be introduced where just cause for failure to file notice is made to appear.

(4) After the defendant files notice as provided in this section, the state shall have the right to have at least one psychiatrist of its selection examine the defendant in the same manner and subject to the same provisions as provided in section 42 of this Act.

COMMENTARY

Since mental or emotional disturbance as a defense under the provisions of subsection (2) of § 89 will often involve psychiatrists appearing for the defense, § 90 requires advance notice by the defendant prior to trial if he intends to use such experts. If he does, the state is given the right to have a psychiatrist of its selection examine the defendant prior to trial.

These provisions reflect a policy identical to that in §§ 40, 41 and 42 (Responsibility) where the defendant intends to use expert witnesses to establish that he is not responsible, or is only partially responsible, due to a mental disease or defect.

Section 91. Criminally negligent homicide. (1) A person commits the crime of criminally negligent homicide when, with criminal negligence, he causes the death of another person.

(2) Criminally negligent homicide is a Class C felony.

COMMENTARY

A. Summary

This section covers deaths caused through criminal negligence. The proposed Oregon Code is based on the Model Penal Code and reads as follows:

> "'Criminal negligence' or 'criminally negligent', when used with respect to a result or to a circumstance described by a statute defining a crime, means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." (See § 7 supra.)

The basic difference between manslaughter and criminally negligent homicide is that in recklessness, constituting manslaughter, a conscious advertence to the risk exists, while in criminally negligent homicide the risk is created inadvertently. The Model Penal Code comment says of this:

> "The distinction between advertence and inadvertence is, however, of such large importance generally in evaluating both the actor's conduct and his character, that we propose to treat such homicides as of a lower grade than manslaughter. In grading the offense as a third-degree felony, the draft provides a sentence range considerably lower than prevailing law in states where manslaughter is now a single category but somewhat higher than the norm in states in which voluntary and involuntary manslaughter are distinguished for purposes of sentence. Given the ameliorative powers which the Code vests in the Court (*e.g.*, Sections 6.11, 7.01), we do not think the sanction is excessive." (Tent. Draft No. 9 at 53).

B. Derivation

The language is drawn from the New York statute § 125.10, but is identical in policy and scope with Model Penal Code § 210.4.

C. Relationship to Existing Law

The creation of this offense will be at least partially new to Oregon law which, like most states, has experienced difficulty in articulating the definition of negligence involved in criminal cases. This section will encompass the existing Oregon provision in ORS 163.091 which applies only to death caused through the "gross" negligence in driving a motor vehicle. In addition, as mentioned in the discussion of the manslaughter section, above, some of the cases which might have been disposed of under ORS 163.040 (2) as involuntary manslaughter on the grounds of a lawful act done without due caution or an unlawful act resulting in death, will now find a more proper disposition under this section.

The use of the term "criminal negligence" should obviate the definitional difficulties and ambiguities heretofore encountered in the Oregon cases. See *e.g.*, *State v. Metcalf*, 129 Or 564 (1929), in which the court apparently equates "due caution and circum-

spection" under the lawful act branch of involuntary manslaughter with mere civil negligence. On the other hand see *State v. Hodgdon*, 244 Or 219, 419 P2d 647 (1966), which equates "gross negligence" under the negligent homicide statute in ORS 163.091 with "recklessness." In the *Hodgdon* case the result apparently is that the degree of negligence presently required under ORS 163.091 for conviction in an auto death case approximates the meaning of "criminal negligence" as defined in this Code and used in the draft section.

In discussing the policy behind the adoption of this section the Model Penal Code comment says:

> "It has been urged with strong conviction that inadvertent negligence is not a sufficient basis for a criminal conviction, both on the utilitarian ground that threatened sanctions cannot influence the inadvertent actor who, by hypothesis, does not perceive their relevancy and on the ground that punishment should be reserved for cases that involve a moral fault which here is absent. But, as we have said in dealing with the problem generally, we are not persuaded that in condemning homicide by negligence the law is impotent to stimulate care that otherwise might not be taken or that an actor's failure to use his faculties may not be deemed a proper ground for condemnation.
>
> "The Code definition of negligence, applied to homicide, requires that the homicidal risk 'be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct, the circumstances known to him and the care that would be exercised by a reasonable person in his situation, involves substantial culpability' or, alternatively, 'a substantial deviation from the standard of care that would be exercised by a reasonable man in his situation'. We think that justice is sufficiently safeguarded by insisting on substantial culpability or deviation; that these terms preclude the proper condemnation of inadvertent risk creation unless the significance of the circumstances of fact would would be apparent to one who shares the community's general sense of right and wrong. They also serve and rightly we believe to convict conduct which is inadvertent as to risk only because the actor is insensitive to the interests and claims of other persons in society." (Tent. Draft No. 9 at 52-53).

The concern of most states with the problem of vehicular homicides was given close attention in the preparation of the Model Penal Code section on negligent homicide. The comment on this aspect reads as follows:

> "In the United States, as well as elsewhere, it has been notoriously difficult to convict the negligent motorist of manslaughter. Facing the fact of jury nullification in such cases, many states have enacted special statutes dealing with vehicular homicide, reducing the grade of the offense and possible sentence on conviction below the levels otherwise obtaining for manslaughter by negligence.
>
> "While we appreciate the practical value of such special provisions for vehicular homicides, we think they are unnecessary as the Code is drawn. The separation from manslaughter is accomplished by treating negligent homicide as a distinct offense of lower grade. If the evidence does not make out a case of negligence, as negligence is defined in Section 2.02, we see no reason for creating liability for homicide, as distinguished from any traffic offense that is involved. If the evidence suffices to establish such a case, the offense is in our view too serious for proper treatment as a misdemeanor. And if conviction of a misdemeanor is all that is believed to be desirable or possible, a prosecution for reckless conduct under Section 201.11 or for a traffic offense should be sufficient. One of the objects of the draft is to avoid proliferation of offenses or distinctions with respect to sentence unsupported by principled rationale." (Tent. Draft No. 9 at 53-55).

ARTICLE 11. ASSAULT AND RELATED OFFENSES

Section 92. Assault in the third degree. (1) A person commits the crime of assault in the third degree if he:

(a) Intentionally, knowingly or recklessly causes physical injury to another; or

(b) With criminal negligence causes physical injury to another by means of a deadly weapon.

(2) Assault in the third degree is a Class A misdemeanor.

COMMENTARY

See commentary under § 94 infra.

Section 93. Assault in the second degree. (1) A person commits the crime of assault in the second degree if he:

(a) Intentionally or knowingly causes serious physical injury to another; or

(b) Intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon; or

(c) Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon.

(2) Assault in the second degree is a Class C felony.

COMMENTARY

See commentary under § 94 infra.

Section 94. Assault in the first degree. (1) A person commits the crime of assault in the first degree if he intentionally, knowingly or recklessly causes serious physical injury to another under circumstances manifesting extreme indifference to the value of human life.

(2) Assault in the first degree is a Class B felony.

COMMENTARY TO SECTIONS 92 TO 94

A. Summary

Criminal assault is made a separate substantive offense under the proposed draft. As defined by the draft, assault is the unlawful causing of physical injury committed with the particular *mens rea* specified in the individual assault provisions. The draft contains three ascending degrees of assault. The basic offense, aggravated by the following factors which, either singly or in combination, raise the degree of the offense:

(1) The actor's culpability or motivation for the assault;

(2) The seriousness of the injury actually inflicted or intended by the actor;

(3) The dangerousness of the means employed by the actor to inflict injury.

Culpability factor: The proposed draft includes not only the intentional but also the reckless and criminally negligent infliction of physical injury. This inclusion is designed to eliminate the anomaly that now exists in the law whereby reckless or "grossly" negligent conduct which causes death is punishable as homicide but such conduct which merely inflicts injury is not punishable as assault regardless of how serious the injury inflicted is. (See § 7 supra for culpability definitions.)

Seriousness of the injury inflicted or intended: The seriousness of the injury inflicted is a factor in determining the degree of assault. The infliction of physical injury constitutes assault in the third degree while the infliction of *serious* physical injury constitutes assault in the second or first degree. (The terms "physical injury" and "serious physical injury" are defined in the general definitions, § 3 supra.)

Mere physical contact which does not produce bodily injury is not covered by the assault article. Trivial slaps, shoves, kicks, etc., are covered by the lesser offense of harassment. Offensive but uninjurious sexual acts are covered by the article on sex offenses (Article 13).

Means employed to inflict injury: The use of a deadly or dangerous weapon will ordinarily raise the degree of assault. The definitions of deadly weapon and dangerous weapon make a distinction between an instrument that ordinarily has no other purpose except as a weapon and an instrument that is not necessarily intended as a weapon but becomes such because of its use. (See general definitions, § 3

supra, for definitions of the terms, "deadly weapon" and "dangerous weapon.")

Section 92 sets forth the basic coverage of assault. In intentional assault, though the intent factor is stated in terms of purpose to injure "another," the act prohibited is physical injury to *any* person. This is intended to preserve the common law concept of transferred intent.

Paragraph (a) of subsection (1) of the section covers both the intentional or reckless infliction of physical injury to anyone. There is no specification of the manner in which the injury is caused. The inclusion of recklessness means that the actor must consciously disregard a substantial and unjustifiable risk. This kind of assault is the counterpart of manslaughter (§ 89 supra). If death results from the recklessness it is manslaughter, but if only physical injury ensues, it is assault in the third degree.

Paragraph (b) of subsection (1) embraces the elements of criminally negligent conduct with a deadly weapon (as defined in § 3 supra) and resulting physical injury to another.

Section 93 is an aggravated form of assault and is classified as a Class C felony because the actor intentionally causes *serious* physical injury to another, or he intentionally causes physical injury by means of a dangerous or deadly weapon, or he recklessly causes *serious* physical injury by means of a weapon.

Paragraph (a) of subsection (1) of § 93 raises the *intentional* crime a degree when the injury inflicted is *serious*. Paragraph (b) makes intentional assault with a dangerous or deadly weapon a felony regardless of whether the injury intended or inflicted is *serious, e.g.*, one who fires a pistol and inflicts only a flesh wound is guilty of assault in the second degree even if he intended only to graze the person.

Under paragraph (c) of subsection (1) of § 93, reckless assault is raised from third to second degree when each of two aggravating factors exists: *serious* physical injury and a deadly or dangerous weapon.

Section 94 is designed to cover the most serious forms of life endangering conduct and includes: (1) intentionally causing nonfatal *serious* physical injury to another (if the intent is to kill, the act could be attempted murder); (2) mayhem; (3) reckless conduct evincing extreme depravity, *e.g.*, shooting into a crowd without any specific homicidal intent. Any act falling within § 94 would be a Class B felony.

As stated by the authors of the New York Draft Penal Law:

> "The proposed assault formulation, requiring actual physical injury, places the crime of assault in the main category of offenses (robbery, larceny, perjury, *etc.*) which are committed only when the offender succeeds in his criminal objective. And as with other offenses of this nature, an unsuccessful endeavor (a common law assault not resulting in a battery) constitutes an attempt." (Commission staff notes, 330-31).

Attempted assault, then, will be governed by the same rules which apply to attempts to commit other crimes. The proposed Oregon Code adopts the Model Penal Code's "substantial step" test for distinguishing acts of preparation from an attempt. Whether or not the conduct of the defendant amounts to a substantial step toward the commission of the crime would be a question of fact to be decided in each case. (See §§ 54-56 supra.)

The suggested assault formulation treats the crime in the same manner as crimes such as theft, robbery or perjury that are committed only when the actor succeeds in his criminal objective. If, as a matter of fact, his conduct constitutes a substantial step toward commission of the crime of assault, an unsuccessful endeavor not resulting in injury to the victim will be "attempted assault."

The proposed draft does not contain any "assault with intent to commit" provisions since an assault with intent to commit another offense will, in every case, constitute an attempt to commit that offense. Assault with intent to rob, rape or kill will be dealt with as robbery, attempted rape or attempted murder under the proposed Code.

Consent under certain circumstances is a defense to a prosecution for assault, *e.g.*, ordinary physical contacts, sports, surgery. In holding consensual assaults illegal, courts rely on the social undesirability of the activity incident to the assault. Section 92 provides for a reduced penalty in the case of a consensual fight or scuffle not involving the use of a deadly weapon or the infliction of serious physical injury. This gradation in penalty is based on the view that consensual scuffles or fights are not of the same degree of culpability as are nonconsensual assaults.

The draft does not treat separately assaults against particular classes of persons such as government officials or public officers since such persons should be adequately protected by the general provisions.

A number of recent codes include the "placing of another in fear of imminent serious bodily injury" within the provisions relating to simple assault. See, 38 Ill Rev Stat 12-1; 40A Minn Stat Ann 609.22 (1); Model Penal Code § 211.1 (c). Such conduct, though culpable, does not constitute either assault or attempted assault under the proposed draft for "physical injury is neither inflicted nor intended." Accordingly, the separate offense of menacing (§ 95 infra) has been created to cover such conduct. In so doing, the draft follows the schematic arrangement of the New York Revised Penal Law and the Michigan Revised Criminal Code.

Mayhem, under the proposed draft, has been eliminated as a separate offense, since every mayhem is of necessity an assault involving serious bodily harm. If the maiming amounts to attempted murder, it can be prosecuted as such.

B. Derivation

Assault in the third degree is adapted from § 211.1 (1) of the Model Penal Code; assault in the second degree from § 211.1 (2) (b) of the Model Penal Code and § 120.05 of the New York Revised Penal Law; and assault in the first degree from § 211.1 (2) (a) of the Model Penal Code.

C. Relationship to Existing Law

At common law assault was defined either as (1) an offer with force or violence to do a corporal hurt to another or (2) an unlawful act which places another in reasonable apprehension of receiving an immediate battery. Battery was defined as the unlawful application of force to the person of another. Both assault and battery were misdemeanors at common law. There was no crime of felonious or aggravated battery but the court had discretion to vary the punishment according to the nature of the circumstances. If the actor's conduct amounted to a separate felony the battery merged therein. Mayhem, a common law felony into which battery merged, was defined as "violently depriving another of the use of such of his members as may render him less able in fighting either to defend himself or to annoy his adversary." In the proposed draft these three common law offenses have been consolidated into the one statutory offense of assault. Such a formulation closes the gap between battery and mayhem by making certain types of assaults felonies.

Oregon statutes dealing with criminal assaults do not define the crime but rather provide for various types of assaults. The factors which aggravate an assault tend to fall into three categories:

(1) Motivation for the assault: Assault now is frequently aggravated according to the actor's purpose in committing the assault:

(a) Intent to intimidate (ORS 163.240)
(b) Intent to kill (ORS 163.280)
(c) Intent to rob (ORS 163.270, 163.290, 163.330)
(d) Intent to commit rape (ORS 163.270)
(e) Intent to commit mayhem (ORS 163.270)

(2) Dangerous means, whether or not resulting in injury: Under Oregon law an assault committed with a dangerous weapon or while armed with a dangerous weapon carries a higher penalty than assault committed while unarmed:

ORS 163.240 Assault while armed with a dangerous weapon—10 years
163.250 Assault with a dangerous weapon —10 years
163.260 Assault and battery while unarmed —1 year plus $500 fine
163.255 Assault while unarmed by means of force likely to produce great bodily injury—5 years
163.280 Assault with intent to kill; assault and robbery while armed with a dangerous weapon—Life or any lesser term
163.290 Robbery or theft while not armed with a dangerous weapon—15 years
162.380 Assault with deadly weapon—20 years
162.400 Assault with deadly weapon—20 years

(3) Serious bodily injury actually inflicted: Assault is aggravated when serious bodily injury is inflicted:

ORS 163.230 Mayhem—20 years

The above three aggravating factors which are now in Oregon law have been incorporated into the proposed draft and are the criteria used in determining the degree of assault. The existing statutes would be repealed.

Assault in Oregon case law has been defined as "any intentional attempt by force or violence to do injury to the person of another coupled with the present ability to do such injury." *State v. Godfrey*, 17 Or 300, 20 P 625 (1889).

Assault can mean either (1) an act which reasonably puts one in fear of corporal injury or (2) an act intended to cause corporal injury by one who has the present ability to carry out such intent. *State v. McLennen*, 16 Or 59, 60, 16 P 879 (1888), *State v. Linville*, 127 Or 565, 572, 273 P 338 (1928). Thus, the tort law derived concept of "intentional creation of the apprehension of receiving a battery" exists in present Oregon case law and will be retained under the proposed law as the newly designated offense of menacing. (See § 95 infra.)

The proposed draft embodies a reorientation of present Oregon law. It limits assault as a concept to the infliction of actual physical injury. It makes assault a substantive crime and does away with the requirements of present ability leaving the general attempt provisions controlling on this issue. In light of the comments made by the Oregon Supreme Court in *State v. Wilson*, 218 Or 575, 346 P2d 115 (1959), this position does not appear to be a radical departure:

> "We are of the opinion that criminal assault, even as defined by this court, should be regarded as a distinct crime rather than an uncompleted battery . . . [T]he mere fact that assault is viewed as preceding a battery should not preclude us from drawing a line on one side of which we require the present ability to inflict corporal injury denominating this as assault and on the

other side conduct which falls short of a present ability, yet so advanced toward the assault that it is more than mere preparation and which we denominate an attempt." At 586-588.

It is intended that an attempt to commit an assault is a lesser included offense and that the conviction will be for the attempt where it, but not the assault, is established by the evidence. (See §§ 54–56 supra.)

Under the present law virtually all of the assault offenses require either a general intent to commit a battery or a specific intent to commit some designated kind of physical injury. However, the courts have interpreted "assault" which is an intentional act to include both an assault and battery even though the battery was an unintentional act. Many courts hold that the intent to injure can be inferred from recklessness while others say that recklessness replaces intent. The proposed draft includes both the reckless and criminally negligent infliction of bodily injury.

Section 95. Menacing. (1) A person commits the crime of menacing if by word or conduct he intentionally attempts to place another person in fear of imminent serious physical injury.

(2) Menacing is a Class A misdemeanor.

COMMENTARY

A. Summary

The proposed draft recognizes, as do most modern codes, that "placing or attempting to place another person in fear of imminent serious bodily harm" is a type of conduct warranting criminal sanction. The menacing section is based on two premises: (1) that an intent to cause apprehension of injury is a culpable *mens rea* and (2) that an intent to injure is more serious than an intent to cause apprehension of injury. As drafted, this section is a compromise between codes which equate an attempted battery with a tortious assault (Model Penal Code, Ill., Minn., La.) and those codes which recognize no crime unless the actor intended to inflict a battery (Wisc.). As an example: X with intent to frighten Y, points a gun at Y which Y thinks is loaded but which in fact is not loaded. Under the Model Penal Code such conduct would constitute a simple assault. (211.1 (1)(c)). Under the proposed draft and the New York and Michigan codes such conduct would constitute the lesser crime of menacing. The conduct would not constitute either assault or attempted assault since physical injury was neither inflicted nor intended. However, any threat of physical injury accompanied by an intent and attempt to execute it also constitutes attempted assault.

Menacing is intended to cover not only menacing physical acts but also threatening words unaccompanied by a physical movement. The following conduct would be considered menacing: X stands with his right hand in his coat pocket and threatens to shoot Y.

"Physical menace" implies such conduct as would cause fear to a reasonable man. The standard to be applied is an objective one. Obviously empty threats to inflict serious injury are not so harmful as to deserve criminal sanction.

Unsuccessful attempts to place another in fear are included within the menacing section. It is intended that the following cases would constitute the offense of menacing:

(1) The victim apprehends the danger but does not fear it.

(2) The actor's conduct is such as would cause fear to a reasonable man but the intended victim is aware that the actor will not inflict the threatened harm, *e.g.*, victim knows the actor's gun is not loaded.

(3) The intended victim is unaware of the actor's threat, *e.g.*, he is blind and does not know the actor is pointing a gun at him.

Conditional threats of violence made to coerce another to engage or refrain from engaging in conduct will be covered by the section on coercion. Less serious forms of abuse, *e.g.*, pranks, jokes, will be covered in the section on harassment.

B. Derivation

Menacing is adapted from New York Revised Penal Law, § 120.15. The Model Penal Code includes the offense of menacing in its general assault provision [§ 211.1 (1)(c)].

C. Relationship to existing law

Oregon case law in defining assault includes the element of apprehension in its definition:

> "An intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as create a well-founded fear of imminent peril, coupled with the apparent present ability to effectuate the attempt, if not prevented, constitutes an assault." *State v. Linville*, 127 Or 565, 572, 273 P 338 (1928).

But as pointed out in *State v. Wilson*, 218 Or 586, 346 P2d 115 (1959) the act of placing one in apprehension of receiving a battery is not assault unless there is also the intent to inflict injury:

> ". . . apprehension of injury on the part of the victim need not be shown to make out the crime. Further, it seems clear that an act done with the intention to *place one* in *apprehension* of *injury only* and *not* to *inflict corporal injury* would not constitute the crime of assault in this state. And too, according to the definition, an act done with the intention to inflict corporal injury but where the actor did not have the present ability to inflict corporal injury would not be a criminal assault." At 584.

The proposed draft, therefore, creates a new offense of menacing to cover the situation where the actor places or attempts to place another person in fear of imminent serious bodily harm and where serious injury is neither intended nor inflicted.

Section 96. Recklessly endangering another person. (1) A person commits the crime of recklessly endangering another person if he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

(2) Recklessly endangering another person is a Class A misdemeanor.

COMMENTARY

A. Summary

This section creates a new offense known as recklessly endangering another person. This offense is designed to prohibit reckless conduct which places another person in danger of serious bodily harm. The statute covers potential risks as well as cases where a specific person is within the zone of danger.

In the area of offenses involving danger to the person, there are three areas where reckless conduct is made criminal:

(1) If it causes death it is manslaughter.

(2) If it causes injury it is assault.

(3) If it causes neither death nor injury it is recklessly endangering another person.

This may be illustrated by the following example: *X*, without any specific intent to injure or kill recklessly, shoots into a crowd. If death results, the crime is murder; if injury results, the crime is assault; if neither death nor injury results, the crime is recklessly endangering another person.

An unsuccessful attempt to cause intended physical injury is an attempted assault. Reckless conduct which is likely to cause physical injury, but does not do so, does not constitute attempted assault for one cannot attempt to act recklessly. There must be intent or knowledge before there can be an attempt. As an example, if *X* recklessly throws a rock through the window of a house without knowing or caring whether anyone is within, he is guilty of assault if anyone is injured, but if no one is injured, he is not guilty of attempted assault but he is guilty of recklessly endangering another person.

This section is intended to cover the reckless pointing of firearms and, therefore, it does not include a special subsection prohibiting this particular conduct. The proposed draft, unlike Model Penal Code § 211.2, does *not* include the words "danger of death." It was felt that these words were redundant in light of the definition of "serious physical injury." (See general definitions, § 3 supra.)

B. Derivation

This section is adapted from New York Revised Penal Law § 120.20.

C. Relationship to Existing Law

Under existing Oregon law, reckless conduct which creates a risk of death or serious bodily injury is treated on an *ad hoc* basis. Statutes of this nature now found in ORS chapters 163, 164 and 166 would be repealed either by § 96 or by other provisions of the proposed Code. (See ORS 163.310, 163.320, 163.340, 164.440, 164.530, 166.010, 166.110, 166.150, 166.320, 166.560, 166.630.) Statutes such as ORS 483.992, reckless driving, and 493.160, prohibited operation of aircraft, would be unaffected by the draft.

ARTICLE 12. KIDNAPPING AND RELATED OFFENSES

Section 97. Kidnapping and related offenses; definitions. As used in sections 98 to 101 of this Act, unless the context requires otherwise:

(1) "Without consent" means that the taking or confinement is accomplished by force, threat or deception, or, in the case of a person under 16 years of age or who is otherwise incapable of giving consent, that the taking or confinement is accomplished without the consent of his lawful custodian.

(2) "Lawful custodian" means a parent, guardian or other person responsible by authority of law for the care, custody or control of another.

(3) "Relative" means a parent, ancestor, brother, sister, uncle or aunt.

COMMENTARY

A. Summary

This section sets out definitions of three basic terms used in the article. The definition of the term "without consent" is vital to the basic crime of kidnapping. The phrase "or who is otherwise incapable of giving consent" is intended to focus upon the issue of whether the person taken or confined is unable to effectively consent because of mental incompetency or other disability. "Incapable" is used in its generally accepted sense.

Subsection (2) "lawful custodian" is necessary to both kidnapping and custodial interference. The definition permits a shorter statement of those crimes in §§ 98 and 100 infra.

Subsection (3) "relative" includes both parents and close relatives. The term is used in subsection (2) of § 98 in connection with the defense to kidnapping in the second degree.

B. Derivation

Subsection (1) is derived from the definition of the term appearing in New York Revised Penal Law § 135.00.

Subsection (2) is a new definition.

Subsection (3) is taken from New York Revised Penal Law § 135.00.

C. Relationship to Existing Law

The section would be new.

Section 98. Kidnapping in the second degree. (1) A person commits the crime of kidnapping in the second degree if, with intent to interfere substantially with another's personal liberty, and without consent or legal authority, he:

(a) Takes the person from one place to another; or

(b) Secretly confines the person in a place where he is not likely to be found.

(2) It is a defense to a prosecution under subsection (1) of this section if:

(a) The person taken or confined is under 16 years of age; and

(b) The defendant is a relative of that person; and

(c) His sole purpose is to assume control of that person.

(3) Kidnapping in the second degree is a Class B felony.

COMMENTARY

See commentary under § 99 infra.

Section 99. Kidnapping in the first degree. (1) A person commits the crime of kidnapping in the first degree if he violates section 98 of this Act with any of the following purposes:

(a) To compel any person to pay or deliver money or property as ransom; or

(b) To hold the victim as a shield or hostage; or

(c) To cause physical injury to the victim; or

(d) To terrorize the victim or another person.

(2) Kidnapping in the first degree is a Class A felony.

COMMENTARY TO SECTIONS 98 AND 99

A. Summary

Sections 98 and 99 provide for two ascending degrees of kidnapping, scaled according to the actor's purpose. Kidnapping in the second degree defines the basic offense of kidnapping. It consists of the abduction of a person with intent to prevent his liberation by either taking him from one place to another or by secreting or holding him in a place where he is unlikely to be found. The basic offense of kidnapping becomes more serious if the actor has a further purpose than that of the abduction itself. In the event that the abduction is accompanied by one or more of the following purposes, the offense is raised to the stature of kidnapping in the first degree:

(a) To compel any person to pay or deliver money or property as ransom; or

(b) To hold the victim as a shield or hostage; or

(c) To cause physical injury to the victim; or

(d) To terrorize the victim or another.

The rationale behind the provision for a higher degree of the crime is the increased danger to the victim when one or more of the above purposes is present. Therefore, the nature of the defendant's purpose is the determinative factor in assessing the degree of the offense and ultimately the range of the penalty to be imposed.

The purpose incorporated in almost every kidnapping statute is the intent to hold the victim for ransom or reward. The term reward has been interpreted by the courts to include *any* benefit or satisfaction received by the kidnapper. *Phillips v. State*, 267 P2d 167 (Okla Cr 1954); *State v. Berrey*, 200 Wash 495, 93 P2d 782 (1939). Because this term has such a vague meaning it has been omitted from subsection (1) of § 99.

Subsection (2) of § 98 has been included to cover the parental kidnapping cases. In general the courts have rather rigidly held to the rule that a parent who abducts his child is guilty of kidnapping (child-stealing) if a custody decree has been rendered, but not guilty in the absence of such a decree. A minority of state legislatures have either departed from this rule by exempting parents from the operation of the kidnapping statute or they have mitigated the severity of the criminal penalties under such statutes. The Federal Government also treats parental kidnappers as a preferred class to be dealt with less severly by providing for parental exemption in the Federal Kidnapping Act and by openly inviting parental kidnapping as a result of failure to give, as between states, absolute finality to a custody decree rendered by the child's state of domicile.

The exclusion in subsection (2) of § 98 applies only where the relative's *sole* purpose in abducting the child is to assume physical control over that child. If the relative abducts the child for any other purpose, *e.g.*, extortion, terrorization of the mother, perpetration of any crime upon the child, then the exclusion does not apply and the abductor may be found guilty of kidnapping. A relative might also be guilty of custodial interference under § 100 or 101.

The justification for the preferential treatment accorded relatives in § 98 (2) is the view that relatives who abduct a child solely to gain physical custody have a genuine interest or affection for the child and their conduct is neither as culpable as that of the stranger kidnapper nor are they as likely to endanger the child's welfare or sense of security as would the stranger kidnapper.

Current kidnapping statutes apply to abductions which are incidental to or an integral part of the commission of an independent crime such as robbery or rape where the victim is removed and confined for a given period to effectuate the criminal purpose. Where the detention period is brief there is no gen-

uine kidnapping. However, cases of this nature are sometimes prosecuted as kidnapping in order to secure the death penalty or life imprisonment for behavior that amounts in substance to rape or robbery in jurisdictions where these offenses are not subject to such penalties. *People v. Chessman*, 238 P2d 1001 (1951). The Model Penal Code and the New York Revised Penal Law have tried to exclude this type of case from first degree kidnapping by differentiating on the basis of the movement and duration of detention of the victim. The Model Penal Code provides for kidnapping only where the kidnapper removes the victim from his place of residence or business, or a substantial distance from the vicinity where he is found, or if the kidnapper unlawfully confines the victim for a substantial period in a place of isolation. New York has selected the arbitrary figure of twelve hours to designate the point in the course of a criminal project at which the abduction becomes a major offense in itself and not merely a facet of some other crime.

The proposed draft solves this problem by strictly limiting kidnapping in the first degree to only those instances where the actor's purpose in abducting falls within subsection (1) of § 99.

The terms "hostage" and "terrorize" are not defined in the draft, but brief comment about their use is in order. "Hostage" is used in ORS 163.635 which covers the crime of prisoners in the penitentiary or Oregon State Correctional Institution taking or holding hostages. Paragraph (b) of subsection (1) of § 99 is intended to include that type of conduct, as well as the situation in which the actor uses another person as a shield or for bargaining with police to facilitate the commission of another crime, to attempt to avoid arrest or to escape afterwards.

The term "hostage" as used in ORS 163.635 was recently construed by the Oregon Supreme Court in *State v. Gann*, 89 Or Adv Sh 853, — P2d — (1970), to mean "the forcible holding of prison employees by prison inmates for the purpose of exploiting the captives." At 873. The court also held that it is not necessary that the inmate, to violate the statute, communicate his purpose or intent in taking and holding captives. Although § 99 is not limited to the prison-hostage situation, for the purposes of the type of conduct now denounced by ORS 163.635 the term "hostage" is used in the broad sense of the word that was adopted by the majority of the court in *Gann*.

"Terrorize" is defined by *Webster's* as meaning "to fill with terror; to coerce, maintain power, etc. by inducing terror." The dictionary defines terror as meaning "intense fear . . . the quality of causing dread; terribleness." *Webster's New World Dictionary* (Coll ed 1968). The verb form of the word seems particularly apt for use in a kidnapping statute; and the American Law Institute indicates that the term was employed in the Model Penal Code to cover "vengeful or sadistic abductions accompanied by threats of torture, death or other severely frightening experience." [Commentary, Tent. Draft no. 11 at 18 (1960)]. Section 99 adopts this view and is concerned with the *intent* or *purpose* of the actor and not with the subjective effect of his actions upon either the person kidnapped or other persons.

B. Derivation

Section 98 is based on § 2211 of the Michigan Revised Criminal Code and § 135.00 of the New York Revised Penal Law. Section 212.1 of the Model Penal Code differs from the proposed draft and present Oregon law in that it defines only one offense of kidnapping. The proposed draft follows the approach of Michigan and New York in dividing the offense of kidnapping into two separate degrees, the higher degree being distinguished from the lower degree on the basis of the actor's purpose for the kidnapping.

Subsection (2) of § 98 is adapted from § 2211 of the Michigan Revised Criminal Code.

Section 99 is adapted from § 2210 of the Michigan Revised Criminal Code and § 135.25 of the New York Revised Penal Law. It differs from these codes in that the word "reward" has been deleted from paragraph (a), subsection (1).

C. Relationship to Existing Law

Kidnapping was defined at common law as the "forcible abduction or stealing away of a man, woman or child from his own country and sending him into another." Perkins, *Criminal Law* 134 (Foundation Press, 1957). The essential elements of the crime were (1) a false imprisonment and (2) the carrying of the imprisoned person out of the country. Kidnapping was a misdemeanor and was punishable by fine, imprisonment and pillory.

The goal in current legislative reform of the kidnapping area is to devise a proper system of grading to distinguish between behavior which is merely an unlawful restraint and behavior which constitutes the more terrifying abductions for ransom.

The proposed draft retains the existing Oregon system (ORS 163.610, 163.620) of dividing kidnapping into separate degrees. The kidnapping in the second degree section retains the basic provisions of ORS 163.610 and adds a new provision rendering the section inapplicable to the situation where a "relative" abducts a child less than sixteen years of age for the sole purpose of obtaining control of the child. At present, ORS 163.610 is applicable to both adults and children since it is an offense against the *person* unlawfully taken. ORS 163.640, the child-stealing statute, is concerned with the right of the parent to the custody of the child so that stealing the child is primarily an offense against the parent. *State v. Metcalf*, 129 Or 577, 278 P 974 (1929). The

separate offense of child-stealing covered by ORS 163.640 is incorporated into the offense of custodial interference and ORS 163.640 will be repealed.

ORS 163.620 sets out kidnapping for ransom or reward as a more serious form of kidnapping and imposes a greater penalty for it. Section 99 specifically sets out kidnapping for ransom and a number of other purposes as the most serious forms of kidnapping.

The proposed draft would eliminate ORS 163.630 and ORS 163.635 as separate offenses. ORS 163.630 is covered by the general conspiracy section (§ 59 supra) and is, therefore, unnecessary. ORS 163.635 is covered by subsection (1) of § 99.

NOTE ON UNLAWFUL IMPRISONMENT: Preliminary drafts included a section defining the crime of unlawful imprisonment which was designed to cover illegal detentions not serious enough to constitute kidnapping. The Commission deleted the section because the members were generally of the opinion that there are adequate civil remedies available in this area, and further, that if the detention or imprisonment were serious enough to warrant criminal sanctions the provisions of § 98 should apply.

Section 100. Custodial interference in the second degree. (1) A person commits the crime of custodial interference in the second degree if, knowing or having reason to know that he has no legal right to do so, he takes, entices or keeps a person from his lawful custodian with intent to hold him permanently or for a protracted period.

(2) Custodial interference in the second degree is a Class A misdemeanor.

COMMENTARY

See commentary under § 101 infra.

Section 101. Custodial interference in the first degree. (1) A person commits the crime of custodial interference in the first degree if he violates section 100 of this Act and:

(a) Causes the person taken, enticed or kept from his lawful custodian to be removed from the state; or

(b) Exposes that person to a substantial risk of illness or physical injury.

(2) Custodial interference in the first degree is a Class C felony.

COMMENTARY TO SECTIONS 100 AND 101

A. Summary

Sections 100 and 101 are intended to cover the "child-stealing" situations and to protect the rights of a person having legal custody of another against invasion by those having no right to custody. Section 100 is intended to cover the typical child-stealing situation committed by a relative. However, the language adopted by the Commission is broad enough to encompass any interference with lawful custody rights by a person having no legal right to do so if there is an intent by the person to hold the person taken for a protracted period. It should be noted, also, that the section is meant to cover not merely child-custody situations but incompetents or others as well, who are entrusted by authority of law to the custody of another person or institution.

Section 101 is an aggravated form of the basic offense, the aggravating factors being:

(1) The victim is taken out of the state; or

(2) The victim is exposed to a substantial risk of illness or physical injury.

Custodial interference in the second degree is classified as a misdemeanor and custodial inter-

ference in the first degree as a felony. Since extradition is not available in misdemeanor cases, subsection (1) of § 101 was included to provide a criminal sanction in cases where a person not having lawful custody removes the person taken or enticed from the state. In such situation, while a civil remedy does exist, it was considered inadequate due to the expense and difficulty involved in locating the fleeing offender. Custodial interference would, likewise, be raised a degree in cases where there is a substantial risk to the victim's health or safety. For example: the person taken is an infant who requires a special formula or medication and is deprived of it by the actions of the defendant.

B. Derivation

Section 100 is based on New York Revised Penal Law § 134.45; subsection (1)(a) of § 101 is new; subsection (1)(b) of § 101 is derived from § 135.50 of the New York Revised Penal Law.

C. Relationship to Existing Law

Child-stealing is proscribed by ORS 163.640. This statute seeks to protect the rights of the parent or guardian having legal custody of the child. In *State v. Metcalf*, 129 Or 577, 278 P 974 (1929), the court said that child-stealing was primarily an offense against the parents.

The proposed draft incorporates ORS 163.640 within the offense of custodial interference. The draft goes beyond the present statute by including not only children under the age of sixteen, but also any incompetent or committed person. The draft also would repeal ORS 165.245, substituting a child for infant committed to one's care.

A number of states have child-stealing statutes which prohibit the taking of a child under a specified age from the custody of his lawful guardian. The age specified varies: twelve years in Illinois; fourteen years in Indiana and New Jersey; sixteen years in New York and Oregon; eighteen years under the Model Penal Code.

These statutes are designed to protect the rights of the person or institution having legal custody of the child against invasion by those having no right to custody. The intervention of the courts is necessary to adequately safeguard the child's welfare and sense of security. Without the inhibiting influence of a penal statute prohibiting child-stealing, the law of custody could be reduced to a "seize and run" policy since the only deterrent to such conduct would be a contempt of court proceeding.

The Commission believes the courts have a duty to protect the interests and welfare of the child in custody disputes and in cases where a removal from custody adversely affects the child's welfare. The court must have the power to compel adherence to its decisions. Since custody orders are often unenforceable as a practical matter once the offending party and the child leave the state, the criminal process should be available as a means of regaining custody and securing enforcement of the original custody decree in aggravated cases.

Section 102. Coercion. (1) A person commits the crime of coercion when he compels or induces another person to engage in conduct from which he has a legal right to abstain, or to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will:

(a) Cause physical injury to some person; or

(b) Cause damage to property; or

(c) Engage in other conduct constituting a crime; or

(d) Accuse some person of a crime or cause criminal charges to be instituted against him; or

(e) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

(f) Cause or continue a strike, boycott or other collective action injurious to some person's business, except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act; or

(g) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(h) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or

(i) Inflict any other harm which would not benefit the actor.

(2) Coercion is a Class C felony.

COMMENTARY

See commentary under § 103 infra.

Section 103. Coercion; defense. In any prosecution for coercion committed by instilling in the victim a fear that he or another person would be charged with a crime, it is a defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of the threatened charge.

COMMENTARY TO SECTIONS 102 AND 103

A. Summary

Coercion consists of compelling a person by intimidation to commit or refrain from committing an act. *Coercion* is separated from the offense of theft by extortion. Extortion is basically a form of coercion in which the act compelled is the payment of money. The proposed § 102 defines coercion in terms similar to theft by extortion and the kinds of threats which form a basis for the offense of coercion are equated with those contained in § 127 infra. (See the commentary therein regarding the kinds of threats which comprise the offense of theft by extortion.)

Coercion as defined by the proposed draft requires successful intimidation; the victim must actually act or refrain from acting. A mere threat or attempt failing of its coercive purpose would constitute attempted coercion.

The proposed draft is based on the premise that the forceful compulsion by means of a threat to act or forbear from acting, ought to be recognized as a crime even though the offense committed cannot be measured by monetary standard. The problem arises in coercion as to how to measure the gravity of the actor's misconduct since the act sought to be compelled may be of slight significance such as threatening to call the police unless the victim ceases seeing the defendant's daughter or the act may be as serious as attempting to compel the victim to leave town. The Model Penal Code, § 212.5(2), attempts to measure the gravity of the defendant's misconduct on the basis of whether the threat is to commit a felony or the actor's purpose is felonious. New York Revised Penal Law § 135.65 raises the offense a degree on the basis of (1) the kind of threat specified and (2) the kind of conduct which he compels the victim to perform.

The proposed draft adopts neither of these measures but defines only one degree of coercion. This affords some protection against such threats but avoids imposing additional penalties on the basis of artificial distinctions. This is in accord with the committee commentary to the Michigan Revised Criminal Code which states:

> "The committee is not persuaded that the utility in subjecting some persons who commit coercion to extended prison terms outweighs the difficulties inherent in classifying the particular threats made." (§ 2125)

Section 103 is the counterpart of the defense to theft by extortion. (See Article 14 infra.) This section provides a defense to a defendant charged with coercion committed by one particular kind of threat, namely, a threat to "accuse some person of a crime or cause criminal charges to be instituted against him," and where the defendant's coercive action is undoubtedly an attempt to compel or induce the victim to take reasonable steps to make good the

wrong perpetrated by him. As an example, a defendant accused of coercion for having compelled a youth, under threat of charging him with criminal mischief, to paint defendant's fence which the youth had marked up in an act of vandalism would have this defense available to him.

B. Derivation

Section 102 of the proposed draft is adopted from § 135.60 of the New York Revised Penal Law and § 212.5 (1) of the Model Penal Code. Section 103 is adopted from § 135.75 of the New York Revised Penal Law.

C. Relationship to Existing Law

Under present Oregon law "any person . . . who threatens any injury to the person or property of another . . . or threatens to accuse another of any crime with intent thereby to extort any pecuniary advantage or property from him, or with intent to compel him to do any act against his will, shall be punished . . . ." (ORS 163.480). The crime is committed when the threat is made and there is no requirement that property be obtained. The proposed draft follows the present law but separates the offenses of theft by extortion and coercion.

ARTICLE 13. SEXUAL OFFENSES

Section 104. Sexual offenses; definitions. As used in this Act, unless the context requires otherwise:

(1) "Deviate sexual intercourse" means sexual conduct between persons not married to each other consisting of contact between the sex organs of one person and the mouth or anus of another.

(2) "Female" means a female person who is not married to the actor. Spouses living apart under a decree of separation from bed and board are not married to one another for purposes of this definition.

(3) "Forcible compulsion" means physical force that overcomes earnest resistance; or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person, or in fear that he or another person will immediately be kidnapped.

(4) "Mentally defective" means that a person suffers from a mental disease or defect that renders him incapable of appraising the nature of his conduct.

(5) "Mentally incapacitated" means that a person is rendered incapable of appraising or controlling his conduct at the time of the alleged offense because of the influence of a narcotic or other intoxicating substance administered to him without his consent or because of any other act committed upon him without his consent.

(6) "Physically helpless" means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(7) "Sexual contact" means any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of arousing or gratifying the sexual desire of either party.

(8) "Sexual intercourse" has its ordinary meaning and occurs upon any penetration, however slight; emission is not required.

wrong perpetrated by him. As an example, a defendant accused of coercion for having compelled a youth, under threat of charging him with criminal mischief, to paint defendant's fence which the youth had marked up in an act of vandalism would have this defense available to him.

B. Derivation

Section 102 of the proposed draft is adopted from § 135.60 of the New York Revised Penal Law and § 212.5 (1) of the Model Penal Code. Section 103 is adopted from § 135.75 of the New York Revised Penal Law.

C. Relationship to Existing Law

Under present Oregon law "any person . . . who threatens any injury to the person or property of another . . . or threatens to accuse another of any crime with intent thereby to extort any pecuniary advantage or property from him, or with intent to compel him to do any act against his will, shall be punished . . . ." (ORS 163.480). The crime is committed when the threat is made and there is no requirement that property be obtained. The proposed draft follows the present law but separates the offenses of theft by extortion and coercion.

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(2) "Female" means a female person who is not married to the actor. Spouses living apart under a decree of separation from bed and board are not married to one another for purposes of this definition.

(3) "Forcible compulsion" means physical force that overcomes earnest resistance; or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person, or in fear that he or another person will immediately be kidnapped.

(4) "Mentally defective" means that a person suffers from a mental disease or defect that renders him incapable of appraising the nature of his conduct.

(5) "Mentally incapacitated" means that a person is rendered incapable of appraising or controlling his conduct at the time of the alleged offense because of the influence of a narcotic or other intoxicating substance administered to him without his consent or because of any other act committed upon him without his consent.

(6) "Physically helpless" means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(7) "Sexual contact" means any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of arousing or gratifying the sexual desire of either party.

(8) "Sexual intercourse" has its ordinary meaning and occurs upon any penetration, however slight; emission is not required.

COMMENTARY

This section contains definitions for eight terms that are used in the draft in later sections. Each will be discussed further within the context of the other sections.

Subsection (1) is designed to remove any uncertainty as to what conduct falls within the meaning of "deviate sexual intercourse." It includes all acts of anal or oral intercourse (fellatio, cunnilingus and sodomy) between human beings but does not include sexual conduct between married persons or intercourse with animals (bestiality) or with dead bodies (necrophilia). Source of this definition is Michigan Revised Criminal Code § 2301 (b).

Subsection (2) defines "female" as a female person who is not married to the actor. This excludes sexual activity between husband and wife from this article. If there is a decree of separation from bed and board, a couple is considered not married for the purposes of the definition. The matter of sexual conduct between two persons living together as husband and wife without benefit of legal marriage is not covered by the definition but is dealt with as an affirmative defense under § 107 infra. The definition is drawn from Michigan Revised Criminal Code § 2301 (d).

"Forcible compulsion" is defined in subsection (3) to include threats that place the victim in fear of immediate death, serious physical injury or kidnapping, not only of himself, but also of another person, *e.g.*, a woman's child or her escort. There is no requirement that the victim have "reasonable cause to believe" that the actor will carry out his threat. Force or duress falling short of physical force sufficient to overcome "earnest resistance" or severe intimidation involving a threat of serious injury or kidnapping, does not render the victim's submission nonconsensual for purposes of prosecution for a sex crime based upon forcible compulsion. Thus a person who submits to a sexual act because of, for example, a threat made by the actor to expose a theft the victim had committed, is not forcibly compelled within the meaning of this definition. The definition is derived from Michigan Revised Criminal Code § 2301 (h).

In subsection (4) the term "mentally defective" states in the language of contemporary psychiatry when a person is, by reason of mental disease or defect, incapable of consenting to a sexual act. The definition is taken from Michigan Revised Criminal Code § 2301 (e).

Subsection (5) defines a person as being "mentally incapacitated" when he is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or other intoxicating substance administered to him without his consent, or to any act committed upon him without his consent. It is not required that the defendant administer the substance to the victim but only that it be administered without the victim's consent. If the victim is rendered completely unconscious, he then falls within the definition of "physically helpless" in subsection (6). Source of this definition is Michigan Revised Criminal Code § 2301 (f).

"Physically helpless" is defined in subsection (6) to include a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act. Examples of persons covered by the definition would be one who is in a state of sleep as a result of drugs or one who is a total paralytic. The definition is the same as Michigan Revised Criminal Code § 2301 (g).

The term "sexual contact" defined in subsection (7) applies to acts of heterosexual or homosexual genital manipulation, and to acts such as the nonconsensual fondling of a woman's breast. The term does not include the inadvertent touching of the intimate parts of another person. The definition includes the phrase "for the purpose of arousing or gratifying the sexual desire of either party." Under this definition, for the crime of sexual abuse the prosecution will need to prove (1) the touching and (2) that the touching was for the purpose of gratifying sexual desire. The source of the definition is Michigan Revised Criminal Code § 2301 (c).

Subsection (8) defines the term "sexual intercourse" as having its ordinary meaning. Thus it may occur without orgasm or complete penetration of the penis into the vagina. Emission is not required. The definition is from Michigan Revised Criminal Code § 2301 (a).

Section 105. Lack of consent. A person is considered incapable of consenting to a sexual act if he is:

(1) Under 18 years of age; or

(2) Mentally defective; or

(3) Mentally incapacitated; or

(4) Physically helpless.

COMMENTARY

A. Summary

Lack of consent is the common denominator for all the crimes proscribed in this article. This section is intended to define the limits of legal incapacity to consent so as to eliminate any efforts to make the term control in instances other than those specified.

Generally speaking, a sexual act is committed upon a person "without his consent" in the following instances: (1) when the victim is forcibly compelled to submit; (2) when the victim is considered to be incapable of consenting as a matter of law; and (3) when the victim does not acquiesce in the actor's conduct.

A person is under 18 years of age if he has not reached his 18th birthday, that is, up to and including the day before his 18th birthday. This age sets the basic dividing line between criminal and noncriminal conduct of both a heterosexual and a homosexual character.

B. Derivation

This section is adapted from § 130.05 of the New York Revised Penal Law. Subsection (2) of that section has not been incorporated into this draft because in the instances other than where the victim is considered incapable of giving consent the question of lack of consent would be determined by the trier of fact.

C. Relationship to Existing Law

The effect of the draft is to provide that consent by a person deemed incapable of consenting to a sexual act would not be a defense to a prosecution for either rape, sodomy, sexual abuse or sexual misconduct, whereas consent by a person not deemed incapable of consenting to a sexual act would be a good defense to a prosecution for those crimes. The victim's nonconsent, either in law or in fact, is presently an essential element of the crime of rape. Rape is defined in ORS 163.210 as follows:

> "Any person over the age of 16 years who carnally knows any female child under the age of 16 years, or any person who forcibly ravishes any female, is guilty of rape . . ."

This statute encompasses two types of carnal knowledge as rape: (1) forcible rape and (2) statutory rape.

Lack of consent is an essential element of the crime of forcible rape. The Oregon Court has defined the crime as follows:

> "To constitute rape the act must have been committed forcibly and without the consent of the woman." *State v. Gilson*, 113 Or 202, 206, 232 P 621 (1925); *State v. Risen*, 192 Or 557, 560, 235 P2d 764 (1951).

In statutory rape the consent of the female under the age denominated in the statute is deemed not to be consent and therefore lack of consent is presumed in law. *State v. Lee*, 33 Or 506, 510, 56 P 415 (1899), states:

> "The law, therefore, conclusively presumes that a female under the prohibited age is incapable of yielding her consent, and sexual intercourse with her before she reaches the period of mental development is denominated statutory rape, in which actual force is not necessarily an ingredient, and, if alleged in the indictment, may be treated as surplusage."

The wisdom of the legislative determination of 16 as the age of consent was discussed in *State v. Sargent*, 32 Or 110, 115, 49 P 889 (1897):

> "The law has determined that a female child under the age denominated is incapable of consenting. It is as though she had no mind upon the subject, no volition pertaining to it. There is a period in a child's life when in reality it is incapable of consenting, and the legislature has simply fixed a time, arbitrarily, as it may be, but nevertheless wisely, when a girl may be considered to have arrived at an age of sufficient discretion, and fully competent, to give her consent to an act which is a palpable wrong, both in morals and in law. Under these conditions, while a girl may give her formal consent, yet in law she gives none. The evidence of such consent is withheld, and rendered wholly incompetent for the establishment of such a fact, as in law the fact itself does not exist."

Oregon has thus expressly recognized the limitation placed upon consent on the basis of youth. Other sex offenses involving youthful victims are discussed in the commentary to § 117 infra.

In addition to recognizing the incapacity of youth to consent, the proposed draft also makes any person who suffers from a mental disease or defect which renders him "incapable of appraising the nature of his conduct," (§ 104 (4)), incapable of yielding consent. Also, any person who is "rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent or to any other act committed upon him without his consent," (§ 104 (5)), is deemed incapable of consenting. Finally, the draft makes any person who is "unconscious or for any other reason physically unable to communicate his unwillingness to an act," (§ 104 (6)), incapable of consenting. Although the terms which represent these mental states, "mentally defective," "mentally incapacitated" and "physically helpless" are new to the statutory phraseology of Oregon, the concepts which they describe are not

foreign to factors which the law has long recognized as affecting one's capacity to consent.

The inability of the mentally defective to consent was impliedly pointed out in *State v. Lee*, supra at 509, where the court said:

> "The rule was early established . . . that the seeming acquiescence of a female of *feeble mind* . . . to an act of sexual intercourse afforded no defense to an action of rape, because such female, being ignorant of the nature of the act, was incapable of yielding consent, from a *defect of understanding*." (Emphasis supplied).

Under the draft, if this "defect of understanding" renders a person incapable of appraising the nature of his conduct, he is in law unable to effectively consent.

The mental capacity required by law to classify a person as "feeble minded" was discussed in the annotation at 93 *ALR* 918. Under the cases there cited the rule for feeble minded persons was either the lack of mental capacity to know the right or wrong of the sexual conduct, *State v. Haner*, 186 Iowa 1259, 173 NW 225 (1919), or so defective as to lack power to give or withhold consent, *Lee v. State*, 43 Tex Crim Rep 285, 64 SW 1047 (1901). The rule stated in the *Haner* decision closely approximates the rule stated in this draft, whereas the *Lee* rule would in fact abolish the legal conclusion of lack of consent of a mental defective by requiring that no power to consent be present. Such a rule makes the statute superfluous.

The rape of a woman who is mentally incapacitated or physically helpless was also recognized at common law. 75 *CJS*, Rape, § 7, at 468 states: "It [rape] may be committed on a woman who is insane or idiotic, drugged, intoxicated or asleep." Under the draft being drugged or intoxicated "without his consent" renders a person "mentally incapacitated," whereas, being asleep renders one "physically helpless."

The section also allows consent as a defense to a prosecution for sodomy. ORS 167.040 presently defines the crime as follows:

> "Any person who commits sodomy or the crime against nature, or any act or practice of sexual perversity, either with mankind or beast, or sustains osculatory relations with the private parts of any person, or permits such relations to be sustained with his private parts, shall be punished upon conviction."

The statute does not require the use of force, nor does it designate an age limitation below which consent is presumed. The absence of such requirements substantiate the conclusion of *State v. Stanley*, 240 Or 310, 312, 401 P2d 30 (1965), that presently "one who consents that an act of sodomy be committed upon his person, if capable of consenting, is an accomplice . . ."

Clearly, if the consenting party is guilty as an accomplice, his consent is no defense to the perpetrator of the act. The proposed draft would alter this by allowing the consent of a party who is capable of consenting to be a good defense to the prosecution.

Section 106. Ignorance or mistake as a defense. (1) In any prosecution under sections 109 to 118 of this Act in which the criminality of conduct depends on a child's being under the age of 12, it is no defense that the defendant did not know the child's age or that he reasonably believed the child to be older than the age of 12.

(2) When criminality depends on the child's being under a specified age other than 12, it is an affirmative defense for the defendant to prove that he reasonably believed the child to be above the specified age at the time of the alleged offense.

(3) In any prosecution under sections 109 to 118 of this Act in which the victim's lack of consent is based solely upon his incapacity to consent because he is mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense for the defendant to prove that at the time of the alleged offense he did not know of the facts or conditions responsible for the victim's incapacity to consent.

COMMENTARY

A. Summary

(1) Mistake as to age. Under present law, it is generally held that a reasonable mistake as to the age of the victim does not exculpate or mitigate the offense. This position has in recent years been criticized by legal commentators in cases where the victim is over a specified minimum age, such as 10 years of age. As the age of the victim increases, the sexual act begins to lose its abnormality and physical danger to the victim, and bona fide mistakes can be made more easily by men who are not essentially dangerous where the victim is physically more developed. A person who engages in a sexual act with a consenting adolescent, believing honestly and reasonably that such adolescent was of sufficient age to exercise discretion and judgment in the matter may be violating social conventions but such conduct does not betoken any abnormality nor does it exhibit a dangerous propensity to victimize the immature. Ploscowe, *Sex and the Law*, 184-185 (1951). Imposing absolute liability on such an offender would have little deterrent, much less rehabilitative effect. In any event the trier of fact would make the ultimate decision as to the reasonableness of the offender's belief. (See Model Penal Code, Tent. Draft No. 4, at 253).

Where the victim is less than 12 years of age at the time of the act giving rise to the charge, no defense is allowed since:

(a) A child of such age would be considerably below the age of sexual pursuit by normal males;

(b) Sexual conduct with a child below this age can be extremely dangerous, both physically and mentally to the child;

(c) In such cases there is high probability that the actor has some mental aberration.

(2) Mistake as to consent. Lack of knowledge of the facts or conditions responsible for the victim's incapacity to consent is a defense. There is no requirement that the mistake be "reasonable." Since in most cases the only source of information about the mistake will be the defendant himself, this means that he will need to take the stand on his own behalf to prove the defense. At this point the jury should be competent to judge his credibility. The defendant is given the opportunity to exculpate himself but the state is not given the difficult burden of proving culpable knowledge. A defense under either subsection (2) or subsection (3) is an "affirmative defense," which, as defined in § 4 supra, requires the defendant to prove the defense by a preponderance of the evidence.

B. Derivation

Subsections (1) and (2) are adapted from Model Penal Code § 213.6 (1).

Subsection (3) is derived from New York Revised Penal Law § 130.10.

C. Relationship to Existing Law

Section 106 provides for the limited defense of mistake as to age. Until the decision in *People v. Hernandez*, 61 Cal 2d 529, 39 Cal Rptr 361, 393 P2d 673 (1964), it was the universally accepted view that the defendant's knowledge of the age of the woman was not an essential element of the crime of statutory rape. The rule that knowledge of the victim's age is not an essential element of the crime of statutory rape and therefore justifiable ignorance of age is not a defense in a prosecution for that crime is apparently an exception to the general rule that guilt attaches only where the accused intended to do the prohibited act.

The courts have justified or explained this divergence in various ways. Where adultery or fornication are crimes themselves, the conviction of the more serious offense of statutory rape may be grounded on the doctrine of transferred intent. However, to the extent that prosecutions for adultery and fornication have become dead letters, it may be somewhat sophisticated to base a conviction of a serious crime upon an intent transferred from the intention to commit such "crimes." The result has also been justified on grounds of social policy, *i.e.*, the interest of society in protecting children. This argument loses much of its effectiveness where the age of consent has been raised substantially.

The rule that reasonable mistake as to the age of the victim of statutory rape is not a defense to a prosecution for that crime has been attacked by scholars and rejected in other countries. See: Jerome Hall, *General Principles of Criminal Law*, 2d ed 372-375; Comment: Forcible and Statutory Rape: An Exploration of the Objectives of Consent Standards, 62 *Yale L J* 55; Myers, Reasonable Mistake of Age: A Needed Defense to Statutory Rape, 64 *Mich L Rev* 105.

Those who have argued against the rule that knowledge of the girl's age is irrelevant have pointed out that no serious social policy of protecting the sexually immature and inexperienced female is likely to be involved in any case where the defendant can make out a reasonable case for his belief that the girl was above the age of consent, and that to apply the rule strictly may lead to convictions of persons who are themselves the victims of imposture by fully experienced and aware, though young, girls, who under our social and sexual mores are permitted and encouraged to go into the world as women and even to marry.

The *Hernandez* court ruled that participation in a mutual act of sexual intercourse by a defendant who believed his partner to be beyond the age of consent,

with reasonable grounds for such belief, necessarily revealed a lack of criminal intent, since in such circumstances he has not consciously taken any risk but has subjectively eliminated the risk by satisfying himself by reasonable evidence that the crime would not be committed.

Although the great weight of authority before *Hernandez* was to disallow the defense of reasonable mistake of age in a prosecution for statutory rape, Oregon has never had the opportunity to rule precisely on the point. Thus the proposed draft allowing the defense does not disrupt Oregon case law and provides a clear legislative showing of the intent to allow such a defense. See 44 *Or L Rev* 243 for possibility of following the *Hernandez* decision under the present Oregon statutory scheme.

Section 106 also covers *mistake as to consent.* There are no reported cases in Oregon ruling on the availability of such a defense in prosecutions for rape; however, it would appear that if there was in fact no consent, the crime would be committed. Also, there are no reported cases on the availability of such a defense in prosecutions for sodomy; however, since consent is no defense to sodomy, it would appear that mistake as to consent would not provide a defense.

Corroboration: Seduction statutes usually, rape statutes occasionally and sodomy and indecent exposure cases hardly ever, require that the complainant's testimony be corroborated. If such corroboration defense is to be allowed at all, there is validity for applying it to all sex offenses. *Wigmore* disapproves of corroboration requirements in general on the ground that they are unnecessary because (1) jurors are naturally suspicious of such complaints and (2) the court has the power to set aside a verdict for insufficient evidence. 7 *Wigmore Evidence* § 2061 (3d ed 1940); 60 *ALR* 1124; 62 *Yale L J* 55 (1952).

While a general caution against convicting on the bare testimony of the complainant has validity, it would seem that the emphasis would be better placed on the credibility of the complainant than on the mere weight of the evidence. If the testimony of the complainant is credible, it should be sufficient. See 18 *Or L Rev* 264 (1939). The other alternative would be to require corroboration as to every element of the crime, since there is no reason to believe that the complainant is more likely to lie or deceive herself on one point rather than another. The draft contains no corroboration requirement.

Section 107. Relationship of parties as a defense. In any prosecution under paragraph (a) of subsection (1) of section 111 or paragraph (a) of subsection (1) of section 114 of this Act in which the victim is 18 years of age or older, it is an affirmative defense for the defendant to prove that he and the victim were, at the time of the alleged offense, living together by mutual consent in a relationship of cohabitation as man and wife, regardless of the legal status of their relationship.

COMMENTARY

The foundation of this section was recognized in *State v. Blackwell*, 241 Or 528, 407 P2d 617 (1965), wherein it was stated:

> "We will assume that such statute [ORS 163.210] incorporates the common law, i.e., a husband cannot be guilty of rape by personally forcing himself upon his wife . . . We hold, however, that he can be guilty of rape by forcing his wife to have intercourse with another . . . The decisions from other jurisdictions so hold and we stated our accord with such decisions by way of dictum in State v. Olsen, 138 Or 666, 7 P2d 799 (1932).
>
> "The broad principle is that one can be indicted for an act and convicted upon proof that the defendant did not personally do the act but was the prime mover in having another, voluntarily or involuntarily, perform the actual act." At 529-531.

Section 107 changes the common law to the extent that it allows the spouse relationship to protect parties who are not in fact legally married if they are living by mutual consent as man and wife, while it denies the relationship as a defense to parties living apart under a decree of judicial separation. (See § 104 (2) supra).

Allowing the defense to a prosecution for sodomy would limit the present statute. ORS 167.040 condemns "any person" who performs or willingly sustains any of the three types of conduct proscribed by the statute. There is no reference to private consensual acts between spouses as being outside the environs of the statute; however, it seems clear that private marital relations are protected from regulation by the state through the use of a criminal penalty under the decision in *Griswold v. Conn.*, 381 US 479.

The section is intended to provide a defense if the

defendant is charged with *personally* committing the act, but is not meant to change the rule in the *Blackwell* case that a husband can be guilty of rape by forcing his wife to have intercourse with another. A husband or a man cohabiting with a woman in a "husband and wife" relationship can be criminally liable for the conduct of another, and, consequently, guilty of rape or other sexual offense if he aids or abets another person in committing the offense. (See §§ 12 to 15 supra). Section 107 would repeal ORS 167.015, lewd cohabitation.

A defense under § 107 is an "affirmative defense," which, as defined in the proposed Code, requires the defendant to prove the defense by a preponderance of the evidence. The defense would be available only in "forcible" rape or sodomy cases in which the victim of the alleged offense was 18 years of age or older.

Section 108. Defendant's age as a defense. In any prosecution under sections 109, 110, 112 or 113 of this Act in which the victim's lack of consent was due solely to incapacity to consent by reason of being less than a specified age, it is a defense that the actor was less than three years older than the victim at the time of the alleged offense.

COMMENTARY

A. Summary

This section allows the age of the defendant to be a defense to a prosecution for certain sex offenses in which the victim's lack of consent *was due solely to incapacity by reason of being less than a specified age*. The defense would apply to the following:

Rape in the third degree (§ 109 infra). An example of the application of the defense would be in the case of a 15 year old female victim and a 17 year old defendant.

Rape in the second degree (§ 110 infra). For instance, it would be a good defense to such a charge if the female victim were 13½ and the defendant were 16.

Sodomy in the third degree (§ 112 infra) and Sodomy in the second degree (§ 113 infra). The same principles that allow the defense to second and third degree rape would apply.

Note that the defense of age is *not available* in any prosecution for first degree rape or first degree sodomy (§§ 111, 114 infra) or for a prosecution brought under paragraph (a) of subsection (1) of § 110 or paragraph (a) of subsection (1) of § 113 where the basis for the second degree offense is not the victim's age, but rather, incapacity by reason of mental defect, mental incapacitation or physical helplessness. Nor would the defense be available in a prosecution for contributing to the sexual delinquency of a minor (§ 117 infra) or for sexual misconduct (§ 118 infra).

Contrary to §§ 107 and 108 in which the burden of proof is placed on the defendant to establish reasonable mistake or relationship of the parties by a preponderance of the evidence, this section is cast in terms that would require the defendant to raise the defense and go forward with the evidence, but the burden of proof would not shift from the state.

B. Derivation

This section is new. It embodies the same rationale as the Model Penal Code (§§ 213.3, 213.4), New York Revised Penal Law (§§ 130.25, 130.30, 130.40, 130.45) and Michigan Revised Criminal Code (§§ 2311, 2312, 2316, 2317, 2322), all of which require the defendant to be of a specified age in relation to the age of the victim. However, the technique of casting the defendant's age in terms of a defense, instead of as part of the definitive statement of the crime itself, permits a simpler format and should leave no doubt that the defendant's age is not intended to be an element of the crime to be pleaded by the state.

The purpose of the section is to attempt to avoid punishing adolescent sexual experimentation as a felony where the actor is less than three years older than the minor and where there is no forcible compulsion or mental or physical incapacity involved.

C. Relationship to Existing Law

Under Oregon case law it is not necessary in a prosecution for statutory rape to allege the age of the defendant as being over 16 years because it is considered as being a matter of defense. *State v. Knighten*, 39 Or 63, 64 P 866 (1900); *State v. Nesmith*, 136 Or 593, 330 P 356 (1931); *State v. Cole*, 244 Or 455, 418 P2d 844 (1966).

Sexual Impotency. An area not considered in the proposed draft is the defense of impotency. 75 *CJS*, Rape, § 6, 466-67, states:

"The crime of rape can be committed directly

only by a male person of sufficient mental capacity to entertain a criminal intent and physically capable of committing the offense.

"Capacity to commit the crime does not exist until a male has reached the age of puberty and who is capable of committing rape."

The general presumptions regarding the male's capacity to commit the crime are stated in 26 ALR 772 as follows:

"Persons over the age of 14 years are presumed prima facie physically capable of the crime of rape. But the presumption may be rebutted . . . the defendant may introduce evidence relevant to the issue of his physical capacity to accomplish the offense, the sufficiency of proof to that end being ordinarily a jury question."

The same annotation then states the two views as to the conclusiveness of the presumption concerning males *under* the age of 14. At 774 and 776 it is stated:

"The majority of American jurisdictions apply the rule that male infants under the age of 14 are prima facie presumed physically incapable of committing the crime of rape, but that presumption may be rebutted by proof that the infant has in fact arrived at puberty . . . England and several of the American states still adhere strictly to the common law rule that an infant under the age of 14 years is conclusively presumed to be physically incapable of committing rape."

Oregon follows the doctrine of conclusive presumption of incapacity of males under the age of 14. In *State v. Knighten*, 39 Or 63, 64 P 866 (1900), the court said:

"The statute provides that 'if any person over the age of sixteen years shall carnally know any female child under the age of sixteen years' etc., he shall be deemed guilty of rape . . . as we understand the statute, its only effect is to raise the age of capacity of the male from fourteen, as it was at common law, to sixteen years. At common law, a boy under fourteen years of age was conclusively presumed to be physically incapable of committing the crime of rape, but it was never held that it was necessary to allege the age of the defendant in an indictment for that crime. . . . Nor is it necessary under the statute. If the defendant . . . is below 14 it is simply a matter of defense."

Section 109. Rape in the third degree. (1) A male commits the crime of rape in the third degree if he has sexual intercourse with a female under 16 years of age.

(2) Rape in the third degree is a Class C felony.

COMMENTARY

See commentary under § 111 infra.

Section 110. Rape in the second degree. (1) A male who has sexual intercourse with a female commits the crime of rape in the second degree if:

(a) The female is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness; or

(b) The female is under 14 years of age.

(2) Rape in the second degree is a Class B felony.

COMMENTARY

See commentary under § 111 infra.

Section 111. Rape in the first degree. (1) A person who has sexual intercourse with a female commits the crime of rape in the first degree if:

(a) The female is subjected to forcible compulsion by the male; or

(b) The female is under 12 years of age; or

(c) The female is under 16 years of age and is the male's sister, of the whole or half blood, his daughter or his wife's daughter.

(2) Rape in the first degree is a Class A felony.

COMMENTARY TO SECTIONS 109 TO 111

A. Summary

Rape has been a serious offense since early Biblical days. The difficulties inherent in formulating an adequate and fair statute are best summed up in the comments to § 207.4 of the Model Penal Code:

> "The chief problems are (i) to decide and express what shall be the minimum amount of coercion or deception to be included here, i.e., drawing the line between rape-seduction, on the one hand, and illicit intercourse on the other; and (ii) to devise a grading system that distributes the entire group of offenses rationally over the range of available punishments. The latter problem is especially important because: (1) the upper ranges of punishment include life imprisonment and even death; (2) the offense is typically committed in privacy, so that conviction often rests on little more than the testimony of the complainant; (3) the central issue is likely to be the question of consent on the part of the female, a subtle psychological problem in view of social and religious pressures upon the woman to conceive of herself as victim rather than collaborator; and (4) the offender's threat to society is difficult to evaluate." (Tent. Draft No. 4, 241).

A few states, including Oregon, define only one category of the offense. A number of states divide rape into two classes, the lower class covering intercourse with a female below a specified age and the higher class covering rape by force without contest and consensual relations with very young girls. The majority of states have adopted a triple classification scheme with the additional category covering specific age groups, fundamental forms of deception, threats, incapacitation, etc.

The proposed draft contains three ascending degrees of rape. The substantive offense of rape remains unchanged but the three degree breakdown allows for a more equitable and rational penalty structure; the rationale being that severe punishments should be reserved for situations which involve brutality, threaten public security or manifest dangerous mental aberrations, and that lesser punishments should be imposed where desirable or safe. This is in accord with the present judicial tendency to mitigate the harshness of existing rape statutes.

The basic offense of rape is differentiated in three degrees on the basis of the following factors:

(1) The age of the victim;

(2) The mental or physical condition of the victim;

(3) The use of force or threats.

With respect to age, the degree of the crime increases in proportion to the youthfulness of the victim. The following age scheme is applicable to both the rape and sodomy sections:

Offense		*Age of Victim*
3rd degree	(rape (sodomy	Under 16
2nd degree	(rape (sodomy	Under 14
1st degree	(rape (sodomy	Under 12

Rape in the third degree is committed if a male has sexual intercourse with a female less than 16 years of age. The age difference is substantial enough to designate intercourse of this nature as rape. If the female is less than 14 years of age it is rape in the second degree, and if the female is less than 12 years of age the offense is raised to rape in the first degree.

Rape in the second degree also covers the situations where the female is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness. The definitions of these terms, contained in § 104 of the draft are directly incorporated into § 110. "Lack of capacity to appraise the nature of her conduct" does not include appraisal involving value judgments or consideration of remote consequences of the immediate act. It is a defense for the actor to prove that at the time he engaged in the sexual intercourse he did not know of the facts or conditions responsible for the victim's incapacity to consent. (See § 106 supra).

Both the New York and Michigan codes differentiate between incapacity to consent by reason of

mental defect and mental incapacitation and incapacity to consent by reason of physical helplessness. There seems to be no logical reason for such a distinction and the disparity in sentencing which could result from such a distinction would be unjustified and indefensible. The element of victimization present in such cases justifies raising this offense to rape in the second degree.

Paragraph (b) of subsection (1) of section 110 covers rape of a female less than 14 years of age. It is a defense to a charge of rape in the second degree for the actor to prove that he did not know the female was less than 14 years of age at the time the offense was committed.

Rape in the first degree is limited to the following forms of rape:

(1) Where the female is subjected to forcible compulsion by the male.

(2) Where the female is less than 12 years of age.

(3) Where the female is less than 16 and is the male's sister, of the whole or half blood, or his daughter or stepdaughter.

In the above situations the conduct involved is so dangerous to the victim that it deserves the most severe penalty. The definition of forcible compulsion (§ 104 (3)) is directly incorporated into this section. No defense of mistake of age is allowed where the victim is less than 12 years of age.

The substantive offense of rape is defined in terms of male aggression. While some states define rape to include female aggression, it seems more realistic to treat such conduct as sexual abuse rather than rape. This does not preclude liability of a female who aids a male to rape a female.

Seduction has been eliminated as a separate offense under the proposed draft. The following comments to § 207.4 of the Model Penal Code sum up the prevailing arguments against making seduction a criminal offense:

> "Whatever may have been the case in preceding generations, the present generation would hardly be unanimous in the view that intercourse is a favor granted by the female only in exchange for a *quid pro quo*. A substantial body of present opinion would regard intercourse as a matter of mutual gratification, and aggression as much of the female's *libido* as the male's. To the extent that this is the case, it would rarely be true that the female 'yields' completely or predominantly on account of the deception . . . deception in love does not betoken the same depravity and deviation from social norms as deception in business, and is less likely to deprive the victim of anything she really wants to keep.
>
> "Moreover the penal legislator must recognize that in such an area courts and juries will have unusual difficulty in distinguishing with sufficient certainty between vicious instances of victimization by fraud and superficially similar cases in which an angry and disappointed woman testifies to words or innuendoes of promise. Considerations of this character have lead to widespread legislation abolisihng civil actions for breach-of-promise and seduction, one of the main grounds being that it was primarily an instrument of blackmail." (Tent. Draft No. 4, 256-257).

B. Derivation

Section 109 is adapted from § 130.25 of the New York Revised Penal Law and § 213.3 (1)(a) of the Model Penal Code. The age of the female was set at 16.

Section 110 is adapted from §§ 130.25 (1), 130.30 and 130.35 (2) of the New York Revised Penal Law.

Section 111 is adapted from § 130.35 of the New York Revised Penal Law. The age of the female was raised by the Commission from 11 to 12.

C. Relationship to Existing Law

The proposed draft divides the crime of rape into three degrees. In the absence of statute there are no degrees to the crime of rape. 75 *CJS*, Rape, § 3, p. 464.

Although rape has been defined as the carnal knowledge or unlawful carnal knowledge of a woman or female by force, or forcibly and against her will, *State v. Gilson*, 113 Or 202, 232 P 621 (1925), rape at common law was the unlawful carnal knowledge of a woman over the age of 10 years forcibly and without her consent. 75 *CJS*, Rape, § 1, p. 462. Lord Hale defines the crime as follows:

> "Rape is the carnal knowledge of any woman above the age of ten years against her will, and of a woman child, under the age of ten years, with or against her will." 1 Hale, PC (Eng) 628.

At common law, to constitute the crime of rape on a female above the age of consent, three elements must be present: (1) carnal knowledge, (2) force, and (3) the commission of the act without the consent or against the will of the woman. *CJS*, supra at 471.

Only one of these elements, sexual intercourse or carnal knowledge, is required by § 109 of the proposed draft. That section is a modification of the common law and present statutory definition of the crame of statutory rape. It modifies the common law to the extent that the age of consent is raised from 10 to 16 and it modifies the present statutory definition to the extent that the age of the male is not set out in the statement of the crime.

Under the present statute "the essential elements of statutory rape are the facts of sexual intercourse, and the age of the prosecutrix." *State v. Gauthier*, 113 Or 297, 231 P 141 (1925). It is settled in this state

that it is not necessary for the indictment to allege the age of the defendant in charging the crime of statutory rape. *State v. Knighten*, supra; *State v. Edy*, 117 Or 430, 244 P 538 (1926); *State v. Ralph*, 135 Or 599, 296 P 1065 (1931).

Since carnal knowledge, *i.e.*, sexual intercourse, is an essential element of the crime of statutory rape under the draft and present law, proof of some penetration is necessary. *State v. Poole*, 161 Or 481, 90 P2d 472 (1939); *State v. Hoffman*, 236 Or 98, 385 P2d 741 (1963).

Since the age of the prosecutrix is an essential element of the crime of statutory rape, it is necessary that there be an allegation that she was below the statutory age at the date of the commission of the offense. *State v. Nesmith*, 136 Or 593, 330 P 356 (1931). Since the age of the prosecutrix is important, the date of the alleged crime becomes important. Ordinarily, the state is not required to prove the specific date of the commission of the crime. *State v. Howard*, 214 Or 611, 331 P2d 1116 (1958); *State v. Pace*, 187 Or 498, 212 P2d 755 (1949). However, "when a defendant asks for a specific date, and can show that the time element is essential . . . as when an act committed after a certain date would not be a crime, the court must require the state to prove the date . . ." *State v. Yielding*, 238 Or 419, 424, 395 P2d 172 (1964).

Section 110 (1)(b) of the proposed draft differs from common law also in that only intercourse between a female of 14 and a male is required. Force and lack of consent are not required. Thus, with the modification of the age difference, §§ 109 and 110 (1)(b) are essentially the same.

Section 110 (1)(a) makes intercourse with a female deemed incapable of consenting by some reason other than age, rape in the second degree. Force is not required. At common law intercourse with a woman incapable of consenting was rape even without force. There were no degrees of rape at common law. The draft, therefore, recognizes the common law but makes the act, when committed without "forcible compulsion," rape in the second degree.

Section 111 (1)(a) and (b) in part restates the common law definition of rape, *i.e.*, sexual intercourse with a female by forcible compulsion and against her will. (At common law sexual intercourse with a female under 10 was rape. The draft raises the age to 12.) It is therefore pertinent to examine more closely what conduct satisfies the three essential elements of the crime of rape.

The first requirement is "sexual intercourse." *State v. Wisdom*, 122 Or 148, 257 P 826 (1927), states:

> ". . . if there is the slightest penetration within the labia of the female organ, that is sufficient to constitute statutory rape, and without regard to the extent of the penetration if the other elements of the crime are present." At 161.

State v. Kendrick, 239 Or 512, 519, 398 P2d 471 (1965), adopted the rule announced in *Wisdom* and applied it to cases of forcible rape: "Even the slightest penetration is sufficient."

Oregon has no reported cases on the necessity of emission; however, since only slight penetration is required it would appear that emission is not necessary. Thus, the present definition of "sexual intercourse" and that proposed by § 104 (8) of the draft are essentially the same.

The other two elements of the crime of rape, *i.e.*, force and the absence of consent of the victimized female, are closely connected in proof of fact. Proof of these two elements is dependent upon proof of resistance. This rule was stated in *State v. Colestock*, 41 Or 9, 67 P 418 (1902):

> "While it may be expected in such cases, from the nature of the crime, that the utmost reluctance would be manifested, and the utmost resistance made which the circumstances of a particular case would allow, still, to hold, as a matter of law, that such manifestation and resistance are essential to the existence of the crime, so that the crime could not be committed if they were wanting, would be going farther than any well-considered case in criminal law has hitherto gone . . . *This importance of resistance is simply to show two elements in the crime,—carnal knowledge by force by one of the parties, and nonconsent thereto by the other. These are essential elements and the whole question is one of fact for for the jury.*" [Emphasis supplied.] At 12.

The necessity and amount of resistance was considered at length in *State v. Risen*, supra at 561-562:

> "The woman must resist by more than mere words. Her resistance must be reasonably proportionate to her strength and her opportunities. It must not be a mere pretended resistance, but in good faith and continued to the extent of the woman's ability until the act has been consummated. 44 Am. Jur., Rape, § 7; *People v. Dohring*, 59 N.Y. 374, 17 Am. Rep. 349, 355; *Mills v. United States*, 164 U.S. 644, 648, 41 L. ed. 584, 17 S. Ct. 210; *Brown v. State*, 127 Wis. 193, 199, 106 N.W. 536; *Bailey v. Commonwealth*, 82 Va. 87, 107, 3 Am. St. Rep. 89. Those are the law's requirements in the case of a woman 'in the normal condition, awake, mentally competent, and not in fear.' 2 Bishop on Criminal Law, 9th ed., § 1122 (5). If the evidence does not show that the woman resisted to the utmost extent of which she was capable, the jury may infer that, at some time during the course of the act, it was not against her will. Nevertheless, the phrase 'the utmost resistance' is a relative one; one woman's resistance may be more violent and prolonged than that of another. Moreover, the attending circumstances may modify the requirements of the rule . . .

"The reason why evidence of resistance is important is to show carnal knowledge of the woman by force and nonconsent on her part. *State v. Colestock*, 41 Or 9, 12, 67 P. 418. Where submission of a girl is induced 'through the coercion of one whom she is accustomed to obey, such as a parent or one standing in loco parentis,' the law is satisfied with less than a showing of the utmost physical resistance of which she was capable . . ."

State v. Christensen, 119 Or 333, 249 P 366 (1926), and *State v. Cook*, 242 Or 509, 411 P2d 78 (1966), stand for the proposition that actual force is not necessary, but rather only a threat of force sufficient to overcome the resistance of the female. *State v. Christensen*, at 335, cites 22 *RCL* 1185 as stating:

"Consent of the woman from fear of personal violence is void, and though a man lays no hands on a woman, yet, if by an array of physical force, he so overpowers her mind that she dares not resist or she ceases resistance through fear of great harm, the consummation of unlawful intercourse by the man would be rape."

State v. Cook, supra, approved an instruction to the effect that if the defendant threatened the girl and she was so terrified by the threats that she did not resist defendant's having intercourse with her, the defendant would nevertheless be guilty of rape.

Clearly then, force which overcomes earnest resistance or the threat of force which places a person in fear of serious physical injury is recognized in Oregon as constituting "forcible compulsion." See § 104 (3) of the proposed draft. Its allowance of the threat or force to be applied to a third person apparently would extend the Oregon rule although there are no reported cases on point.

Paragraph (b) of subsection (1) of § 111 makes intercourse with a female under 12 years of age rape in the first degree regardless of force or consent. This modifies the common law definition of the crime as stated by Lord Hale. This section would retain the applicability of Oregon case law on statutory rape; that is, the essential elements would be the intercourse and the age of the prosecutrix. Mistake as to age or consent would not be available as a defense to a prosecution under this section.

The crime of seduction as defined in ORS 167.025 would be repealed by the proposed draft. The ingredients of this crime were stated in *State v. Meister*, 60 Or 469, 120 P 406 (1912).

". . . in order to convict a defendant for a perpetration of the offense denounced, proof must be adduced tending to establish the following constituent ingredients of the crime, to wit: (1) that under a promise of marriage (2) he seduced and had illicit connection (3) with an unmarried female (4) of previous chaste character." At 473.

The court later continued to distinguish which of these elements were considered the gravamen of the offense requiring corroborative proof:

". . . the promise of marriage and the illicit intercourse constitute the gravamen of the offense . . . Corroborating evidence is required only as to these two." At 481.

Concerning the two elements not constituting the gravamen of the offense, the *Meister* court noted its reasons for refusing to examine, beyond the promise of marriage, the motivating factors which produced the illicit intercourse:

"An unconditional promise of marriage made by a man to a previously chaste woman, and her acceptance of the offer in reliance upon the engagement whereby she is induced by his persuasion to yield consent to illicit intercourse with him are essential facts to be established in a criminal action . . . The court will not determine the preponderance of desires for sexual indulgence entertained by either party to the illicit connection, for the woman, who under the promise of marriage yields her chastity . . . takes upon herself the more onerous burden of shame, disgrace and social ostracism in case of discovery than the man, and for that reason she is entitled at least to equal protection." At 483.

The rationale upon which the court based its reluctance to examine the sexual desire or curiosity of the female as contributing to her acquiescence appears to support the Commission's position for the repeal of this offense.

Likewise, the proposed draft would repeal the offense of fornication. (See commentary to § 117, infra).

As previously noted, *State v. Blackwell* assumed that ORS 163.210 incorporated the common law doctrine that a husband could not be guilty of the rape of his wife. However, it is not necessary under Oregon law to allege in the indictment that the defendant charged with rape was not the husband of his alleged victim because our statute does not use a reference to a victim as not being the wife of the accused. *State v. Edy*, supra; *State v. Gauthier*, supra; *State v. Hilton*, 119 Or 441, 249 P 1103 (1926); *State v. Nesmith*, supra. The proposed draft, because of the definition of "female," would require that such an allegation be stated in the indictment.

Similarly, under present Oregon case law it is not necessary in a prosecution for statutory rape to allege the age of the defendant as being over 16 years. Case law indicates that the age of the defendant is a matter of defense, and under the proposed draft, the defendant's age would likewise be a matter of defense. *State v. Knighten*, supra; *State v. Nesmith*, supra; *State v. Cole*, 244 Or 455, 418 P2d 844 (1966).

Paragraph (c) of subsection (1) of § 111 incorporates the present effect of ORS 163.220, rape of

sister, daughter or wife's daughter. The statute states:

"A person convicted of raping his sister, of the whole or half-blood, or his daughter, or the daughter of his wife shall be punished by imprisonment in the penitentiary for life or any lesser period."

State v. Jarvis, 20 Or 437 (1891), held that the crimes of incest and rape were separate and distinct offenses. The court stated:

"We think that the decided weight of authority is that under a statute like ours, the crimes of rape, by forcible ravishment, and incest cannot be committed by the same act, but that of incest requires the concurring assent of both parties." At 441.

In *State v. Winfree*, 136 Or 531, 299 P 1005 (1931), the defendant was charged with the statutory rape of his daughter. The court ruled that the indictment did not state two crimes, incest and rape, because the child was incapable of consenting:

"A female under sixteen years of age is incapable of consenting to an act of carnal knowledge. Incest is the voluntary act of carnal knowledge with the consent of both."

Clearly, under *State v. Winfree*, supra, an indictment framed under paragraph (c) of subsection (1) of § 111 would not state two crimes, rape and incest.

The crime of incest is not covered in this article, but for purposes of organization of the proposed Code, is placed in the article on offenses against the family. (Art. 20 infra).

The purpose of subsection (1)(c) is to provide for an enhanced degree of rape where the parties to the offense are within the prescribed degree of relationship and the victim is under 16. As punishment for a father or stepfather who takes advantage of a consenting daughter or stepdaughter, this is not an excessive classification. *State v. Gidley*, 231 Or 89, 371 P2d 992 (1962), recognized the validity of such a classification in considering the enhanced penalty provision of ORS 163.220. The court stated:

"The crime of which the plaintiff was convicted is punishable by imprisonment in the penitentiary for life or any lesser period. ORS 163.220. In view of the nature of the crime, it cannot be said that even the maximum punishment prescribed is per se excessive, cruel, or unusual, and not proportioned to the offense." At 90.

Forcible rape of a female so related to the actor would be covered by subsection (1)(a) regardless of the victim's age.

Section 112. Sodomy in the third degree. (1) A person commits the crime of sodomy in the third degree if he engages in deviate sexual intercourse with another person under 16 years of age or causes that person to engage in deviate sexual intercourse.

(2) Sodomy in the third degree is a Class C felony.

COMMENTARY

See commentary under § 114 infra.

Section 113. Sodomy in the second degree. (1) A person who engages in deviate sexual intercourse with another person or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the second degree if:

(a) The victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness; or

(b) The victim is under 14 years of age.

(2) Sodomy in the second degree is a Class B felony.

COMMENTARY

See commentary under § 114 infra.

Section 114. Sodomy in the first degree. (1) A person who engages in deviate sexual intercourse with another person or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the first degree if:

(a) The victim is subjected to forcible compulsion by the actor; or

(b) The victim is under 12 years of age; or

(c) The victim is under 16 years of age and is the actor's brother or sister, of the whole or half blood, his son or daughter or his spouse's son or daughter.

(2) Sodomy in the first degree is a Class A felony.

COMMENTARY TO SECTIONS 112 TO 114

A. Summary

Deviate sexuality has been regarded with intense aversion in almost all cultures and ages and has been the subject of severe punishment and condemnation. The lawmaker will find little consensus among experts in this area as to the causes of deviate sexuality or as to the possibilities of curing the offender. The difficulty lies in defining laws which will result in the removal of mentally deranged and dangerous persons from society and at the same time impose only minor penalties or no penalties in cases where the deviate sexuality is a minor incident and constitutes no threat to the public safety. The objective of the sections relating to sodomy in the proposed draft is to (1) protect all persons from acts of sexual aggression and (2) to protect children from abuse because of their immaturity. The protection of the public from public solicitation or performance of sexual acts is covered by §§ 119 and 120 infra, or by the articles dealing with prostitution and disorderly conduct.

The proposed draft, therefore, excludes from the criminal law all sexual practices not involving force, adult corruption of minors, or public offenses and all sexual practices between married persons and consenting adults. As stated in the comments to § 207.5 of the Model Penal Code:

> "No harm to the secular interests is involved in atypical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities." (Tent. Draft No. 4, 277-278).

Therefore, all homosexual conduct and all heterosexual intercourse other than vaginal engaged in between consenting adults in private is not criminal under the proposed draft. The rationale behind this position is threefold:

(1) There is no more reason to penalize private consensual homosexual acts between adults than there is to penalize nonmarital heterosexual intercourse between such adults;

(2) Such laws are substantially unenforceable and constitute a potential danger of arbitrary and discriminatory enforcement;

(3) Such statutes have only minimal deterrence and no rehabilitative value.

Medical writings approach consensus on the opinion that homosexual conduct is symptomatic of pathological disorders stemming from a failure to achieve mature psychic development and that it cannot be cured unless the underlying psychological deviation is cured. 60 *Mich L R* 717, 753-57 (1962); *Sexual Behavior and the Law*, 434-77 (Slovenko ed 1964). Criminal sanctions are no more able to cure homosexual conduct than they are mental disease or defect. Such criminal sanctions may actually deter some people from seeking psychiatric or other assistance for their emotional problems.

As pointed out in the Model Penal Code commentary:

> ". . . there is the fundamental question of the protection to which every individual is entitled against state interference in his personal affairs when he is not hurting others. Lastly, the practicalities of police administration must be considered. Funds and personnel for police work are limited, and it would appear poor policy to use them to any extent in this area when large numbers of atrocious crimes remain unsolved. Even the necessary utilization of police in cases involving minors or public solicitation raises special problems of police morale, because of the entrapment practices that enforcement seems to require, and the temptation to bribery or extortion." (Tent. Draft No. 4, 278-279).

In general it can be stated that what would be criminal heterosexual activity under the rape sections is sodomy in the corresponding degree if it involves deviate sexual intercourse. The forms and degrees of the two crimes involving age factors and other types of consensual incapacity and forcible compulsion are presented in an identical structure,

e.g., § 109, rape in the third degree, parallels § 112, sodomy in the third degree. Therefore, the comments to the rape sections are equally applicable, where appropriate, to the sections relating to sodomy. Sodomy based on compulsion or perpetrated on a young person or on anyone incapable of consenting can be as dangerous and harmful to the victim as a heterosexual attack.

The Model Penal Code imposes higher penalties for rape than sodomy on the grounds that the harm done to a woman by forceful sexual intercourse is graver than that involved in deviate sexual intercourse, *e.g.*, the possibility of pregnancy, the physical danger in case abortion is required and the impairment of her marriage eligibility. The proposed Oregon Code recommends that rape and sodomy be treated as being of equal gravity.

In the sections relating to sodomy the perpetrator is described as a person to indicate that either a male or female may commit the offense.

The clause "or causes another to engage in deviate sexual intercourse" in the sodomy sections is intended to cover not only the situation where the victim has some deviate act forced upon him or her, but also where the victim is compelled to perform such an act upon the perpetrator of the offense, or upon some third person.

As defined in § 104 (1), deviate sexual intercourse includes unnatural acts between human beings but does not include intercourse with animals (bestiality) or with dead bodies (necrophilia). It is felt that such conduct is more appropriately covered under statutes relating to cruelty to animals or abuse of a corpse. The only real justification for including such acts in the sections relating to sex offenses is the extreme repulsiveness of the behavior. Occasional conduct of this nature is not likely to be deterred by criminal sanction and habitual conduct would be better treated in other ways.

The Kinsey studies indicate that while bestiality is rare in the general population, it is common among adolescent farm youths. When such acts occur in this group, they are usually brief, youthful "experiments" rather than part of a pattern of conduct that either contributes to or constitutes a significant degeneration of the individual involved. Kinsey, Pomeroy and Martin, *Sexual Behavior in the Human Male*, 667-78 (1st ed 1948). In such instances "focusing public attention on the person who happens to be found in such an act serves no useful social purpose and may seriously impair the development of the accused to a normal life." (Ill Ann Stat, Commentary to ch 38, § 11-2).

B. Derivation

Section 112 is adapted from § 130.40 of the New York Revised Penal Law and § 213.3 (1)(a) of the Model Penal Code.

Section 113 is adapted from §§ 130.40 (1), 130.45 and 130.50 (2) of the New York Revised Penal Law.

Section 114 is adapted from § 130.50 (1) and (3) of the New York Revised Penal Law. The age of the victim was raised by the Commission from 11 to 12.

C. Relationship to Existing Law

Sections 112 to 114 define the three degrees of sodomy. Oregon defines only one degree of sodomy in ORS 167.040, but the statute encompasses three prohibitions. *State v. Anthony*, 179 Or 282, 169 P2d 587 (1946), describes these three prohibitions:

> "O.C.L.A. Sec. 23-910 (now ORS 167.040) embraces three separate prohibitions. The first clause of the statute prohibits sodomy or the crime against nature . . . Being a crime known to the common law, further statutory definition of the word 'sodomy' was unnecessary.
>
> "Part two . . . prohibits any act or practice of sexual perversity either with mankind or beast. Part three relates specifically to certain osculatory relations which this court has held were within the prohibition of the sodomy statute prior to its amendment."

The court's reference to a prior holding concerning the nature of osculatory relations refers to *State v. Start*, 65 Or 178, 132 P 512 (1913). There the court said:

> "The rule at common law was that: 'All unnatural carnal copulation whether with man or beast seem to come under the notion of sodomy'. 1 Hawk P.C. 357 . . . It is self-evident that the use of either opening (mouth or anus) . . . for the purpose of sexual copulation is against the natural design of the human body. In other words. it is an offense against nature. There is no difference in reason whether such an unnatural coition takes place in the mouth or in the fundament . . . Each is rightfully included in the true scope and meaning of the common law definition quoted above from Hawkins. . .
>
> "It is said in Section 1539, L.O.L. (now ORS 167.040 (2)) that 'Proof of actual penetration into the body is sufficient to sustain an indictment . . . for the crime against nature.' No particular opening of the body into which penetration can be made is specified in this section. It follows that the actual penetration of the virile member into any orifice of the human body is sufficient for establishment of the crime in question." At 180-81.

The latter two paragraphs of this statement from *State v. Start* present two points for discussion.

First, the recognition by the court that either opening, mouth or anus, for the purpose of sexual copulation is embraced by the crime of sodomy. To this extent there is no difference between present Oregon law and the proposed draft's condemnation

of "deviate sexual intercourse" which is defined in § 104 as involving the mouth or anus of another.

Second, the court's reference to proof of penetration into any orifice of the body as sufficient to sustain the indictment might provide an argument that cunnilingus was not within the scope of the statute.

At common law, sodomy involved only two essential elements: (1) penetration (2) into an aperture of the body. Aperture was generally construed as being limited to copulation, per os or per anum. The requirement of actual penetration has been held to exclude cunnilingus from the scope of the common law crime of sodomy. 81 *CJS*, Sodomy, 371. Thus, before the amendment to ORS 167.040 it could be argued that that form of sexual contact was not within the common law crime. However, *State v. Start* was concerned only with fellatio and since the statute now prohibits "osculatory relations with the private parts of any person" it appears that cunnilingus is definitely provided for.

The second part of the statute concerning any act or practice of "sexual perversity" either with mankind or beast was the portion of the statute with which the court in *Anthony* was most concerned. The reference in this portion of the statute to acts of sexual perversity with a beast would indeed seem to be unnecessary in view of *State v. Start's* common law definition of sodomy as including unnatural copulation with a beast. However, to give independent effect to the inclusion the statute would appear to contain within its scope acts of sexual perversity with a beast other than copulation. What, if any, acts of sexual perversity would be included may be enlightened after an examination of *Anthony's* discussion of "sexual perversity" as defining criminal conduct.

In *Anthony* the court was faced with determining whether "sexual perversity" as defining the crime of sodomy was "void for vagueness." The court ruled that such phraseology unlimited and undefined by judicial construction would in fact be void. The court stated:

> ". . . the legislature has ventured into the dim and uncertain mazes of abnormal psychology. If the Act were to be left unlimited and undefined by construction . . . we think it would not only be void for uncertainty, but might also be applied in such manner as to invade other constitutional rights." At 305.

However, after recognizing the statute's face value defects the court held that it could be judicially applied in a manner not to offend constitutional standards and stated the limitations to be applied to the statute:

> "But we hold that the statute may be so limited by construction as to render it valid as here applied.
>
> ". . . it is clear that the words 'sexual perversity' cannot be limited in their application to cases involving carnal copulation for such cases where already included in the sodomy statute . . . By applying the doctrine of ejusdem generis, we find that the words, 'or any act or practice of sexual perversity' are preceded . . . by the words 'if any person shall commit the crime of sodomy or the crime against nature' . . . the words 'sodomy or the crime against nature' have a definite meaning at common law. Those terms, which are synonymous, relate and are limited to offenses directly involving the sex organ of at least one of the parties; and . . . we conclude that the prohibited acts of sexual perversity are likewise so limited . . .
>
> "Not only must the statute be limited to cases directly involving the sex organ, but . . . it must be limited to unnatural conduct contrary to the course of nature. The act does not prohibit such personal and physical intimacies as accompany or precede normal relations and intercourse between the sexes. Again the prohibited conduct must have been performed for the purpose of accomplishing abnormal sexual satisfaction on the part of the actor." At 305-307.

The final limitation placed upon the statute's application was stated to be that the state must show that the particular act charged was "willful," *i.e.*, that it was done intentionally or recklessly.

State v. Anthony thus required four elements to be established in a prosecution for sodomy under the sexual perversity section of the statute. First, the act must involve a sex organ of one of the parties; second, the act must be unnatural, i.e., not involved in normal sexual foreplay between the sexes; third, the act must have been performed for the purpose of accomplishing some abnormal sexual satisfaction; fourth, the act must have been done intentionally or recklessly. It should be noted that compulsion or force is not an element of the crime of sodomy as defined by the statute. *State v. Weitzel*, 157 Or 334, 69 P2d 958 (1937).

Applying these standards to sexual perversity with a beast, it is possible to commit sodomy in a manner not involving copulation. For example, masturbating a male animal or forcing an object into the sex organ of a female animal. As the commentary to the proposed draft indicates, it is not the intention of the draft to include such conduct within the scope of sodomy. It was believed that such acts would better be dealt with under a statute proscribing cruelty to animals.

Applying these criteria to the facts of an earlier Oregon decision, *State v. Brazell*, 126 Or 579, 269 P 884 (1928), one can determine the type of conduct between humans which the present statute proscribes. *State v. Brazell*, supra at 580, held that prac-

ticing masturbation by a man upon a boy is an act of sexual perversity within the ordinary meaning and acceptation of the words. Applying the *Anthony* criteria, such conduct amounts to sodomy under the present Oregon law. First, clearly a sex organ of one of the parties, the penis of the boy, is involved. Secondly, it is not an act naturally preceding intercourse between the sexes. Third, the inference may easily be drawn as to the purpose of the act, *i.e.*, to satisfy an abnormal sexual desire. Fourth, such an act must clearly have been performed intentionally.

Presently under Oregon law "the general rule is that one who consents that an act of sodomy be committed upon his person, if capable of consent, is an accomplice . . ." *State v. Stanley*, 240 Or 310, 312, 401 P2d 30 (1965).

The term "accomplice" has been defined by the Oregon Court as "a person who knowingly, voluntarily and with common intent with the principal offender, unites in the commission of a crime." *State v. Stacey*, 153 Or 449, 445, 56 P2d 1152 (1936); *State v. Ewing*, 174 Or 487, 149 P2d 765 (1944); *State v. Nice*, 240 Or 343, 401 P2d 296 (1965).

The fact that a person who consents to an act of sodomy is an accomplice presents a problem under Oregon law; if the person is an accomplice his testimony must be corroborated to sustain a conviction. (ORS 136.550). This requirement of proof has presented the issue of whether or not a child may be an accomplice requiring corroboration of his testimony.

In *State v. Ewing*, supra, the court was faced with the question of whether or not a 13 year old was an accomplice to the crime of sodomy. The court applied the common law rebuttable presumption that children between seven and 14 years of age are without criminal capacity. The court then ruled that whether an infant prosecuting witness of 13 possessed and exercised sufficient mentality to make an intelligent choice to voluntarily consent to an act of sodomy, thereby becoming the accused's accomplice, was a question for the jury. Therefore, if the jury did determine that he was an accomplice, it was then to apply the evidentiary requirement of corroborative proof of the commission of the crime.

In *State v. Stanley*, supra, the defendant was convicted of the crime of sodomy committed orally upon or with a 15 year old boy. The defendant argued he was convicted on the uncorroborated testimony of an accomplice, violating ORS 136.550. Since the age of the child would not allow the court to rely on the common law rebuttable presumption established in *Ewing*, the court instead noted that they were not asked to rule upon the effect of ORS 419.476 as to whether a child under 16 may or may not be an accomplice. However, the court made no reference to the common law 14 year old presumption and ruled that it was a jury question whether the child of 15 was an accomplice, thereby impliedly recognizing that the juvenile code modified the age of the common law presumption.

However, *State v. Nice*, supra, apparently handed down during the same term, returned to the common law presumption and ruled that a 12 year old participant in a violation of ORS 167.040 may or may not be an accomplice. The court, at 345-46, stated:

> "In *State v. Ewing*, 174 Or 407, 149 P2d 765 (1944), we took notice of the common law rebuttable presumption that children between the ages of seven and fourteen years of age are without criminal capacity. We held that it was a jury question in a given case whether the child knew and appreciated the nature of the act and made an intelligent choice in participating in it. If the jury so found, it would apply to the child's testimony the cautionary rule concerning the testimony of an accomplice. *We hold that the rule stated in State v. Ewing, supra, is still valid, despite, the subsequent enactment of ORS 419.478 and 419.533, which vest in the juvenile court exclusive jurisdiction over children less than sixteen years of age who may commit offenses denounced as crimes.*
>
> "While it is now possible to argue in certain cases that a given child does not exactly fit the traditional role of an accomplice because he may not be subject to prosecution as an adult offender, the child is still under the control of law enforcement officers and other persons in authority. This control over the witness by the state is the reason why the law subjects his testimony to special scrutiny. The testimony of an accomplice may be given under the hope of leniency . . . This reason applies with equal force to the testimony of a child who is under the control of the state." (Emphasis supplied).

Relating present law to the proposed draft, five areas of comparison need to be examined. First, sodomy or sexual perversity with an animal; second, sodomy per os or per anum; third, osculatory relations; fourth, acts of sexual perversity; and fifth, the age of the "victims."

First, sodomy or sexual perversity with an animal. At present Oregon law includes within its concept of sodomy both copulation with an animal and sexual perversity not involving copulation with an animal. The proposed draft would encompass neither of these activities within its definition of sodomy. The draft defines sodomy in the terms of "deviate sexual intercourse" as "contact between the sex organ of one person and the mouth or anus of another." Clearly within this framework the term "person" excludes animals and the use of "another" likewise indicates "another person" and not an animal.

The second and third areas can be combined for purposes of comparative discussion since the only

possible distinction between the two under Oregon law could be that osculatory relations include cunnilingus whereas sodomy per os or per anum, as implying the necessity of penetration, may not.

The proposed draft would not affect present Oregon law to the extent that it defines sodomy as sexual copulation of the virile member of the body through either the opening of the mouth or the anus. See *State v. Start*, supra. Such activity clearly falls within the scope of the definition of "deviate sexual intercourse" as involving "contact between the sex organ of one and the mouth or anus of another." Likewise, the definition of the proposed draft would include cunnilingus presently proscribed by the osculatory relations portion of ORS 167.040. This is evident by the draft's reference to contact with a sex organ.

An instruction on the meaning of "sex organ" was approved in *State v. Anthony*, supra, at 309. The pertinent portions of the instructions stated:

> ". . . the anal opening . . . refers to the anus, situated near the anal orifice or opening of the rectum and not to the sex organ. Therefore, the penetration of such opening alone in and of itself, except by the male organ, would not necessarily constitute the crime . . ."

Clearly then, the anus is not the sex organ of a person. The sex organ in the male is, therefore, limited to the penis; in the female, it is limited to the vagina. If the female vagina is contacted by the mouth of another, performing the act of cunnilingus, the act is sodomy under the draft and under the osculatory relations portion of ORS 167.040. Therefore, the proposed draft would include as sodomy the physical acts presently prohibited by the first and third portions of the present statute.

Fourth, the present scope of acts included within the confines of the "sexual perversity" portion of the sodomy statute would not be included as acts of sodomy under the proposed draft. Acts not involving contact between the sex organ of one person and the mouth or anus of another would not be sodomy under the draft. Therefore, the act of masturbation by a man upon a boy, sodomy under the *Brazell* case, would not be sodomy under the draft. The act of forcing an object other than the male sex organ within the anus would not be sodomy under the draft or Oregon law. If the object was placed within the vagina, the act would be sodomy under Oregon law, but would not be sodomy under the draft. This is so because for an act to be sexually perverse under Oregon law all that is required is that the sex organ of one party or the other be involved, either penetrated or manipulated. However, contrary to *Anthony*, the draft does not require proof that the act was done for the purpose of gratifying some abnormal sexual desire.

In summary then, the draft would include all acts presently within ORS 167.040 except those acts of sexual perversity not involving the sex organ of one party and the month or anus of the other. Such acts of "sexual perversity" would come within the confines of the sexual abuse sections. (§§ 115, 116 infra).

The draft does make some changes concerning the parties who can be guilty of sodomy. In each degree of sodomy defined in the draft, the definition excludes acts between spouses. The draft also excludes acts between consenting parties. A party is deemed capable of consent if he or she is above the age of 16 and is not mentally defective, mentally incapacitated or physically helpless. Deviate sexual intercourse with a person over 16 but less than 18 would be covered by § 117, infra. If the person is capable of consent, the draft requires the act be perpetrated through the use of forcible compulsion. None of these factors are presently found in ORS 167.040.

Fifth, the selection of 16 as the age of consent would make impossible a finding that a person below that age was an accomplice. This result clearly affects present case law. *State v. Ewing*, supra; *State v. Stanley*, supra; and *State v. Nice*, supra, all recognized that a child under (either 14 or 16) and above the age of seven, could be an accomplice to the crime. Although this rule allows for a showing of consent and complicity by the infant it would not affect the guilt or innocence of the accused since consensual sodomy is a crime; however, theoretically it could aid an accused's defense if there were no corroborative evidence.

The draft would alter this by making 16 the age under which an infant would be deemed incapable of criminal capacity. This would overrule *State v. Nice*, supra, and *State v. Ewing*, supra. However, the defense of mistake as to age would be available to a defendant charged with sodomy committed upon a consenting victim between the ages of 12 and 16.

Section 115. Sexual abuse in the second degree. (1) A person commits the crime of sexual abuse in the second degree if he subjects another person to sexual contact; and

(a) The victim does not consent to the sexual contact; or

(b) The victim is incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless.

(2) In any prosecution under subsection (1) of this section it is an affirmative defense for the defendant to prove that:

(a) The victim's lack of consent was due solely to incapacity to consent by reason of being under 18 years of age; and

(b) The victim was more than 14 years of age; and

(c) The defendant was less than four years older than the victim.

(3) Sexual abuse in the second degree is a Class A misdemeanor.

COMMENTARY

See commentary under § 116 infra.

Section 116. Sexual abuse in the first degree. (1) A person commits the crime of sexual abuse in the first degree when he subjects another person to sexual contact; and

(a) The victim is less than 12 years of age; or

(b) The victim is subjected to forcible compulsion by the actor.

(2) Sexual abuse in the first degree is a Class C felony.

COMMENTARY TO SECTIONS 115 AND 116

A. Summary

The offense of sexual abuse is intended to cover all unconsented acts of sexual contact which do not involve the element of genital penetration. The section encompasses the following types of behavior:

(1) Fondling

(2) Manipulation of genitals

(3) Digital penetration

(4) Sadistic or masochistic flagellation

Under the common law such conduct would have constituted an assault. Most state laws do not differentiate sexual from other assaults, except assaults with intent to rape or commit sodomy. Assault as defined in the draft requires the infliction of actual physical injury. It is contemplated that in many instances the conduct dealt with in the sexual abuse sections would not result in physical injury and, therefore, would not be covered by the assault article. When such sexual contacts do result in injury, the assault sections may also apply. In accord with other offenses involving sexual imposition contained in this article, the sexual abuse sections are applicable to both children and adults.

The definition of sexual contact contained in § 104 (7) and directly incorporated into §§ 115 and 116 proscribes any nonconsensual salacious "touching" of a person's sexual or other intimate parts. An actual touching is required. Indecent proposals and obscene gestures are treated in the article relating to disorderly conduct. (Art. 26 infra). (Also, see accosting for deviate purposes, § 119 infra).

However, the contact need not be directly with the person's body; it is sufficient if the defendant touches the victim's sexual or intimate parts through clothing. The contact need only be with either the victim or the actor but it need not be between them. Subjecting another to sexual contact with an animal or another person is also covered.

The inclusion of the words "or other intimate parts" does not limit the touching to genitalia but is intended to include genitalia, breasts and whatever anatomical areas the trier of fact deems "intimate" in the particular cases which arise. Thus the ultimate decision of "intimate" parts is left to the community sense of decency, propriety and morality.

The proposed draft requires that the touching be for "the purpose of arousing or gratifying the sexual desire of either party." Thus inadvertent touching of the intimate parts of a person (crowded elevator) does not constitute sexual contact.

The offense of sexual abuse is divided into two ascending degrees. Section 115 defines the basic offense. It should be noted that consensual sexual contacts between adults are not proscribed. Subsection (2) of § 115 makes a defense available to the defendant when the circumstances are as specified. The purpose of this defense is to exclude from criminal sanction certain activity by adolescents, *e.g.*, the

"petting party" between a 14, 15 or 16 year old "victim" and another young though criminally responsible person of slightly greater age. The age of criminal responsibility is 14 in the proposed Code. (Art. 5 supra).

The offense is raised a degree if either of the following factors is present:

(1) The victim is under 12 years of age; or

(2) The victim was subjected to forcible compulsion by the actor.

B. Derivation

Section 115 is adapted from § 130.55 of the New York Revised Penal Law. Paragraph (b) of subsection (1) has been added by the Commission. Section 116 is adapted from § 130.65 of the New York Revised Penal Law.

C. Relationship to Existing Law

Sections 115 and 116 of the proposed draft define two degrees of sexual abuse. Presently there is no Oregon statute treating this offense specifically. The offense is defined in terms of "sexual contact." Section 104 defines "sexual contact" as "any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of arousing or gratifying the sexual desire of either party."

This definition would include within it the judicial interpretation of "sexual perversity" found in *Anthony*, supra, *i.e.*, conduct involving the sex organ of either party for the purpose of gratifying abnormal sexual desires. These two elements are stated in *Anthony* and would be within the definition of "sexual contact." However, the definition of "sexual contact" is broader than the concept of sexual perversity. First, the sexual contact need not be "unnatural"; and, second, it is not limited to contact with a "sexual" organ, but can be contact with "other intimate parts."

The *Anthony* court discussed the intent requirement of a sexually perverse act. Rejecting the prosecution's interpretation of intent, the court stated:

> "The prosecution in reliance upon statements found in learned dissertations on abnormal psychology has urged upon the court that any act of physical contact by a male person with the body of a female person with intent to cause and causing sexual satisfaction to the actor constitutes an act of sexual perversity. Whatever may be said by the psychiatrists concerning this theory, we reject it as unreasonable, arbitrary and an unconstitutional criterion when applied to a criminal statute." At 307.

The draft's inclusion of the intent requirement may come close to exceeding the limitation's placed upon the terminology by the court. For sodomy, the court required that the application be limited to contact with a "sex organ" with the purpose of gratifying an abnormal sexual satisfaction. The draft allows the contact to be with an "intimate" part of the body and does not require that the purpose of the contact be to arouse "abnormal" sexual desire, but only that its purpose be to arouse or gratify the sexual desire, either normal or abnormal, of either party.

The precise meaning of "other intimate parts" is not defined in the draft and the intent of the Commission is for the triers of the fact to determine what parts of the body are "intimate." Case law in Oregon has never interpreted the meaning of "intimate" parts but has had occasion to discuss the import of "private parts."

State v. Moore, 194 Or 232, 241 P2d 455 (1952), at 240-241, states:

> "It is hornbook law that whenever and wherever the terms 'privates' or 'private parts' are used as descriptive of a part of the human body, they refer to the genital organs . . . A woman's breasts do not come within the designation 'private parts'. Obviously they are not part of her genital organs."

The offense of sexual abuse, insofar as it relates to children as victims, is intended to reach conduct that was held to be violative of ORS 167.210 (contributing to the delinquency of a child) prior to the decision in *State v. Hodges*. (The *Hodges* case is discussed further in commentary to § 117 infra.)

Proof of "contributing" previously required only proof of an act which had a "manifest tendency" to cause a child to become delinquent, as that term is defined in ORS 419.476 (c).

State v. Hoffman, 236 Or 98, 385 P2d 471 (1963), ruled that "proof of the defendant's placing his private parts upon and against those of a minor child, standing alone, would suffice to sustain a verdict of guilty of contributing." At 102. *Bonnie v. Gladden*, 240 Or 462, 402 P2d 237 (1965), ruled that an indictment charging the crime of contributing by the defendant's placing his tongue inside a minor's mouth and his face upon her lap presented a question of fact for jury determination whether the acts had a manifest tendency to induce the child to act in a manner which would bring her within the definition of delinquency.

The proposed draft places such conduct under the category of "sexual abuse." The facts of *Hoffman* would not be sodomy because there was no contact with the mouth or anus. Neither did they constitute rape, because there was no penetration. The facts of *Bonnie* present an excellent example of the jury's function in deciding what portions of the body

constitute "intimate parts," *i.e.*, under the facts of that case did the mouth and lap of the child constitute "intimate parts."

The proposed draft alters the former effect of the contributing statute as applied to sexual contact by providing a defense if the child is between 14 and 18 and the actor is less than four years older than the alleged victim.

Section 117. Contributing to the sexual delinquency of a minor. (1) A person 18 years of age or older commits the crime of contributing to the sexual delinquency of a minor if:

(a) Being a male, he engages in sexual intercourse with a female under 18 years of age; or

(b) Being a female, she engages in sexual intercourse with a male under 18 years of age; or

(c) He engages in deviate sexual intercourse with another person under 18 years of age or causes that person to engage in deviate sexual intercourse.

(2) Contributing to the sexual delinquency of a minor is a Class A misdemeanor.

COMMENTARY

A. Summary

This provides for three types of criminal sexual activity by persons over 18 with persons less than 18 years of age. The first is sexual intercourse by a male with a female under 18 (paragraph (a) of subsection (1)).

Paragraph (b) of subsection (1) covers sexual intercourse by a female with a male who is less than 18. Paragraph (c) deals with deviate sexual intercourse with a person under 18. Deviate sexual intercourse is defined in § 104 of the draft as conduct consisting of contact between the sex organs of one person and the mouth or anus of another. Therefore, the subsection also includes male-female contacts of this nature if a person less than 18 years of age is involved.

The primary purpose of the section is to take care of those situations involving minors who are above the age of 16 and below 18. In the cases where the minor is a female the male could be prosecuted now under the seldom used fornication statute (ORS 167.030) or, before the decision in *State v. Hodges* was handed down, for contributing to the delinquency of a minor under ORS 167.210. Cases involving males below the age of 18 also were covered by the broad sweep of the latter statute.

B. Derivation

The section is drawn from Michigan Revised Criminal Code § 2305 (sexual misconduct); however, the minimum age is raised from 16 to 18 and in paragraph (c) the language "or causes that person to engage in deviate sexual intercourse" has been added.

C. Relationship to Existing Law

As noted in earlier commentary, the draft repeals the offense of fornication. *State v. Gilson*, 113 Or 202, 232 P 621 (1925), states the distinction between rape and fornication:

> "Where rape is charged to have been committed upon a woman over the age of consent, which in this state is sixteen years, the words used by the statute in defining the crime are 'forcibly ravish'. Rape, therefore, as at common law, is the carnal knowledge of a woman by a man forcibly and unlawfully against her will. Fornication, however, as defined by statute, is the carnal knowledge of a woman under the age of eighteen years and over the age of sixteen years who is not his wife, by a man without force and with her consent." At 206.

As the quoted language implies, fornication is not a common law crime. [See Perkins, *Criminal Law*, 328, 330 (1957)].

State v. Mallory, 92 Or 133, 180 P 99 (1919), enumerates the elements of the crime of fornication:

> "First, the offender must be a male person over the age of eighteen years, and it must be committed so as not to make the act rape; second, the offender must 'carnally know any female person of previous chaste and moral character'; third, who is over the age of sixteen years, and is not his lawful wife; and when so committed, such

male person shall be deemed guilty of fornication." At 138.

As noted before, the Supreme Court in *State v. Hodges*, 88 Or Adv Sh 721, — Or —, 457 P2d 491 (1969), held ORS 167.210 (contributing to the delinquency of a minor) unconstitutional "on its face" because of vagueness. Although the statute is no longer a viable force in Oregon law, an examination of it and the cases decided under it is necessary for a complete understanding of the far-reaching consequences of the *Hodges* decision.

Since "delinquency" was unknown to the common law, the court must look exclusively to the statute for the definition of this offense. *State v. Dunn*, 53 Or 304, 99 P 278 (1909).

ORS 167.210 provides:

"When a child is delinquent as defined by any statute of this state, any person responsible for, or by any act encouraging, causing or contributing to the delinquency of such child, or any person who by threats, command or persuasion, endeavors to induce any child to perform any act or follow any course of conduct which would cause it to become a delinquent child, or any person who does any act which manifestly tends to cause any child to become a delinquent child, shall be punished upon conviction by a fine of not more than $1,000, or by imprisonment in the county jail for a period not exceeding one year, or both, or by imprisonment in the penitentiary for a period not exceeding five years."

ORS 167.210 fixes a penalty for contributing to delinquency, but it does not itself define delinquency. It instead refers to a ". . . delinquent child as defined by any statute of this state . . ." ORS 418.205 provides that to determine what acts constitute delinquency paragraphs (a) to (e) of subsection (1) of ORS 419.476 must be consulted. ORS 418.205 (2) provides, unless the context requires otherwise, that the definition of delinquency and dependency is the same as that set out in ORS 419.476 (1) which gives the juvenile court jurisdiction. ORS 419.476 defines as a delinquent a person who is under 18 years of age and:

"(a) Who has committed an act which is a violation, or which if done by an adult would constitute a violation, of a law or ordinance of the United States or a state, county or city; or

"(b) Who is beyond the control of his parents, guardian or other person having his custody; or

"(c) Whose behavior, condition or circumstances are such as to endanger his own welfare or the welfare of others; or . . .

"(f) Who has run away from home."

Paragraphs (d) and (e) have been omitted because they deal with the definition of dependency rather than delinquency. *State v. Harmon*, 225 Or 571, 358 P2d 1048 (1961). Although ORS 418.205 refers to paragraphs (a) through (e) of ORS 419.476 for the definition of delinquency, at the time it was enacted paragraph (e) referred to runaways. Subsequently ORS 419.476 was amended to add what is now paragraph (e) and paragraph (f) which now cover runaways. *State v. Day*, 242 Or 559, 410 P2d 1018 (1966), points up how this amendment process confused the state of the statute. The court, following the legislative history of the statutes involved, stated:

"ORS 167.210 makes it a felony to contribute to the delinquency of a minor and provides that we shall look to the other statutes of this state for a definition of 'delinquent child'. ORS 418.205 states that we shall look to paragraphs (a) through (e), Section (1), ORS 419.476 for statements of what acts or conditions make a child delinquent or dependent. ORS 419.476 lists the categories of children within the jurisdiction of the juvenile court. At the time ORS 418.205 was enacted paragraph (e), Section (1), ORS 419.476 read, 'one who has run away from his home.' Subsequent to the enactment of ORS 418.205, Section (1), ORS 419.476 was amended to add a new category and the reference to a child 'who has run away from his home' is now paragraph (f). The legislature . . . did not concurrently amend ORS 418.205 to include paragraph (f), Section (1), ORS 419.476. Under the circumstances of this case we need not decide whether a runaway is presently within the definition of a 'delinquent child'." At 560-61.

ORS 167.210 specifies three general kinds of conduct, any one or all of which constitute the crime of contributing. The crime may be committed by: (1) causing a child to become an actual delinquent; (2) persuading a child to perform any act or follow a course of conduct that would cause it to become delinquent; or (3) doing an act which manifestly tends to cause a child to become a delinquent. *State v. Palmer*, 232 Or 300, 375 P2d 243 (1962).

The word "child" in the contributing statute has been judicially interpreted to mean an unmarried child of either sex under the age of 18. *State v. Eisen*, 53 Or 297, 99 P 282, 100 P 257 (1909), states the reasons for this construction:

"Statutes previously enacted permit the marriage, with the consent of her parents, of any female over 15, and under 18, years of age after which all parental control ceases. In other words, the child then loses its legal status as such, and does not come within the term 'child' as contemplated by the juvenile act; the law conclusively presuming the guardianship of the State under such circumstances to be unnecessary." At 302.

State v. Gates, 98 Or 110, 193 P 197 (1920), relied on the decision in *Eisen* to require an allegation in the indictment that the minor was not married.

The phrase "any person" as used in the statute and defined in ORS 167.205 to include parents, guardians or other persons having the care or custody of the child is not limited in its application to such persons who owe a legal duty to the child. The statute's terms and purposes are sufficiently broad to invoke its protection against the wrongs of those who do not stand *in loco parentis*. The fact that the definition of "person" includes persons owing a legal duty to the child does not exclude its application to all others. *State v. Eisen*, supra; *State v. Hutchison*, 222 Or 533, 353 P2d 1047 (1960).

The statute apparently was not intended to apply to other juveniles, since the Oregon Court has impliedly scoffed at the notion that a juvenile could contribute to the delinquency of a juvenile. *State v. Everson*, 231 Or 15, 19, 371 P2d 672 (1962). For similar reasons a child is not an accomplice to the crime. *State v. Harvey*, 117 Or 466, 242 P 440 (1926); *State v. DuBois*, 175 Or 341, 153 P2d 521 (1944); *State v. Holleman*, 225 Or 1, 357 P2d 262 (1960). Addressing itself to the issue of whether the child was an accomplice, *State v. DuBois*, supra at 349, states:

> "Certainly it can not reasonably be contended that the girl could be prosecuted for a violation of the statute governing the delinquency of minors and, after all, that is the test as to whether she was an accomplice."

ORS 167.210 "nowhere requires proof of a specific intent to cause the child to become a delinquent child, even though that intent may exist." *State v. Hoffman*, 236 Or 98, 285 P2d 741 (1963). Rather the crime denounced requires only a willful act upon the part of the accused and the term " 'willful' in connection with such crimes . . . means nothing more than that the accused must have acted wittingly; that is, that there was a union or concert of action between his intent and his act. It does not, however, require an intention upon his part to violate a law or injure another." *State v. Doud*, 190 Or 218, 225, 225 P2d 400 (1950).

Of the three alternative ways in which before *Hodges* the statute could have been violated, it is obvious that the third alternative listed by the court in *State v. Palmer*, supra, covered the broadest range of conduct and required the least nexus between the act of the adult and the potential delinquency of the child. Referring to the necessary elements needed to be established by an indictment drawn under this portion of the statute, the court in *State v. Moore*, 194 Or 232, 241 P2d 455 (1952), stated:

> ". . . it is necessary to allege and prove the specific act or acts relied upon as manifestly tending to cause delinquency . . . Of course, it is further necessary to prove that the act or acts so established manifestly tended to cause the child to become a delinquent. In other words, it is necessary to establish by the evidence: (1) one or more of the acts of misconduct specifically alleged, and (2) that such act or acts manifestly tended to cause the child to become delinquent." At 239-40.

Thus it was only necessary that the conduct of the adult tended to cause or encourage delinquency. It was not necessary to show that the child had in fact become delinquent. *State v. Williams*, 236 Or 18, 386 P2d 461 (1963). On the other hand it was not a defense to the charge that the child was in fact a delinquent before the commission of the acts which purportedly tended to cause the child to become delinquent. In *State v. Caputo*, 202 Or 456, 274 P2d 798 (1954), the indictment charged contributing in that the defendant "did then and there by threats, commands and persuasion induce and persuade the said Lila Victor to engage in prostitution . . ." At 458. The defendant contended and the court found that the girl was a delinquent child 16 years of age when she met the defendant. The defendant, therefore, urged that it was impossible for the defendant to have caused her to "become" what she already was. In rejecting this argument the court stated:

> "A similar argument was considered by the Supreme Court of Washington . . . The court said: 'We think the word 'cause' may well be used with reference to acts which bring about or assist in the continuance of a state of delinquency as well as refer to the acts which bring about the initial delinquency.' *State v. Strom*, 144 Wash 334, 258 P 15."

Applying this definition of "cause" the court concluded that the prior delinquency of the child was irrelevant, saying:

> "It is unthinkable that the legislature intended that the waywardness of the child should be a defense to a man who attempts to lead her into a life of commercialized degeneracy." *State v. Caputo*, supra at 466.

It is readily apparent that when one combines the statutory statement of the crime of contributing, resulting from the doing of an act which has a manifest tendency to cause a child to become delinquent, with the definition of delinquency found in ORS 419.476 (1), the result is a very broad definition of conduct which is criminal within the contributing statute. The contributing statute was drafted with that intent in order to reach the infinite variety of conduct which might tend to cause delinquency. The reason for such a broad definition was stated in *State v. Stone*, 111 Or 227, 226 P 430 (1924):

> "The arts of seduction are so variant and insidious, especially when applied to different individuals, that it is impossible as a matter of law to lay down any rule on the subject of what will or will not invariably tend to produce delinquency in all minors. An act which might lure one child into the paths of sin might prove re-

pulsive and abhorrent to another, working an exactly opposite effect.

"The statute has not defined any particular act as one which, as a matter of law, shall be deemed manifestly to tend to cause delinquency in a child. On questions of morals like those which are within the purview of the statute . . . it is not practical in legislation precisely to describe an act which shall be *malum prohibitum*." At 235.

On the basis of this reasoning the *Stone* case held that the judge could not supplement the work of the Legislature by providing a definition declaring any particular act to be criminal and left the jury to decide whether the particular conduct of the defendant was criminal in the circumstances attendant at the time in question. The court stated at page 236:

"In view of the diverse factors that enter into such cases, it becomes a question of fact to be left to the jury . . . to determine from all the circumstances of the case as disclosed by the testimony whether the act, charged in the indictment as a fact to be proved, has the tendency condemned by the statute."

If the jury is to determine whether the act alleged in the indictment and proved at trial has the tendency to cause delinquency, the issue arises as to when it can be determined if the indictment states a crime. *State v. Ely*, 237 Or 329,390 P2d 348 (1964), summarizes the law relating to the sufficiency of an indictment charging contributing:

". . . *State v. Casson* . . . holds that the state may in general statutory language charge the crime of contributing to the delinquency of a minor and may then lay under the videlicet (to-wit:) as many specific constituent acts as the grand jury thinks the evidence will prove. Each act, however, must be an act of the character denounced by the statute and each act so pleaded must be part of the same criminal episode (State v. Palmer . . .) or scheme (State v. Casson, supra)." At 331.

In such a situation, *State v. Casson*, 223 Or 421, 428, 354 P2d 815 (1960), held that before any evidence can be received on a charge or a specification in a multiple count indictment, the court must first decide that each of the charges states a crime.

State v. Iverson, 231 Or 15, 371 P2d 672 (1962), and *State v. Peebler*, 200 Or 321, 265 P2d 1081 (1954), establish some guideposts in assisting the judge in making this initial determination. In the *Iverson* case the court stated that ORS 167.210:

". . . requires the State to allege at least enough facts so that if the indictment is true the defendant could not be innocent . . . In the final analysis, however, the statute merely requires the State to allege facts, which, if proven, would entitle a jury to find that the defendant had committed acts prejudicial to the welfare of the child in certain limited particulars . . ." At 17-18.

In *Peebler*, the court stated:

"The requirement that the tendency to delinquency must be 'manifest' in the acts charged implies that those acts must be of such a character as to indicate of themselves a tendency to cause delinquency."

The requirement that the acts have a causative tendency toward the child would indicate that there must be some causal relationship between the acts of the adult and the juvenile delinquency. The strength of this relationship is largely undefined but the Ohio Court in *State v. Crary*, 10 Ohio App2d 26, 155 NE2d 262 (1959), indicated a necessity that they be committed in the "presence" of the child. See 5 *Will L J* 104, 111.

With the breadth of the definition of delinquency and the scope of the behavior that previously could have been considered as contributing to it, it is to be expected that a wide variety of conduct was prosecuted within its boundaries. However, categorizing this conduct on the basis of cases reported in Oregon, it is discovered that the conduct punished under the statute primarily involved sexual or sexually related acts. Indeed the Oregon Legislature apparently viewed contributing to delinquency as a sex crime under ORS 167.050 which provides indeterminate sentences for any persons who have been previously convicted under one or more of several statutes including ORS 167.210. Conduct secondarily involved in contributing prosecutions related to liquor activities. (*e.g.*, State v. Gordineer, 229 Or 105, 366 P2d 161 (1961)). Also, one reported case involved the use of drugs (State v. Holleman, 225 Or 1, 357 P2d 262 (1960)), and one other case related to the child's environmental surroundings (State v. Casson, supra).

The specific sexual conduct involved includes:

(1) Having or attempting to have sexual intercourse with a child, *State v. Dunn*, supra; *State v. DuBois*, supra; *State v. Harmon*, 225 Or 571, 358 P2d 1048 (1961); *State v. Hoffman*, supra; *State v. Day*, supra; *State v. Gates*, supra. It has also been held that one who aids and abets another to have sexual intercourse with a minor is guilty of contributing to the delinquency of that minor. *State v. Glenn*, 233 Or 566, 379 P2d 550 (1963);

(2) Inducing the child to become a prostitute, *State v. Caputo*, supra;

(3) Procuring or supplying drugs for the purposes of abortion, *State v. Eisen*, supra; and *State v. DuBois*, supra;

(4) Exposing of private parts to a child, *State v. Nagel*, 185 Or 486, 202 P2d 640 (1949);

(5) Manipulating of private parts of a child or inducing a child to manipulate the private parts of

the defendant, or placing of defendant's private parts against those of the child. *State v. Dunn*, supra; *State v. Harvey*, supra; *State v. DuBois*, supra; *State v. Stone*, supra; *State v. Moore*, 194 Or 232, 241 P2d 455 (1952); *State v. Schell*, 224 Or 321, 356 P2d 155 (1960); *State v. Ely*, supra; *State v. Doud*, supra;

(6) Being unclothed in bed with the child, *State v. Iverson*, supra; *Lasly v. Gladden*, 244 Or 349, 418 P2d 256 (1966);

(7) Taking the child to the home of a man known to be a promiscuous homosexual, *State v. Casson*, supra; and

(8) "French kissing," *Bonnie v. Gladden*, 240 Or 462, 402 P2d 237 (1965). However, an indictment alleging merely that two people slept in a bed in the presence of four children was held not to charge acts manifestly tending to cause the children to become delinquent. *State v. Peebler*, supra at 327.

State v. Hodges overrules the *Peebler-Casson* doctrine, characterizing *Casson* as an attempt to "save" ORS 167.210, but holding that it cannot be saved when considered in the specific context of an assertion that the statute is unconstitutional "on its face." *Hodges* holds that regardless of what a person is told after he is charged with a crime, a law fails to meet the requirements of the due process clause "if it is so vague and standardless that it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." Supra at 725.

The Legislature, anticipating the *Hodges* decision, enacted House Bill 1897 (Ch. 655, Oregon Laws 1969) in an attempt to cover specifically certain sex oriented misconduct with minors that formerly was within the purview of the catch-all language of ORS 167.210. The new statute, ORS 167.227, reads as follows:

"(1) Any person who lewdly fondles or manipulates the private parts of a child under the age of 18 or who induces or permits a child under the age of 18 to fondle or manipulate that person's private parts or who by threats, commands or persuasion endeavors to induce any such child to commit any crime or to participate in any act of sexual perversion with himself or with another person shall be punished by a fine of not more than $1,000 or by imprisonment in the county jail for a period not to exceed one year, or both, or by imprisonment in the penitentiary for a period not to exceed five years.

"(2) Subsection (1) of this section shall not apply to acts between persons who are lawfully married to one another."

Indeterminate sentence for sex offenders: ORS 167.050 provides that a person convicted of violating either ORS 163.210, rape; 163.220, rape of daughter; 163.270, assault with intent to commit rape; 167.035, incest; 167.040, sodomy; or 167.045, removal of a child with intent to commit certain sex offenses, who has previously been convicted for violating any of those statutes, ". . . shall be sentenced to imprisonment in the state penitentiary for an indeterminate term not exceeding the natural life of such person."

ORS 137.111 provides that a person convicted of any of the statutes which are listed in ORS 167.050 may be sentenced to an indeterminate term not exceeding the offender's natural life if:

"(1) The offense involved a child under the age of 16 years; and

"(2) The court finds that such person has a mental or emotional disturbance, deficiency or condition predisposing him to the commission of any crime punishable [under the enumerated sections] to a degree rendering the person a menace to the health or safety of others."

The proposed Code's sentencing provisions provide for enhanced penalties for "dangerous offenders." (See §§ 85, 86 supra).

Section 118. Sexual misconduct. (1) A person commits the crime of sexual misconduct if he engages in sexual intercourse or deviate sexual intercourse with an unmarried person under 18 years of age.

(2) Sexual misconduct is a Class C misdemeanor.

COMMENTARY

The purpose of this section is to discourage premature ventures into sexual experiences by adolescents. The defendant's age is irrelevant and the defense provided in § 108, supra, is not available in a prosecution under this section.

This section, then, represents the basic dividing line between criminal and noncriminal conduct of either a heterosexual or homosexual nature by prohibiting sexual intercourse or deviate sexual intercourse with an unmarried person less than 18 years of age.

Section 119. Accosting for deviate purposes. (1) A person commits the crime of accosting for deviate purposes if while in a public place he invites or requests another person to engage in deviate sexual intercourse.

(2) Accosting for deviate purposes is a Class C misdemeanor.

COMMENTARY

A. Summary

Accepting the premise that open and aggressive solicitation by homosexuals may be grossly offensive to other persons availing themselves of public facilities, a legitimate public interest arises in discouraging such conduct aside from the propriety or impropriety of the sexual conduct represented by the solicitation.

The section is intended to discourage indiscriminate public seeking for deviate sexual intercourse. It is not intended to reach purely private conversations between persons having an established intimacy, even if conducted in a public place and related to deviate sexual intercourse.

There is no requirement that the solicited conduct be for hire. That form of conduct is covered by Article 28 infra.

B. Derivation

The section is based on Model Penal Code § 251.3.

C. Relationship to Existing Law

There is no specific Oregon statute comparable to the proposed section. Similar conduct could be punished under ORS 166.060(1)(f) as vagrancy or ORS 161.310 as conduct grossly disturbing public morals.

Section 120. Public indecency. (1) A person commits the crime of public indecency if while in, or in view of, a public place he performs:

(a) An act of sexual intercourse; or

(b) An act of deviate sexual intercourse; or

(c) An act of exposing his genitals with the intent of arousing the sexual desire of himself or another person.

(2) Public indecency is a Class A misdemeanor.

COMMENTARY

A. Summary

Indecent or lewd exposure of the person to the public view is a common law misdemeanor and it has been made a specific offense under many state statutes.

Paragraphs (a) and (b) of subsection (1) prohibit the performance of certain sexual activity in a public place. There is no *mens rea* requirement here; the commission of the act in public for whatever reason constitutes the offense.

Paragraph (c) requires an intent to arouse the sexual desire of the actor or another. An exposure that is not sexually motivated would not violate this section, but might be "disorderly conduct." (See Art. 26 infra).

B. Derivation

The section is taken from Connecticut Revised Penal Code § 196 (1969).

C. Relationship to Existing Law

ORS 167.145, indecent exposure, 1 year, $500 fine; ORS 161.310, offenses against public peace, health or morals, 6 months, $200 fine. Both statutes would be repealed by the proposed Code.

OFFENSES AGAINST PROPERTY

ARTICLE 14. THEFT AND RELATED OFFENSES

Section 121. Definitions. As used in this Act, unless the context requires otherwise:

(1) "Appropriate property of another to oneself or a third person" or "appropriate" means to:

(a) Exercise control over property of another, or to aid a third person to exercise control over property of another, permanently or for so extended a period or under such circumstances as to acquire the major portion of the economic value or benefit of such property; or

(b) Dispose of the property of another for the benefit of oneself or a third person.

(2) "Deprive another of property" or "deprive" means to:

(a) Withhold property of another or cause property of another to be withheld from him permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him; or

(b) Dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property.

(3) "Obtain" includes, but is not limited to, the bringing about of a transfer or purported transfer of property or of a legal interest therein, whether to the obtainer or another.

(4) "Owner of property taken, obtained or withheld" or "owner" means any person who has a right to possession thereof superior to that of the taker, obtainer or withholder.

(5) "Property" means any article, substance or thing of value, including, but not limited to, money, tangible and intangible personal property, real property, choses-in-action, evidence of debt or of contract.

COMMENTARY

This section contains definitions of terms used in several succeeding sections of the theft draft, thereby providing for a shorter and clearer definition of the crime and ensuring a uniformity of meaning throughout the sections. The definitions employed are patterned generally after the New York Revised Penal Law § 155.00.

Subsections (1) and (2) define "appropriate" and "deprive," both fundamental to a definition of the requisite intent on the part of the thief to exert permanent or virtually permanent control over the property taken, or to cause permanent or virtually permanent loss to the owner of the possession and use thereof. These definitions retain the traditional distinction between larceny and some other offenses which, though similar, do not reach the stature of larceny because of a lesser intent to obtain temporary possession or use of the property or to cause temporary loss to the owner. *CJS*, Larceny, §§ 27, 28; *State v. Teller*, 45 Or 571 (1904); *State v. Ducher*, 8 Or 394 (1880).

The definition of "obtain" in subsection (3) extends the concept of a taking to include the constructive acquisition of property, and is consistent with the ensuing definition of "property," which includes real property. Asportation or "carrying away" of the property is not required.

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Subsection (4), in defining the terms "owner of property taken, obtained or withheld" and "owner," articulates the relationship that must exist between

a person and the property involved in order for him to be the victim of a larceny if the property is wrongfully taken from him. The word is not found in our existing larceny statute; however, the phrase "the property of another" that appears in ORS 164.310, as well as in the common law definition of larceny, means "ownership." *State v. Broom*, 135 Or 641 (1931); *State v. Poyntz*, 168 Or 69 (1942). For larceny purposes, it is uniformly held that "ownership" of property means "possession" of it and that having a legally recognizable interest in property gives a person possession of it. *State v. Luckey*, 150 Or 566 (1935); *State v. Swayzer*, 11 Or 357 (1884).

Subsection (5), "property," is defined broadly enough to avoid a limitation to the enumerated kinds and to encompass the subjects of larceny now covered in ORS 164.310, including real property. By specifically including intangible property within its scope, the definition remedies the type of problem that occurred in *State v. Tauscher*, 227 Or 1 (1961), wherein it was held that only property that is tangible and capable of being possessed may be the subject of larceny or embezzlement under the existing statutes and an agent who, without authority and for her own purposes, drew a check on her principal's account was guilty of neither crime.

Section 122. Consolidation of theft offenses; pleading and proof. (1) Except for the crime of theft by extortion, conduct denominated theft under section 123 of this Act constitutes a single offense.

(2) If it is an element of the crime charged that property was taken by extortion, an accusation of theft must so specify. In all other cases an accusation of theft is sufficient if it alleges that the defendant committed theft of property of the nature or value required for the commission of the crime charged without designating the particular way or manner in which the theft was committed.

(3) Proof that the defendant engaged in conduct constituting theft as defined in section 123 of this Act is sufficient to support any indictment, information or complaint for theft other than one charging theft by extortion. An accusation of theft by extortion must be supported by proof establishing theft by extortion.

COMMENTARY

The purpose of this section is to spell out the procedural consequences of the consolidation of theft offenses. A charge of theft is sufficient without designating the particular theory of the crime, except for theft by extortion which is classified as a Class B felony. The section serves to underscore one of the chief aims of the theft article, elimination of the confusing distinctions between larceny, larceny by trick, embezzlement, obtaining under false pretenses, *etc.* The section is based on Model Penal Code § 223.1 and New York Revised Penal Law § 155.45.

Section 123. Theft; definition. A person commits theft when, with intent to deprive another of property or to appropriate property to himself or to a third person, he:

(1) Takes, appropriates, obtains or withholds such property from an owner thereof; or

(2) Commits theft of property lost, mislaid or delivered by mistake as provided in section 126 of this Act; or

(3) Commits theft by extortion as provided in section 127 of this Act; or

(4) Commits theft by deception as provided in section 128 of this Act; or

(5) Commits theft by receiving as provided in section 129 of this Act.

COMMENTARY

A. Summary

The primary purpose of this section is to eliminate the traditionally distinct crimes of larceny, larceny by trick, embezzlement, obtaining property by false pretenses, receiving stolen property and extortion and to consolidate them into one crime called "theft." Consolidation is accomplished by the language of subsection (1), aided by the definitions contained in the previous section.

The secondary purpose of broadening the scope of existing law is effected by subsections (2) through (5).

Subsection (2) designates as a form of theft the acquisition of property lost, mislaid or delivered by mistake.

Subsection (3) provides that theft may be committed by "extortion."

Subsection (4) designates "deception" as theft.

Subsection (5) continues the expanded concept of the crime to include theft by "receiving."

B. Derivation

The basic definition of theft is similar to New York Revised Penal Law § 155.05, although, contrary to that code, the enumeration of the old crimes of larceny, larceny by trick, embezzlement and obtaining by false pretenses as ways of committing theft has been purposely avoided. The Commission hopes thereby to preclude the implication that any of the artificial technicalities of these crimes are being retained.

Following the example of the Model Penal Code and several other states, we have attempted to abolish completely the labels and highly technical distinctions between the various larceny-type offenses and propose to codify them into one comprehensive theft statute. Existing statutes covering larceny, embezzlement and obtaining property under false pretenses would be repealed.

C. Relationship to Existing Law

ORS 164.310 is the basic larceny statute, but it is merely one of numerous statutes relating to the stealing of property. Our present statutes contain three general types of provisions proscribing the criminal taking of property and draw technical distinctions between the traditionally separate crimes of larceny, embezzlement and obtaining property by false pretense. In addition many of the existing statutes found in ORS chapter 164 describe specific criminal acts that are covered by the basic larceny section but are distinguished from it by the subject matter of the theft or its locus. These other statutes cover separately, and often prescribe different penalties for, the crimes of stealing from the person, stealing minerals, trees or plants, livestock, railroad property and animals, to mention a few. It is apparent that this multiplicity of statutory provisions with its confusing diversity of penalties for similar crimes, gradually developed over the years as the result of piecemeal legislation to meet specific problems.

The embezzlement laws themselves are further refined into a perplexing series of distinct statutory crimes, each with its own special penalty provision. Often, the vastly different penalties between one type of embezzlement and another appear to rest on no logical foundation. (See ORS 165.005 to 165.040). Fraudulent criminal conduct which results in the defendant obtaining property from the victim is dealt with as separate crimes in ORS chapter 165.

A substantial body of case law exists in which the Oregon Supreme Court has grappled with the distressing problems created by our archaic theft statutes and related provisions. The structure of the Oregon statutes, inherited as it was from the old common law, retains today distinctions that are not only meaningless in a modern society, but are also unnecessary handicaps to effective administration of the laws. See *State v. Thompson*, 240 Or 468, 402 P2d 243 (1965); *State v. Harris*, 246 Or 617, 427 P2d 107 (1967); *State v. Lewis*, 248 Or 217, 433 P2d 617 (1967); *State v. Stuart*, 250 Or 303, 442 P2d 231 (1968).

Section 124. Theft in the second degree. (1) A person commits the crime of theft in the second degree if, by other than extortion, he:

(a) Commits theft as defined in section 123 of this Act; and

(b) The property is under $250 in value.

(2) Theft in the second degree is a Class A misdemeanor.

COMMENTARY

See commentary under § 125 infra.

Section 125. Theft in the first degree. (1) A person commits the crime of theft in the first degree if, by other than extortion, he:

(a) Commits theft as defined in section 123 of this Act; and

(b) The property is $250 or more in value.

(2) Theft in the first degree is a Class C felony.

COMMENTARY TO SECTIONS 124 AND 125

These sections retain the traditional standard of the value of the property stolen as the basis for distinguishing between a misdemeanor and a felony. The Model Penal Code and most of the new state criminal codes continue to use value as a criterion for determining the penalty for the crime. The dividing line between the two crimes is raised from $75 (ORS 164.310) to $250.

Section 126. Theft of lost, mislaid property. A person who comes into control of property of another that he knows or has good reason to know to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient, commits theft if, with intent to deprive the owner thereof, he fails to take reasonable measures to restore the property to the owner.

COMMENTARY

A. Summary

A person who comes into control of property of another that he knows or has good reason to know to have been lost, mislaid, or delivered by mistake as to the nature or amount of the property or the identity of the recipient, commits theft if, with intent to deprive the owner thereof, he fails to take reasonable measures to restore the property to the owner. A person who merely learns of the whereabouts of lost property but does not assume control over it would not commit theft. A finder who casually handles a lost article would not be considered to have "come into control" of it. The chances of restoration to the owner might often be increased rather than lessened by noninterference of casual finders.

Even though a finder may take possession with intent to keep the property from the owner, he does not commit theft if he then proceeds to take reasonable measures to restore the property to its owner.

This section is intended to punish finders for failure to act rather than for an initial misappropriation. The *mens rea* element of the crime—the intent to deprive the owner of the property—must exist at the time of the actor's failure to take reasonable measures to restore the property to the owner.

The following statement from the Model Penal Code details the type of fact situation in which the section would apply:

> "Common law theory of larceny as an infringement of another's possession required a determination of the actor's state of mind at the moment of finding, for an honest state of mind at that point would preclude the felony conviction; the subsequent formation of a dishonest purpose would not be criminal since he would already be in possession. The search for an initial fraudulent intent appears to be largely make-believe. The realistic objective in this area is not to prevent the initial appropriation but to compel subsequent acts to restore to the owner. Therefore the section permits conviction even where the original taking was honest in the sense that the finder then intended to restore, but subsequently changed his mind; and it bars conviction where the finder acts with reasonable promptness to restore the property, even though he may have entertained a fraudulent purpose at some time during his possession." (Tent. Draft No. 2 at 83-84).

The section deals with property that is lost, mis-

laid or delivered by mistake. The latter category covers the kind of situation wherein one accepts a $10 bill knowing that the other person thinks he is handing over a $1 bill. In such a case the receiver acquires the property without trespass or false pretense and the traditional concept of larceny fails to reach such conduct. However, it is not proposed to make criminal certain types of tolerated sharp trading such as the purchase of another's property at a bargain price on a mere showing that the buyer was aware that the seller was mistaken regarding the value of the property sold.

B. Derivation

The section is based on Model Penal Code § 223.5; New York Revised Penal Law § 155.05 (1)(b); and Illinois Criminal Code § 16-2.

C. Relationship to Existing Law

At common law, "lost property" is property not intentionally deposited by the owner in a place where it was found. *Jackson v. Steinberg*, 186 Or 129 (1949). "Mislaid property" is that which the owner has voluntarily and intentionally laid down in a place where he can again resort to it and then has forgotten where he laid it. ORS 98.010–98.040 presently impose certain affirmative duties on the finders of lost goods; however, none of the criminal statutes deal with the question. Under existing case law one who receives money from another to which he knows he is not entitled, and which he knows has been paid to him by mistake, and conceals such overpayment, appropriating the money to his own use, with intent to defraud, is guilty of larceny. *State v. Ducher*, 8 Or 394 (1880).

Section 127. Theft by extortion. (1) A person commits theft by extortion when he compels or induces another person to deliver property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will in the future:

(a) Cause physical injury to some person; or

(b) Cause damage to property; or

(c) Engage in other conduct constituting a crime; or

(d) Accuse some person of a crime or cause criminal charges to be instituted against him; or

(e) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

(f) Cause or continue a strike, boycott or other collective action injurious to some person's business; except that such conduct shall not be considered extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act; or

(g) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(h) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or

(i) Inflict any other harm that would not benefit the actor.

(2) Theft by extortion is a Class B felony.

COMMENTARY

A. Summary

This section continues the comprehensive definition of theft and deals with situations where coercion is employed to obtain property of another. The crime would consist of the wrongful acquisition of property by intimidation or threat. Because of the threat element the crime is considered more dangerous than other methods of committing theft and is classified as a Class B felony.

The kinds and varieties of threats or intimidating

conduct that would amount to theft by extortion are set forth in paragraphs (a) to (i) of subsection (1).

As recommended by the Model Penal Code, paragraph (a) covers threats to injure *anyone*, on the theory that if the threat is in fact the effective means of compelling another to give up property, the nature of the relationship between the victim and the person he chooses to protect is immaterial. The issues are whether the threat is intended to intimidate and whether it is effective for that purpose.

Paragraph (b) is aimed at the threat to cause damage to someone's business, home or other property. A common example would be the selling of "protection" to a store owner.

The provisions of paragraph (c) are taken directly from New York Revised Penal Law and are similar to the Model Penal Code which employs the language "commit any other criminal offense." Commentary to Model Penal Code indicates its purpose is to cover a situation like this: A racketeer obtains property from another racketeer by threatening to operate houses of prostitution or illegal gambling enterprises in competition with him. Threat to compete would not ordinarily be criminal because the right to compete is one which, in our society, may be bargained away. However, where the competition itself would be criminal activity, there is no need to immunize a threat to engage in that activity when it is used for the purpose of extortion. (Tent. Draft No. 2 at 76). Paragraph (d) resembles closely the language now appearing in ORS 163.480 and is common to most extortion statutes.

Paragraph (e) amounts to a threat to defame. Unlike defamation actions, the truth of the matter threatened to be exposed would not constitute a defense to a prosecution under this subsection. The prohibition is directed against "selling" forbearance from defamation and not against the publication of defamation itself. It is emphasized, however, that the subsection is not intended to make it criminal to conduct legitimate negotiation or to agree to settlement of an asserted claim as consideration for a promise to forbear from civil litigation.

The provisions of paragraph (f) are aimed at racketeering, but do not in any way jeopardize the collective bargaining process, since even menaces are not criminal if the benefits are to be received by the group on behalf of which the "bargaining" is conducted. The group representative or official who threatens such action unless he gets a "kickback" would be reached by this subsection, however. Paragraph (g) is self-explanatory.

Paragraph (h) is aimed at extortion committed under cover of public office and is close to the "bribery" type of crimes now incorporated in ORS 162.230, 162.240 and 162.510. (See also articles 21 and 25 infra.)

Paragraph (i) is a statement of the general principle on which other threats are to be included within extortion. Examples suggested by Model Penal Code are: (a) The foreman in a manufacturing plant requires the workers to pay him a percentage of their wages on pain of dismissal or other employment discrimination; (b) A close friend of the purchasing agent of a corporation obtains money from an important supplier by threatening to influence the purchasing agent to divert his business elsewhere; (c) A professor obtains property from a student by threatening to give him a failing grade.

B. Derivation

The draft follows Model Penal Code § 223.4 and is a blend of that section and New York Revised Penal Law § 155.05 (e). The New York statute proscribes larceny of property by threat to cause physical injury to some person in the future. The Model Penal Code punishes obtaining of property by a threat to inflict bodily injury on anyone. It is submitted that the New York provision is preferable because it more clearly distinguishes between this type of theft and robbery, which is the threatening of immediate use of physical force upon another. Illinois Criminal Code and Michigan Revised Criminal Code contain comparable statutes.

C. Relationship to Existing Law

ORS 163.480, Oregon's "extortion" law, provides that any person who threatens any injury to the person or property of another or threatens to accuse another of any crime with the intent to extort any "pecuniary advantage or property" from him or to compel him to do any act against his will shall be punished. The crime is committed by making the threat, and obtaining property thereby is not an element.

The proposed draft goes beyond the existing statute by providing that the actor would commit theft if he actually obtained property from another as a result of the threat. It should be noted, however, that the Commission does not propose thereby to eliminate the proscription against the conduct now covered by ORS 163.480. (See § 102 supra). Such conduct would, in any event, amount to "attempted theft by extortion" under the draft if the purpose of the threat is to obtain property thereby.

Section 128. Theft by deception. (1) A person, who obtains property of another thereby, commits theft by deception when, with intent to defraud, he:

(a) Creates or confirms another's false impression of law, value,

intention or other state of mind which the actor does not believe to be true; or

(b) Fails to correct a false impression which he previously created or confirmed; or

(c) Prevents another from acquiring information pertinent to the disposition of the property involved; or

(d) Sells or otherwise transfers or encumbers property, failing to disclose a lien, adverse claim or other legal impediment to the enjoyment of the property, whether such impediment is or is not valid, or is or is not a matter of official record; or

(e) Promises performance which he does not intend to perform or knows will not be performed.

(2) "Deception" does not include falsity as to matters having no pecuniary significance, or representations unlikely to deceive ordinary persons in the group addressed.

(3) In a prosecution for theft by deception the defendant's intention or belief that a promise would not be performed shall not be established by or inferred from the fact alone that such promise was not performed.

(4) In a prosecution for theft by deception committed by means of a bad check, it is prima facie evidence of knowledge that the check or order would not be honored if:

(a) The drawer has no account with the drawee at the time the check or order is drawn or uttered; or

(b) Payment is refused by the drawee for lack of funds, upon presentation within 30 days after the date of utterance, and the drawer fails to make good within 10 days after receiving notice of refusal.

COMMENTARY

A. Summary

Section 128 defines the crime of theft by deception. The section is restricted to include only those instances wherein there exists an intent to defraud and to exclude cases essentially civil in nature and amounting to little more than breaches of contract.

Subsection (1)(a) retains the traditional false pretenses concept of creating a false impression, and broadens the scope to include the act of confirming another's false impression which the actor does not believe to be true. If the actor confirms the false impression for the purpose of inducing consent and obtains property thereby, he will commit theft. The false impression may relate to law, value, intention or other state of mind of the victim. The traditional restriction to "existing fact" is rejected. There is no "false token" requirement retained.

If the actor fails to correct a false impression which he previously created or confirmed and obtains property thereby, he would commit theft under (1)(b).

A person who prevents another from acquiring information pertinent to the disposition of the property would commit theft if he does so with fraudulent intent and obtains property of another as the result. (Subsection (1)(c)).

If with like intent and with like result the actor sells, transfers or otherwise encumbers property and fails to disclose a lien or other legal impediment to the enjoyment of the property, he would be guilty of theft under the provisions of (1)(d).

Subsection (1)(e) covers theft committed by "false promise" and represents a significant departure from the familiar limitation to misrepresentation of fact and includes promises of future performance which the actor does not intend to perform or knows will not be performed. However, mere nonperformance alone would not be sufficient to establish that the actor intended or believed that a promise would not be performed. (Subsection (3)).

The exception contained in subsection (2) is designed to deal with the problem of mass advertising

and "commendation of wares" that would be considered unlikely to deceive ordinary persons, and to situations wherein a misrepresentation may be made during the "bargaining" but the person deceived nonetheless gets everything he bargained for. For example, a salesman who misrepresents his political or lodge affiliations to make a sale.

B. Derivation

Subsection (1) is derived from Illinois Criminal Code § 15–4 and Michigan Revised Criminal Code § 3201. In paragraph (a) the phrase, "of law, value, intention or other state of mind," which modifies the word "impression" is taken from Model Penal Code § 223.3. This language seems desirable because it clearly indicates the intent to eliminate needless distinctions based on "fact" as contrasted with "opinion" or "present or past fact" as opposed to "future events."

The exception contained in subsection (2) is taken from Model Penal Code § 223.3; however, the term "representations" has been substituted for the phrase "puffing by statements" used therein.

Subsection (3) is a restatement of language from New York Revised Penal Law § 155.05, and is similar to provisions contained in Model Penal Code § 223.3 (a).

Subsection (4) is from Model Penal Code § 224.5.

C. Relationship to Existing Law

The section brings what is now the crime of obtaining property by false pretenses (ORS 165.205) within the ambit of theft and greatly broadens the scope of the offense to include conduct not now covered. Deception would include, also, the type of fraudulent activity which presently would be prosecuted as "larceny by trick." Eliminated is the tricky question of whether "title" as opposed to "possession" passes. Obtaining property by means of a bad check also could be prosecuted as theft by deception. The prima facie evidence provisions in subsection (4) are identical to those set forth in the section covering negotiating a bad check. (§ 161 infra).

Section 129. Theft by receiving. (1) A person commits theft by receiving if he receives, retains, conceals or disposes of property of another knowing or having good reason to know that the property was the subject of theft.

(2) "Receiving" means acquiring possession, control or title, or lending on the security of the property.

COMMENTARY

A. Summary

The draft follows the Model Penal Code by incorporating the traditionally distinct crime of receiving stolen property as part of the comprehensive "theft" offense.

The definition of "receiving" is taken from Model Penal Code § 223.6 (1). The commentary thereto stresses that the essential idea to be expressed in statutes prohibiting receiving stolen property is that of acquisition of control whether in the sense of physical dominion or of legal power to dispose. The definition is broad enough to cover "constructive possession" and the activities of those who buy stolen property, as well as persons who acquire title thereto otherwise than by purchase, and who make loans and advances on such property.

Consolidation of receiving with other forms of theft provides the same advantages as other aspects of the unification of the theft concept. It reduces the opportunity for technical defenses based upon legal distinctions between the similar activities of stealing and receiving the fruits of the theft.

It should be noted, however, that consolidation would make it impossible to convict of two offenses based on the same transaction. A person found in possession of recently stolen property may be either the thief or the receiver; but if the prosecution can prove the requisite thieving state of mind, it makes little difference whether the jury infers that the defendant took directly from the owner or acquired from the thief.

B. Derivation

Section 129 is based upon Model Penal Code § 223.6.

C. Relationship to Existing Law

The terms "receives" and "conceals" are retained from ORS 165.045 although the concept of "receiving" has been greatly expanded by the definition of that term in subsection (2) and would continue to include "buying."

The knowledge or belief of the actor that the property is stolen is stated in substantially the same manner as in the present statute, "knowing or having good reason to know." This is more severe than the

Model Penal Code which demands actual awareness by the defendant, with the requisite state of mind required to be "knowing that it has been stolen, or believing that it has probably been stolen." Nevertheless, under the Model Penal Code version, proof of reason to believe would authorize a jury to draw an inference of actual knowledge, so the difference between the two drafts is largely academic.

Section 130. Right of possession. Right of possession of property is as follows:

(1) A person who has obtained possession of property by theft or other illegal means shall be deemed to have a right of possession superior to that of a person who takes, obtains or withholds the property from him by means of theft.

(2) A joint or common owner of property shall not be deemed to have a right of possession of the property superior to that of any other joint or common owner of the property.

(3) In the absence of a specific agreement to the contrary, a person in lawful possession of property shall be deemed to have a right of possession superior to that of a person having only a security interest in the property, even if legal title to the property lies with the holder of the security interest pursuant to a conditional sale contract or other security agreement.

COMMENTARY

A. Summary

This section spells out the right of possession of property. Subsection (1) is consistent with the definition of "owner" contained in § 121 by providing that one who obtained possession of property by theft or other illegal means has a right of possession superior to that of one who takes, obtains or withholds it from him by means of theft. This is a codification of a generally accepted principle in the larceny area. (52 *CJS*, § 13, at 811).

Subsection (2) defines the rights of joint or common owners, such as partners, and is a restatement of the generally accepted principle that one cannot "steal" from the other if the taker has a right to possession at the time of the taking.

Subsection (3) deals with the difficult cases in which there is some sort of security agreement between the parties, and provides that in the absence of a specific agreement to the contrary, a person in lawful possession of property has a right of possession superior to one having only a security interest therein. The gist of the subsection is to protect lawful possession.

B. Derivation

Section 130 is taken from New York Revised Penal Law § 155.00.

C. Relationship to Existing Law

The section represents basically a codification of existing common law principles.

Section 131. Value of stolen property. For the purposes of this Act, the value of property shall be ascertained as follows:

(1) Except as otherwise specified in this section, value means the market value of the property at the time and place of the crime, or if such cannot reasonably be ascertained, the cost of replacement of the property within a reasonable time after the crime.

(2) Whether or not they have been issued or delivered, certain written instruments, not including those having a readily ascertainable market value, shall be evaluated as follows:

(a) The value of an instrument constituting an evidence of debt,

including, but not limited to, a check, draft or promissory note, shall be considered the amount due or collectible thereon or thereby.

(b) The value of any other instrument which creates, releases, discharges or otherwise affects any valuable legal right, privilege or obligation shall be considered the greatest amount of economic loss which the owner might reasonably suffer because of the loss of the instrument.

(3) When the value of property cannot reasonably be ascertained, it shall be presumed to be an amount less than $250.

COMMENTARY

A. Summary

Section 131 sets forth three criteria to establish value.

B. Derivation

This section is derived substantially from New York Revised Penal Law § 155.20 and appears to be a more appropriate system of determining value than the Model Penal Code which establishes value merely as "the highest value by reasonable standard of the property or services."

C. Relationship to Existing Law

Under case law the value of stolen property for purposes of determining the degree of larceny is its market value at the inception of the taking thereof. *State v. Albert*, 117 Or 179 (1926).

Section 132. Theft; defenses. (1) In a prosecution for theft it is a defense that the defendant acted under an honest claim of right, in that:

(a) He was unaware that the property was that of another; or

(b) He reasonably believed that he was entitled to the property involved or had a right to acquire or dispose of it as he did.

(2) In a prosecution for theft by extortion committed by instilling in the victim a fear that he or another person would be charged with a crime, it is a defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of the threatened charge.

(3) In a prosecution for theft by receiving, it is a defense that the defendant received, retained, concealed or disposed of the property with the intent of restoring it to the owner.

(4) It is a defense that the property involved was that of the defendant's spouse, unless the parties were not living together as man and wife and were living in separate abodes at the time of the alleged theft.

COMMENTARY

A. Summary

Subsection (1) restates existing case law and provides a defense if a person acts under an honest claim of right in that he is unaware that the property is that of another, or reasonably believes he is entitled to deal with the property as he does.

Subsection (2) excludes from criminal liability the victim of a theft or other crime causing financial

loss, who threatens the thief with criminal prosecution based upon his conduct unless he makes good the loss.

Subsection (3) sets forth a defense to the crime of theft by receiving.

Subsection (4) abrogates the common law rule that because of the legal unity of husband and wife one could not steal property of the other. (52 *CJS*, Larceny, § 40). The common law immunity has been abolished or narrowed in a majority of states on the ground that the Married Women's Property Acts and the changed status of women in society today call for treating her in property matters as a separate person independent of her husband. (See Model Penal Code, Tent. Draft No. 2 at 103-5).

This subsection is substantially the same as the provision found in the Illinois Criminal Code of 1961. Comments to that statute indicate that the Illinois revision committee felt that unless the husband and wife have separated and are living in separate abodes when the theft occurs, the criminal law should not intrude into what usually is a civil dispute wherein the true ownership of the property involved is uncertain at best. If, however, the parties have separated and are living apart and theft occurs, there seems to be no good reason why such conduct should not be punishable in the criminal courts.

Members of the Commission generally agree that such an approach is a reasonable one and would leave most property fights between spouses to the divorce courts, but at the same time would provide criminal sanctions in those situations where the separate property rights of a spouse require the protection of the criminal law.

B. Derivation

Subsection (1) is borrowed from Michigan Revised Criminal Code § 3240. Subsection (2) is adapted from New York Revised Penal Law § 155.15. Subsection (3) is a modified version of language taken from Model Penal Code § 223.6. The language in subsection (4) is substantially the same as that used in Illinois Criminal Code § 16-4 (b). The Model Penal Code also rejects the rule of absolute immunity between spouses (Tent. Draft No. 2 at 103-5); and the Michigan Revised Criminal Code § 3240 adopts a similar position.

C. Relationship to Existing Law

Common law larceny required that the defendant have the intent to deprive the owner permanently of his property. A person is not guilty of larceny if he takes the property of another under a bona fide claim of right or under a mistaken belief that he has authority to deal with the property. 52 *CJS* Larceny § 25; *State v. Teller*, 45 Or 571 (1904); *State v. Meldrum*, 41 Or 380 (1902); *State v. Minnick*, 54 Or 86 (1909); *State v. Sally*, 41 Or 366 (1902). Subsection (1) is, in effect, a restatement of common law principles, in language broad enough to cover all conduct designated as "theft" by the draft.

The defendant must develop evidence on the issue of claim of right, a mere assertion of the possibility of a claim of right being insufficient. The state is not now required to prove the lack of a subjective belief of authority to act by the defendant. If the theft statute is to be enforceable, the state could not be expected to discharge such a burden. What the defendant does by his evidence is to "raise a reasonable doubt" about the *mens rea* element of the crime, and burden continues on the state to prove every element of the crime charged beyond a reasonable doubt. Unquestionably, a jury would be so instructed in the absence of such a provision in the draft, but it seems preferable to make the Code as comprehensive as possible by spelling it out. (See § 4 of this Act for the definition of "defense").

The defense to prosecution for theft by extortion committed by a threat to charge another person of a crime is analagous to the "claim of right" defense, but more limited in its application.

Subsection (3) is directed at cases such as that of an insurance company receiving property on behalf of the owner. The Commission believed it was better to insert this provision in the section relating to defenses rather than as an exception in the substantive statement of the crime to avoid any possible interpretation that it was an element to be negatived by the prosecution.

Section 133. Theft of services. (1) A person commits the crime of theft of services if:

(a) With intent to avoid payment therefor, he obtains services that are available only for compensation, by force, threat, deception or other means to avoid payment for the services; or

(b) Having control over the disposition of labor or of business, commercial or industrial equipment or facilities of another, he uses or diverts to the use of himself or a third person such labor, equip-

ment or facilities with intent to derive a commercial benefit for himself or a third person not entitled thereto.

(2) As used in this section, "services" includes, but is not limited to, labor, professional services, toll facilities, transportation, telephone or other communications service, entertainment, the supplying of food, lodging or other accomodations in hotels, restaurants or elsewhere, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam and water.

(3) Absconding without payment or offer to pay for hotel, restaurant or other services for which compensation is customarily paid immediately upon the receiving of them is prima facie evidence that the services were obtained by deception.

(4) Theft of services is a Class A misdemeanor.

COMMENTARY

A. Summary

"Services" are not "property" as it is defined in § 121; therefore, "theft" of services must be covered by specific statute. The purpose of this section is to protect commercial enterprises that supply services to the public from the thievish type of conduct now only partially covered by existing statutes.

The draft provides that a person commits theft if he obtains "services," as defined in subsection (2), by any of the means defined in subsection (1).

Subsection (3), to aid enforceability, provides that absconding without payment or offer to pay for hotel, restaurant, or other services for which compensation is customarily paid immediately is prima facie evidence that the services were obtained by deception.

B. Derivation

The definition of "services" is similar to the definitions employed in Model Penal Code § 223.7 and Michigan Revised Criminal Code § 3220.

Subsection (1)(a) is based on Model Penal Code § 223.7; however, the above draft spells out the *mens rea* of the element of "intent to avoid payment." The enumeration of the various methods by which services can be obtained illegally has been modified to add the term "force" and to delete "false token" which seems redundant as obtaining services by means of a false token would amount to "deception."

Subsection (1)(b) is a modified version of New York Revised Penal Law § 165.15 and seems preferable to the Model Penal Code provision because it specifically covers the use of labor, equipment and facilities, instead of merely "services" and fixes more precisely the sort of acts that are prohibited.

Subsection (3) is a simplified form of ORS 165.230. Model Penal Code § 223.7 has a similar provision, as does New York Penal Law § 165.15.

C. Relationship to Existing Law

As observed by the Model Penal Code reporter: "There is widespread legislation imposing minor penalties for particular instances of cheating in obtaining service, *e.g.*, obtaining service from hotels and restaurants without intent to pay, dropping slugs in coin machines. But in general it is no crime to induce a doctor, engineer or lawyer by false representations to render services, since no 'property' is obtained." (Tent. Draft No. 2 at 91). As the Oregon Court held in *State v. Miller*, 192 Or 188 (1951), "property" under false pretenses statute must be something capable of being possessed and the title to which can be transferred.

In Oregon statutory prohibitions have been enacted to protect some enterprises. See, ORS 164.540, unlawfully riding on trains; 164.610, interference with water rights and appliances; 164.620, interference with gas and electric appliances; 164.630, interference with telegraphic equipment and service; 164.635, interference with coin telephone; 165.230, defrauding an innkeeper; 165.270, obtaining taxicab transportation by fraud; 165.280, crossing toll bridge without paying; 165.445, defrauding a stablekeeper; 165.530, possessing or using device to obtain service from coin telephone or machine without depositing coin; 165.532, obtaining communications service by fraud.

Section 133 will strengthen the protection for the above service-vending enterprises, and, in addition, will include within its reach any other persons or businesses that furnish "services," including labor or professional services. The sections dealing with

criminal mischief encompass "interfering or tampering" with property of another and will replace those parts of the present statutes dealing with such activity. (See §§ 145-147 infra).

Section 134. Unauthorized use of a vehicle. (1) A person commits the crime of unauthorized use of a vehicle when:

(a) He takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat or aircraft without consent of the owner; or

(b) Having custody of a vehicle, boat or aircraft pursuant to an agreement between himself or another and the owner thereof whereby he or another is to perform for compensation a specific service for the owner involving the maintenance, repair or use of such vehicle, boat or aircraft, he intentionally uses or operates it, without consent of the owner, for his own purpose in a manner constituting a gross deviation from the agreed purpose; or

(c) Having custody of a vehicle, boat or aircraft pursuant to an agreement with the owner thereof whereby such vehicle, boat or aircraft is to be returned to the owner at a specified time, he knowingly retains or withholds possession thereof without consent of the owner for so lengthy a period beyond the specified time as to render such retention or possession a gross deviation from the agreement.

(2) Unauthorized use of a vehicle, boat or aircraft is a Class C felony.

COMMENTARY

A. Summary

This section covers the "joy-riding" type of offense where the actor makes unauthorized use of another's vehicle but without the intent to steal it or permanently deprive the owner of its use. The purpose of the language, "takes, operates, exercises control over, rides in or otherwise uses," is to prohibit not only the taking or driving of another's vehicle without permission but, also, to prohibit *any* unauthorized use of the vehicle.

The first draft of the section limited its coverage to "motor-propelled" vehicles only; however, the Commission believed that the proposal should also protect owners of such things as trailers, sailboats and gliders.

B. Derivation

Subsection (1)(a) is adapted from Model Penal Code § 223.9 and New York Revised Penal Law § 165.05.

Subsections (1)(b) and (c) are taken from New York § 165.05, and define offenses that sound of embezzlement, wherein the defendant originally obtains possession or custody legally, but then misuses or withholds the vehicle wrongfully. Subsection (1)(b) would cover the case of a mechanic who unauthorizedly takes a customer's car and uses it for a personal trip. The type of situation that illustrates (c) would be that of a gratuitous bailment in which a person borrows another's car in Oregon for a few hours and then drives it to another state, keeping it there for several months. In each type of case, the conduct must be a "gross deviation" from the agreed purpose of the bailment.

C. Relationship to Existing Law

The section is meant to include the kinds of acts covered by ORS 164.670, the existing "joy-riding" statute, as well as conduct such as manipulating, starting or tampering with motor vehicles (ORS 164.650, 164.660). Damaging a vehicle would be covered by the sections on criminal mischief. Unauthorized use of a vehicle is classified as a Class C felony, but in appropriate cases the court would be authorized to treat the crime as a Class A misdemeanor. (See § 83 supra).

It will be noted that ORS 164.670 uses the terms "vehicle, watercraft or aircraft," while ORS 164.650 and 164.660 employ the term "motor vehicle as defined in ORS 483.014" in defining the type of property protected by the particular sections. ORS 164.670

was amended in 1965 to insert the terms "watercraft or aircraft." ORS 483.014 (4) provides: " 'Motor vehicle' means every vehicle which is self-propelled." The "taking or using" statute does not define or incorporate by reference any other statutory definition of "vehicle."

"Vehicle" is defined in ORS 482.030 (4) as "every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, except devices moved by human power or used exclusively upon stationary rails or tracks." The term is defined in ORS 486.011 (11) as meaning "every trailer or semi-trailer, and every device which is self-propelled or propelled by electric power from overhead trolley wires but not operated upon rails." ORS 492.010 (3) defines "aircraft" as "any contrivance used or designed for navigation of or flight in the air." The statutes contain no definition of the term "watercraft" and the regulatory statutes all employ the word "boat." ORS 488.705 (2) provides:

> " 'Boat' means every description of watercraft used or capable of being used as a means of transportation on the water, but does not include aircraft equipped to land on water."

ARTICLE 15. BURGLARY AND CRIMINAL TRESPASS

Section 135. Burglary and criminal trespass; definitions. As used in sections 135 to 140 of this Act, except as the context requires otherwise:

(1) "Building," in addition to its ordinary meaning, includes any vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein. Where a building consists of separate units, including, but not limited to, separate apartments, offices, or rented rooms, each unit is, in addition to being a part of such building, a separate building.

(2) "Dwelling" means a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present.

(3) "Enter or remain unlawfully" means to enter or remain in or upon premises when the premises, at the time of such entry or remaining, are not open to the public and when the actor is not otherwise licensed or privileged to do so.

(4) "Premises" includes the term building and any real property.

COMMENTARY

Subsection (1). "Building." This definition is borrowed from Connecticut Penal Code § 110 and closely resembles the definition of the term in New York Revised Penal Law § 140.00 and the definition of "occupied structure" in Model Penal Code § 221.0. Its purpose is to include those structures and vehicles which typically contain human beings for extended periods of time, in accordance with the original and basic rationale of the crime: protection against invasion of premises likely to terrorize occupants.

Subsection (2). "Dwelling." This definition is based on the New York statute, § 140.00, and is much the same as the definition of "dwelling house" in ORS 164.210 (2): "any building of which any part has usually been occupied by any person lodging therein at night, and any structure joined to and immediately connected with such building."

Subsection (3). "Enter or remain unlawfully." This is another definition from New York Revised Penal Law § 140.00. As applied to the burglary sections, the concept of one committing the crime by "remaining unlawfully" represents a departure from the traditional notion that burglary requires a "breaking and entering" or an "unlawful entry" (ORS 164.220). However, ORS 164.250 punishes as burglary the act of "breaking out" of a dwelling house after having committed or attempted to commit a crime therein, but prescribes a maximum pen-

alty of three years imprisonment as compared to 15 years for burglary in a dwelling and 10 years for burglary not in a dwelling. Under the proposed definition an initial lawful entry followed by an unlawful remaining would constitute burglary if accompanied by an intent to commit a crime, and would be criminal trespass if such intent were absent.

Subsection (4). "Premises." This definition comes from New York Revised Penal Law § 140.00. The term is used in the substantive statement of the crime of criminal trespass. By incorporating the term "building," the definition of "premises" thereby covers not only the ordinary concept of trespass to land, but includes the structures, which would not be "real property," as well. This should make for more flexibility in applying the criminal trespass statutes to fit the facts of each particular case, because criminal trespass in the second degree thereby would be a lesser included offense of the first degree offense.

Section 136. Burglary in the second degree. (1) A person commits the crime of burglary in the second degree if he enters or remains unlawfully in a building with intent to commit a crime therein.

(2) Burglary in the second degree is a Class C felony.

COMMENTARY

A. Summary

The basic definition of burglary and the lowest degree of the crime is dealt with by this section. It amounts to nothing more than a form of criminal trespass with two aggravating factors: (1) the premises invaded constitute a "building"; and (2) the intruder enters or remains with intent to commit a crime therein.

B. Derivation

This section corresponds to New York Revised Penal Law § 140.20.

C. Relationship to Existing Law

At common law the offense of burglary consisted of a breaking and entering of the dwelling house of another, in the nighttime, with intent to commit a felony. The statutory crime of burglary and its related "breaking and entering" offenses were probably developed in most jurisdictions to compensate for defects in the attempt law, consisting of definitions of attempts to commit other crimes. (See 4 *Will LJ* 285 (1966)). The traditional definition of burglary has been gradually expanded over the years to include acts which would not have been burglary in the common law sense.

The Oregon Supreme Court, of course, has often discussed the common law rules of burglary:

1. Breaking: At common law an actual physical breaking of the structure was required, except that entries obtained by fraud, threats, trickery, artifice or pretense were recognized as constructive burglarious entry. Since the word "breaking" as used in common law with reference to burglary had a definite meaning that included fraudulent and surreptitious entries, it is established rule that Legislature used the term in its common law sense with reference to the statutory crime of burglary. *State v. Keys*, 244 Or 606, 419 P2d 943 (1966).

Under an indictment for burglary charging a forcible breaking it is sufficient to show unlawful entry without force. Section 1762, Hill's Code (ORS 164.220), enlarges the scope of § 1758 (ORS 164.230) so that any unlawful entry is a breaking and entering. *State v. Huntley*, 25 Or 349, 35 P 1065 (1894).

2. Entering: "Entry" is accomplished by putting through the place broken the hand, finger, foot or any instrument with which one intends to commit a felony, and the least entry of any part of the body is sufficient. *Terminal News Stands v. General Casualty Co.*, 203 Or 54, 278 P2d 158 (1955).

Thrusting hand through hole defendant had made in wall was sufficient entry. *State v. Hicks*, 213 Or 619, 325 P2d 794 (1958), *cert den*, 79 S Ct 594, 359 US 917, 3 L Ed2d 579.

3. The dwelling house of another: It is no longer necessary that there was a human being in the house at the time of the burglary. *Wix v. Gladden*, 204 Or 597, 284 P2d 356 (1955), *cert den*, 76 S Ct 109, 350 US 865, 100 L Ed 767.

4. Nighttime: One of the essential elements of burglary, as defined by Hill's Code, § 1758, is a breaking and entry in the nighttime, and indictment that failed to charge that the acts were committed in the nighttime was insufficient to sustain a conviction. *State v. Mack*, 20 Or 234, 25 P 639 (1891).

5. With intent to commit a felony: That defendant, charged with first degree murder, entered house unlawfully, that there were one or more human beings present therein, and that he intended to commit one or more crimes therein, constitute burglary

under ORS 164.220, 164.230. *State v. Morris*, 241 Or 253, 405 P2d 369 (1965).

Oregon's existing burglary statutes are ORS 164.210 to 164.260. The section as drafted overlaps ORS 164.220 to 164.250. Burglary in the second degree would occur if the intruder entered or remained unlawfully with intent to commit a crime in a nondwelling building without any aggravating factors. The more serious crime of burglary in the first degree is defined in § 137 and differs from § 136 only in terms of aggravating factors.

The basic definition of burglary requires no "breaking" and is consistent with existing law in ORS 164.220. It eliminates the necessity of proving intent to steal or to commit a "felony" in the nondwelling burglary as presently required under ORS 164.240, making the intent element the same as now prescribed for burglary in a dwelling by ORS 164.230, *i.e.*, the intent to commit any "crime." The section also does away with the need for proving that property was kept in the building. Also eliminated is the requirement of proving that the intruder had the intent to commit the crime at the time of the entering.

Section 137. Burglary in the first degree. (1) A person commits the crime of burglary in the first degree if he violates section 136 of this Act and the building is a dwelling, or if in effecting entry or while in the building or in immediate flight therefrom he:

(a) Is armed with explosives or a deadly weapon; or

(b) Causes or attempts to cause physical injury to any person; or

(c) Uses or threatens to use a dangerous weapon.

(2) Burglary in the first degree is a Class B felony.

COMMENTARY

A. Summary

This section incorporates the basic definition of burglary contained in § 136, but aggravates it if the intruder is armed with explosives or a "deadly weapon"; or causes or attempts to cause "physical injury" to any person; or uses or threatens the use of a "dangerous weapon." (See § 3 supra for definitions of terms.)

B. Derivation

The language used in subsection (1), "in effecting entry or while in the building or in immediate flight therefrom, he," is taken from the New York Revised Penal Law § 140.25. The Model Penal Code employs the phrase "in the course of committing the offense" and defines it as meaning one that "occurs in an attempt to commit the offense or in flight after the attempt or commission." The New York version seems more precise and eliminates the need for further definition. Paragraphs (a) and (b) are patterned after Model Penal Code § 221.1. Paragraph (c) is taken from New York Revised Penal Law § 140.25.

C. Relationship to Existing Law

The section as drafted retains some of the features of present statutes which stamp certain kinds of "burglary" as constituting more aggravated crimes than others.

Burglary in a dwelling house, including breaking and entering while armed with a dangerous weapon or assaulting any person lawfully therein, is now punishable under ORS 164.230 by maximum penalty of 15 years imprisonment, as compared to 10 years maximum for a nondwelling burglary under ORS 164.240. Neither statute distinguishes between a daytime or nighttime burglary. The proposed section applies the aggravating factors equally to dwellings and other buildings and continues to treat daytime and nighttime burglaries alike.

"Breaking out" of a dwelling house of another, after having committed or attempted to commit a crime therein, if done in the "nighttime," is now punishable under ORS 164.250 by a maximum penalty of three years imprisonment. This statute would be repealed but this type of conduct would be covered by the draft.

The other existing statute which embodies "nighttime" as an element of the crime is ORS 164.260, burglary with explosives. The "safecracker" or other burglar armed with explosives would be guilty of first degree burglary under the suggested draft. The Commission was divided on whether to grade first degree burglary as a Class A or Class B felony, with the majority voting in favor of the latter classification.

Section 138. Possession of burglar's tools. (1) A person commits the crime of possession of burglar's tools if he possesses any burglar tool with the intent to use the tool or knowing that some person intends to use the tool to commit or facilitate a forcible entry into premises or theft by a physical taking.

(2) "Burglar tool" means explosive, tool, instrument or other article adapted, designed or commonly used for committing or facilitating a forcible entry into premises or theft by a physical taking.

(3) Possession of burglar's tools is a Class A misdemeanor.

COMMENTARY

A. Summary

While not amounting to a crime against property in the strict sense, this section logically belongs in the burglary article.

The offense, as defined by this section, consists of two elements: (1) possession of a "burglar tool" with (2) intent to use the tool or knowledge that some person intends to use it to commit or facilitate a forcible entry into premises or theft by a physical taking.

The name of the crime is not intended to limit the scope of the prohibition to tools used only to commit burglary; an instrument "adapted, designed or commonly used to commit or facilitate" *any* theft of property by a physical taking would fall within its coverage.

Many different tools and articles would be included within the definiton of "burglar tool"—items such as wire cutters, crowbars, picklocks, dynamite and other explosives—which could be used for a legitimate purpose. However, *mere possession alone would not be criminal*, and the state would be required to prove beyond a reasonable doubt that the possession of the burglar tool by the defendant was accompanied by the requisite unlawful intent or knowledge.

B. Derivation

The section is an adaptation of Michigan Revised Criminal Code § 2615 which was derived from the New York Revised Penal Law § 140.35. Both of these states had comparable provisions in their respective criminal codes prior to the revisions and the new sections were designed to modernize and strengthen previous statutes. Model Penal Code § 5.06 penalizes the possession of "any instrument of crime with purpose to employ it criminally."

C. Relationship to Existing Law

Present Oregon law contains no comparable provision; however, the concept of proscribing the possession of instruments of crime is firmly established in existing statutes such as ORS 166.220, 166.240, 166.250 and 166.510.

Section 139. Criminal trespass in the second degree. (1) A person commits the crime of criminal trespass in the second degree if he enters or remains unlawfully in or upon premises.

(2) Criminal trespass in the second degree is a Class C misdemeanor.

COMMENTARY

Section 139 is based on New York Revised Penal Law § 140.05. Its rationale and relationship to existing law is discussed in the commentary to § 140 infra.

Section 140. Criminal trespass in the first degree. (1) A person commits the crime of criminal trespass in the first degree if he enters or remains unlawfully in a dwelling.

(2) Criminal trespass in the first degree is a Class A misdemeanor.

COMMENTARY

A. Summary

The basic rationale of the sections on criminal trespass is the protection of one's property from unauthorized intrusion by others. As with burglary, two degrees of the crime are created, intrusion into premises or intrusion into a dwelling.

The sections on criminal trespass, contrary to the New York statutes, do not provide for a separate degree of trespass to cover property that is fenced or otherwise enclosed in a manner designed to exclude intruders. The proposal does not draw a distinction between the trespasser who goes through a fence and one who does not. The Commission believes that the enforceability of the sections is more important than the severity of punishment. Of course, even without special provision for the "defiant trespasser," if the trespass involves fenced lands, the prosecutor will have a stronger case.

Trespass is committed in or upon "premises," *i.e.*, any real property or a "building" as that term is spelled out in the definitions section. If the invaded premises constitute a "dwelling," as that term is defined, then the actor is guilty of the aggravated crime of trespass in the first degree. A defendant who is charged with the more serious offense may properly plead guilty to or be convicted of second degree criminal trespass because of the broad definition of "premises" in § 135.

The element of entering or remaining unlawfully in or upon the premises is identical to that required for burglary, that is, "at the time of the entry or remaining, the premises are not open to the public and the defendant is not otherwise licensed or privileged to do so."

B. Derivation

The section defining trespass in the second degree corresponds to New York Revised Penal Law § 140.05, and the statement of the first degree offense is taken from § 140.15 of that code. The Model Penal Code, § 221.2, is structured in terms of (1) entering or remaining; (2) defiant trespassing; and (3) affirmative defenses.

C. Relationship to Existing Law

A half dozen criminal statutes in ORS chapter 164 prohibit trespass or unlawful entry: ORS 164.410, trespass to real property; 164.430, entering improved land of another with intent to injure growing products; 164.460, trespassing and refusing to depart; 164.462, unlawful entry of a dwelling; 164.465, unauthorized entry of penal or correctional institutions; 164.555, unauthorized entry of railroad yard. The draft would replace these statutes.

ARTICLE 16. ARSON, CRIMINAL MISCHIEF AND RELATED OFFENSES

Section 141. Arson and related offenses; definitions. As used in sections 141 to 147 of this Act, except as the context requires otherwise:

(1) "Protected property" means any structure, place or thing customarily occupied by people, including "public buildings" as defined by ORS 479.010 and "forest land" as defined by ORS 477.001.

(2) "Property of another" means property in which anyone other than the actor has a possessory or proprietary interest.

COMMENTARY

(1) "Protected property." This definition is similar to the definition of "building" contained in the burglary and criminal trespass article so far as it relates to structures customarily occupied by people. However, it also includes "public buildings" and "forest land," the intentional burning of which would constitute arson in the first degree under the provisions of § 144. The purpose of this definition is to protect those structures or things which typically are occupied by people, and is consistent with the primary rationale of the crime of arson: protection of human life or safety. The Commission believes that forest fires ordinarily present a high degree of risk to human safety as well as causing serious economic loss to the state; therefore, the intentional starting of such a fire should be considered as one of the most serious arson offenses. Arson of a public building, of course, would probably endanger

human life, as well as causing irreparable damage to cherished property and public records and deserves to be treated as arson in the first degree.

(2) "Property of another." This definition is based on Model Penal Code § 220.1, and protects the person who may be the lawful occupant of property, notwithstanding that the actor might have title or vice versa.

Section 142. Reckless burning. (1) A person commits the crime of reckless burning if he recklessly damages property of another by fire or explosion.

(2) Reckless burning is a Class A misdemeanor.

COMMENTARY

See commentary under § 144 infra.

Section 143. Arson in the second degree. (1) A person commits the crime of arson in the second degree if, by starting a fire or causing an explosion, he intentionally damages any building of another that is not protected property.

(2) Arson in the second degree is a Class C felony.

COMMENTARY

See commentary under § 144 infra.

Section 144. Arson in the first degree. (1) A person commits the crime of arson in the first degree if, by starting a fire or causing an explosion, he intentionally damages:

(a) Protected property of another; or

(b) Any property, whether his own or another's, and such act recklessly places another person in danger of physical injury or protected property of another in danger of damage.

(2) Arson in the first degree is a Class A felony.

COMMENTARY TO SECTIONS 142 TO 144

A. Summary

The primary rationale of this article is the protection of human life and safety. The secondary rationale is the protection of cherished property. The draft in its present version provides for two ascending degrees of arson, graded according to whether or not "protected property" is involved or whether or not there is danger to human life. The draft also provides for the less serious crime of reckless burning.

No special provision is made for an attempt to burn property inasmuch as such conduct is covered generally in Article 6 supra. Neither is there a section dealing with destroying property with the intent to defraud an insurer. Such activity would amount to either attempted theft by deception or theft by deception if the property damaged belonged solely to the actor. However, if anyone other than the actor has a possessory or proprietary interest in the property, such an act could violate § 143 and be punishable as second degree arson, or even if the property damaged by fire were the exclusive property of the actor, it could amount to first degree arson if another person were recklessly placed in danger of bodily injury or protected property of another endangered as provided by paragraph (b) of subsection (1) of § 144. The relatively severe penalties for

arson would not apply for behavior which, while objectionable as part of a fraudulent scheme, has no element of danger to another's person or property. On the other hand, where such dangers are present, it should be punished accordingly.

The elements of the crime of reckless burning, § 142, are: (1) reckless (2) damage of (3) property of another (4) by fire or explosion. If there is no intent on the part of the actor to damage the property, but he "consciously disregards a substantial and unjustifiable risk" resulting from his conduct, he violates this section. (See § 7, supra, for culpability definitions). Because there is no intent to damage property the crime does not carry the label, nor the onus, nor the penalty of arson. The *reckless* damage of property by means *other than* fire or explosion is covered by the criminal mischief sections of the draft (§ 146 infra).

The elements of the crime of arson in the second degree, § 143, are: (1) intentional (2) damage of (3) a building of another (4) by fire or explosion and (5) the building is not "protected property." The type of buildings covered by this section would be those that are not "customarily occupied" by people. Since this degree of arson would not *ordinarily* threaten human life or safety it is treated as a less serious offense under the draft, but nonetheless is classified as a felony carrying a maximum penalty of five years imprisonment. For example, if *A* intentionally sets fire to *B's* barn he would be guilty of violating this section. If, however, the barn were in close proximity to *B's* house, *A* could be guilty of first degree arson under § 144 (1) (b).

The elements of the crime of arson in the first degree, § 144, are: (1) intentional (2) damage by (3) fire or explosion of (4) protected property of another *or* (5) any property, whether the actor's or another's *and* this results in (6) recklessly placing another person in danger of physical injury *or* (7) recklessly placing protected property of another in danger of damage.

Intentionally damaging property of another by means *other than* fire or explosion is prohibited by the criminal mischief sections of the draft. *Intentionally* damaging property that is *not* a building or protected property, *i.e.*, personal property, by fire or explosion is covered by § 147 of this draft, criminal mischief in the first degree. However, if the conduct which would otherwise be criminal mischief, because the property damaged is personal property, results in violating subsection (1) (b) then the actor would be guilty of arson in the first degree.

Note that under § 144 (1) (b) the *mens rea* with respect to the property the actor intends to burn is an intent to damage any property by fire or explosion, while the culpability of the actor with respect to another person who might be physically injured or to protected property of another that might be damaged by his act is recklessness. If, for example, *A*, intending to defraud his insurer, intentionally sets fire to his own car which is parked in *A's* driveway but just a few feet from *B's* house, *A* would be "consciously disregarding a substantial and unjustifiable risk" of placing another person in danger of physical injury or of placing the protected property of another in danger of damage and would be guilty of arson in the first degree. *Actual* physical injury to *B* or *actual* damage to B's house would *not* be required to prove *A* guilty under § 144, but the state would be required to prove that *A* intentionally set fire to his car and that the other risks ensued from this act.

It should be noted that § 144 deals with arson, and under the above hypothetical, if *B* were actually physically injured as a result of *A's* arsonous act, *A* would be guilty of first degree arson. Reckless conduct, not involving an intentional act of arson, that causes physical injury to another or creates a substantial risk of serious physical injury to another is covered under the assault provisions of the proposed Code. (See §§ 92 to 96 supra).

The aim of the Commission is to protect human life and safety by enhancing the degree of arson to first degree when the property involved is a building, structure or thing of a kind which is typically occupied by people. The risk to human life or safety is especially great where such property is set afire. Further, the Commission recognizes the danger from fires which occur during riots or civil disturbances, and which occur in many types of structures, buildings or things which vary greatly due to the complexity of our urban society. Some types of things such as boats, campers, etc., are customarily occupied by people at some times and places and not at others. The following guidelines are meant to aid in interpreting the phrase "customarily occupied by people" as it is used within the definition of "protected property" in § 141 of this article.

In instructing jurors, in ruling on motions for judgment of acquittal, or wherever a determination must be made as to whether a certain structure, place or thing is "customarily occupied by people," we expect the following meanings to be used: for purposes of § 144 of this Code, a building, structure or thing is customarily occupied by people if:

(a) By reason of circumstances of time and place when the fire or explosion occurs, people are normally in the building, structure or thing; or

(b) Circumstances are such as to make the fact of occupancy by persons a reasonable possibility.

Because it will normally be a jury question whether the state has proved that the building, structure or thing is "customarily occupied," the jury will be appropriately instructed that if they find it is customarily occupied the crime would be first degree

arson; if they find it is not customarily occupied, the crime would be second degree arson.

B. Derivation

Section 142 is based on Model Penal Code § 220.1 (2) and, in effect, is much like ORS 164.080, but, unlike the Model Penal Code proposal, requires actual damage to any property instead of threatened damage to a building. Section 143 is derived from ORS 164.020, second degree arson. Section 144: subsection (1) (a) is entirely new language proposed by the Commission, but its purpose is the same as that of the Model Penal Code; however, the section requires actual "intentional damage" instead of a "purpose of destroying" and in that particular is akin to New York Revised Penal Law § 150.15. Subsection (1) (b) is based on Model Penal Code § 220.1.

C. Relationship to Existing Law

The crime of arson under Oregon law requires the burning to be "wilful" and "malicious." The word "malicious" is a necessary ingredient to charge arson. *State v. Murphy*, 134 Or 63, 290 P 1096 (1930). *State v. Paquin*, 229 Or 555, 368 P2d 85 (1962), also recognized the necessity that the act be "criminal" and not just "carelessness." At 566, the court said: "The only possible uncertainty as to the fire could be whether its origin was an act of carelessness or a criminal act."

A "burning" of the building is an essential element of the crime of arson. *State v. Elwell*, 105 Or 282, 209 P 66 (1922). To constitute a burning there must be an ignition of some part of the building resulting in a perceptible change in its composition, at common law called a "charring." It is not necessary that the buildings should be consumed or materially injured. It is sufficient if fire is actually communicated to any part thereof, however small. Under the proposed sections any "damage" is sufficient, so the "charring" test would continue to be applicable. In the absence of a statute enlarging the scope of the crime, the burning of personal property does not constitute arson, and the burning of personal property in a building will not constitute arson if no part of the building is burned. 6 *CJS*, Arson, 728.

Oregon's first degree arson statute is ORS 164.020. The statute condemns "any person who wilfully and maliciously or wantonly sets fire to or burns" designated property. The conjunctive requirement that the burning be both "wilful and malicious" is retained from common law. The use of the term "wantonly" as an alternative to the wilful and malicious elements is generally construed as implying, among other things, a criminal intent. See, *State v. Paquin*, supra. ORS 161.010 states that "wantonly" implies that the act was done with "a purpose to injure or destroy without cause." The showing of this criminal intent may be alleged and proved alternatively by a showing that the accused was actuated by a malicious purpose and that he set fire to the structure wilfully. The proposed Code substitutes the new terms, "intentionally" and "recklessly." (See § 7 supra).

The existing statute likewise condemns anyone who "wilfully and maliciously or wantonly, aids, counsels or procures the burning of . . . designated property." This construction merely includes within the scope of the statute those persons who, if not included specifically, would under the rules of common law be charged. *State v. Case*, 61 Or 265, 122 P 304 (1912), recognized the proposition that a person who is not within the class of those by whom the crime may be directly perpetrated may, by aiding and abetting a person who is within the scope of the definition, render himself criminally liable. The proposed Code retains this rationale. (See §§ 12 to 15 supra).

Before 1947 the statutory crime of arson for burning a dwelling was defined substantially as it was defined at common law in § 23–501, OCLA. It consisted of the wilful and malicious burning of the dwelling house "of another in the nighttime." However, the new law of 1947, which repealed § 23–501, OCLA, defined the crime differently, viz., the wilful and malicious burning of a dwelling house, without regard to whether the dwelling house belongs to another or whether the act is committed in the nighttime or daytime. See, *State v. Moliter*, 205 Or 698, 705, 289 P2d 1090 (1955).

The property designated by ORS 164.020 as the subjects of first degree arson are: (1) any dwelling house; (2) any building that is a part of, belongs to, adjoins or is adjacent to a dwelling house, the burning of which building would imperil such dwelling house, whether the dwelling house or building is his property or the property of another; (3) any public building as defined by ORS 479.010.

ORS 164.010 defines "dwelling house" as any structure usually "occupied by any person lodging therein." A "public building" is defined in ORS 479.010 as a "building in which persons congregate for civic, political, educational, religious, social or recreational purposes."

ORS 164.030, defining second degree arson, includes the same intent and parties described in ORS 164.020. The only difference is in the property designated as the subject of the offense. Second degree arson condemns the burning of "any building or structure" of any class or character, except those set forth in ORS 164.020.

ORS 164.040 defines third degree arson. This statute similarly contains the elements necessary under ORS 164.020 and 164.030, *i.e.*, it punishes any person who "wilfully and maliciously or wantonly" burns property, as well as any person, who with the same criminal intent "aids, counsels or procures" the burning of property. The lesser degree is based upon

the type of property burned, property of any class or character. This statute would condemn the burning of personal property since buildings and dwellings are covered by the greater degrees of arson. The statute reinstates the requirement that the property burned be "another's," which requirement was eliminated in 1947 from the definition of first and second degree arson. The reason would seem to be that one may burn his own personal property without the threat to the security of a habitation or the possibility of personal injury which is present in the burning of a structure or dwelling. The draft deals with personal property in an entirely different fashion.

ORS 164.900 similarly condemns the malicious injury or destruction of personal property of another. This crime is punishable either as a felony with a maximum of three years imprisonment or as a misdemeanor, requiring either a fine or imprisonment in the county jail for not more than one year. As observed before, the draft treats intentional damage to property as arson or criminal mischief, depending on the method used and the risk to the person or property of others.

ORS 477.090, civil liability in damages, provides that "the United States, state, political subdivision or private owners whose property is injured or destroyed by fires in violation of ORS 164.070 . . . of this chapter may recover in a civil action double the amount of damages suffered if the fires occurred through wilfulness, malice or negligence. Persons causing fires by violation of any of the provisions of the statutes enumerated in this section are liable in an appropriate action for the full amount of all expenses incurred in fighting such fires."

ORS 164.050 and ORS 164.060, which were repealed in 1965, are now found in ORS 477.715, "wilfully and maliciously setting fire to forest land," and ORS 477.720, "accidentally setting fire to forest land; failure to prevent spread." It should be noted that violation of ORS 477.715, 477.720 and 164.070 would require either wilfulness, malice or negligence and therefore would subject the offender to civil liability specified under ORS 477.090. A violation of any of the conduct proscribed by ORS 164.070 is punishable under ORS 477.933 (4) by imprisonment for not more than two years. A violation of ORS 477.720 subjects the offender to civil liability and apparently would also subject the offender to the punishment prescribed for a misdemeanor under ORS 161.080.

ORS 476.715, throwing away burning material, punishable as a misdemeanor by fine, imprisonment or both under ORS 476.990 (5) easily encompasses ORS 164.070 (1) and (3), for it is recognized in an opinion of the attorney general, 23 *Op Atty Gen* 312 (1946-48), that any offense committed under ORS 476.715 anywhere in the territorial limits of Oregon is in violation of the law. Recognizing the overlap of these two statutes, it is pertinent to note that the maximum term of imprisonment varies under their separate penalty provisions, the former allowing six months, the latter only 90 days. Also, the former allows for a combination of both fine and imprisonment; the latter does not so allow.

ORS 164.070 (2), (3), (4) are acutely interdependent in establishing requisite knowledge and negligence. *Carter v. La Dee Logging*, 142 Or 439, 18 P2d 234, 20 P2d 1086 (1933), states: "The duty imposed upon the defendant by law to use reasonable care and diligence in fighting and preventing fires would not arise until the defendant had knowledge of the existence of the fire." At 468-9. *Sullivan v. Mountain States Power Co.*, 139 Or 282, 9 P2d 1038 (1932), indicates when a party is deemed to have knowledge. The court said: "A party is bound not only by what he knew but also by what he might have known had he exercised ordinary diligence. Notice or knowledge of a condition is almost universally inferred from the nature of the duty or the facts and circumstances of the case." At 306. *Silver Falls Timber Co. v. Eastern & Western Lumber Co.*, 149 Or 126, 140 P2d 703 (1935), impliedly imposes knowledge of ordinary and natural weather conditions on a person by stating that "usual and expected conditions of weather and the natural and ordinary action of the forces of wind and water operating on a negligent act will not ordinarily constitute an independent, efficient intervening cause. . . ." At 206.

The court in *Sullivan v. Mountain States Power Co.*, supra, stated: "It seems clear that the legislature by the use of the single word 'possible' did not intend to demand that those subject to the act should do things that were neither reasonable nor practicable . . . . It is our opinion that the words 'every possible effort' exact everything that is practicable and reasonable, but no more." At 308. *State v. Gourley*, 209 Or 363, 305 P2d 306, 306 P2d 1117 (1956), combines the statement of the rule. The court said: "As soon as the existence of the fire came to his . . . knowledge each was required to make every reasonable effort to extinguish the fire." At 375.

ORS 164.070 imposes a duty upon the owner of land, or a person in lawful possession or control. However, as indicated in *Carter v. La Dee Logging Co.*, supra, "It cannot be said that the duties imposed by § 42–410 (now ORS 164.070) are incumbent alike in all circumstances upon both the owner and the party in possession. It is more likely that the owner not in possession might show that it did not wilfully or negligently allow the fire to escape because it had no knowledge thereof, while the one in possession, being in possession of the land, might have had knowledge of the fire, and wilfully or negligently allowed it to escape from land in its possession." At 468. A logging company engaged in logging on the owner's land is considered a person in possession. *State v. Gourley*, supra.

The draft does not include the negligent or acci-

dental burning offenses now covered by ORS 164.070. If the provisions in the statute imposing affirmative duties on the landowner are retained the Commission recommends that they be transferred to ORS chapter 477.

ORS 164.080, fires affecting land of another, provides that "any person who maliciously or wantonly sets on fire any prairie or other grounds, other than his own . . . or who wilfully or negligently permits a fire to pass from his own grounds . . . to the injury of another, shall be punished." The statute encompasses two distinct offenses. First, setting fire to land not his own with criminal intent or malice. Second, "wilfully or negligently" allowing it to spread to the land of another. These two distinct offenses seem to correspond almost exactly with subsections (1) and (2) of ORS 164.070. The only distinctions in the wordings between ORS 164.070 (1) and the first offense defined by ORS 164.080 is that the former condemns setting a fire "unlawfully" while the latter condemns setting a fire "maliciously or wantonly." Also, subsection (1) encompasses a fire on "any lands" while the first offense defined in ORS 164.080 limits the fire to one set on land not owned or lawfully possessed by the offender. The second offense defined by ORS 164.080 corresponds exactly with subsection (2) of ORS 164.070 except that the former requires injury to another's land while the latter requires only that it spread to another's land.

Although there is no reported Oregon case law on the statute, California in *Gamier v. Porter*, 27 P 55 (1891), interpreted a similar statute in accordance with the above distinction. The court said: "If one set fire to the weed or brush on his own land, so as to prepare it for the plow, intending to limit and control the fire, and actually does so, he has not set fire to the prairies within the meaning of this statute. If under such circumstances the fire gets out of his control, he has set fire to the prairies, but not wilfully, although it may be negligently." At 55.

ORS 164.090 defines an attempt to burn property. The statute declares that "any person who wilfully and maliciously or wantonly attempts to set fire to or burn" property, any person who with the same criminal intent aids, counsels or procures the burning of "any dwelling house, building, or property described in ORS 164.010 to 164.040," as well as any person "who commits any act preliminary" to such a burning or "in furtherance thereof" is guilty of arson. Attempts are covered under §§ 54 to 56 of the proposed Code.

ORS 164.100 describes the offense of destroying property with the intent to defraud an insurer. Sections 141 to 144 would repeal ORS 164.010 to 164.110.

Section 145. Criminal mischief in the third degree. (1) A person commits the crime of criminal mischief in the third degree if, with intent to cause substantial inconvenience to the owner or to another person, and having no right to do so nor reasonable ground to believe that he has such right, he tampers or interferes with property of another.

(2) Criminal mischief in the third degree is a Class C misdemeanor.

COMMENTARY

See commentary under § 147 infra.

Section 146. Criminal mischief in the second degree. (1) a person commits the crime of criminal mischief in the second degree if:

(a) He violates section 145 of this Act, and as a result thereof, damages property in an amount exceeding $100; or

(b) Having no right to do so nor reasonable ground to believe that he has such right, he intentionally damages property of another, or, he recklessly damages property of another in an amount exceeding $100.

(2) Criminal mischief in the second degree is a Class A misdemeanor.

COMMENTARY

See commentary under § 147 infra.

Section 147. Criminal mischief in the first degree. (1) A person commits the crime of criminal mischief in the first degree if, with intent to damage property, and having no right to do so nor reasonable ground to believe that he has such right, he damages property of another:

(a) In an amount exceeding $1,000; or

(b) By means of an explosive.

(2) Criminal mischief in the first degree is a Class C felony.

COMMENTARY TO SECTIONS 145 TO 147

A. Summary

Section 145 is intended to cover the type of conduct that is not thievery, but, rather, amounts to unauthorized and unlawful interference with the property of another. Damage to property is not an element of this crime.

Section 146 defines three ways of committing the crime of criminal mischief in the second degree by damaging property of another. Note that under paragraph (b) *intentionally* damaging property in *any* amount is a violation, but *recklessly* damaging requires the damage to exceed $100.

Section 147 is the same basic offense as that described in § 146, except that it is aggravated by the amount of the damage or because explosives were used. An intent to damage property is a necessary element of the offense.

Taken as a whole, the proposed draft combines the features of "criminal tampering or interference" with those of "malicious mischief."

B. Derivation

Section 145 is drawn from New York Revised Penal Law § 145.15, "Criminal tampering in the second degree." That state's statutes provide for three degrees of "criminal mischief" and two degrees of "criminal tampering." However, the Commission is of the opinion that it is unnecessary to have so many degrees of the offense, and that property rights will be amply protected by the proposal.

Section 146, excepting paragraph (a) of subsection (1), is comparable to New York Revised Penal Law § 145.00, "Criminal mischief in the third degree." Paragraph (a) would apply to the defendant who illegally tampered or interfered with property of another, and as a result, damaged the property in an amount over $100, even though he had no original intent to do so. The culpability element would be reckless instead of intentional conduct. In that respect, it is like the last clause in paragraph (b) of subsection (1) of the section, although a person could violate the latter without having tampered with the property.

Section 147 comes from § 145.10 of the New York Revised Penal Law, differing only in the dollar amount in subsection (1)(a) which is $500 in the New York version.

C. Relationship to Existing Law

As observed in the commentary to § 133, supra, (theft of services) a number of Oregon statutes prohibit "interference" or "tampering" with certain classes of property, such as public utilities and motor vehicles. The theft aspects of these statutes are covered by Article 14, and the tampering aspects are covered by Article 16.

Statutes relating to malicious destruction or injury to property that would be repealed are: ORS 164.810, injuring or destroying boom or wharf; 164.830, injury to person or property by explosive; 164.840, tearing down or defacing posted notices; 164.850, injuring mining claim or appurtenances; 164.860, destroying mining claim monuments; 164.871, injuring or destroying boundary monuments, signs, warning devices; 164.880, destroying surveyor's markings; 164.890, destroying records, documents or scientific instruments; 164.900, malicious destruction of personal property.

ARTICLE 17. ROBBERY

Section 148. Robbery in the third degree. (1) A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft he uses or threatens the immediate use of physical force upon another person with the intent of:

(a) Preventing or overcoming resistance to his taking of the property or to his retention thereof immediately after the taking; or

(b) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft.

(2) Robbery in the third degree is a Class C felony.

COMMENTARY

See commentary under § 150 infra.

Section 149. Robbery in the second degree. (1) A person commits the crime of robbery in the second degree if he violates section 148 of this Act and he:

(a) Represents by word or conduct that he is armed with what purports to be a dangerous or deadly weapon; or

(b) Is aided by another person actually present.

(2) Robbery in the second degree is a Class B felony.

COMMENTARY

See commentary under § 150 infra.

Section 150. Robbery in the first degree. (1) A person commits the crime of robbery in the first degree if he violates section 148 of this Act and he:

(a) Is armed with a deadly weapon; or

(b) Uses or attempts to use a dangerous weapon; or

(c) Causes or attempts to cause serious physical injury to any person.

(2) Robbery in the first degree is a Class A felony.

COMMENTARY TO SECTIONS 148 TO 150

A. Summary

This article provides for three ascending degrees of robbery. Section 148 contains the basic statement of the crime, with §§ 149 and 150 adding one or more of certain aggravating factors to the crime.

A person commits robbery in the third degree if "in the course of committing or attempting to commit" theft he uses or threatens the immediate use of physical force upon another for the purpose of either (a) preventing or overcoming resistance to the taking of the property or its retention immediately thereafter or (b) forcing another to deliver up the property or to do any other act which might aid in the commission of the theft. This covers the "unarmed" type of robbery. By prohibiting the threat of

"immediate use" of physical force, this section is distinguishable from theft by extortion. (See § 127 supra).

Section 149 raises the crime to robbery in the second degree if the robber *creates the impression that he is armed*, or if he is "aided by another person actually present." Subsection (1)(a) is intended to cover the type of robbery in which the actor is, in fact, unarmed, but conveys to the victim the impression that he has a weapon. While such a threat may not create any greater risk to the person of the victim, it does heighten the terror in the victim's mind and also, is persuasive in overcoming resistance to the robbery. This paragraph would make it second degree robbery if the robber uses a note, a "hand-in-pocket" technique or a fake weapon to convey the impression that he is armed with a "dangerous or deadly weapon."

The primary rationale behind paragraph (b) of subsection (1) of § 149 is the increased danger of an assault on the victim when the robber is reinforced by another criminal who is actually present. Furthermore, when two or more persons commit the crime, it indicates greater planning and more likelihood that they are professional criminals. In earlier drafts the conduct proscribed constituted robbery in the first degree. However, the Commission was of the opinion that the accomplice circumstances, while aggravating the crime, are less serious than those specified in § 150. It is important to note, however, that inclusion of the factor of actual aid by another person does not affect the doctrine of vicarious responsibility of accomplices for the criminal acts of the principal. This matter is handled in the general provisions of the draft covering complicity. (Art. 3). The language employed is intended to include only those situations in which the accomplice is in such proximity of the victim that he is in a position to assist in exerting force upon the victim. This will be a question of fact to be determined from the total circumstances in each individual case. In most instances the victim probably will know that more than one person is committing the crime. However, the victim's awareness of the presence of the other person is immaterial. The issue is whether the actor is *aided* by another person actually present and not the subjective effect of his presence on the victim.

Section 150 provides for the three most serious aggravating factors, any of which, if present, elevates the crime to robbery in the first degree. Those factors are: (a) being armed with a "deadly weapon," *i.e.*, a gun; (b) using or attempting to use a "dangerour weapon," *i.e.*, a club; or (c) causing or attempting to cause serious physical injury to any person. Any of these elements, of course, represents the greatest threat to the victim and is graded accordingly.

B. Derivation

Section 148 is a combination of Model Penal Code § 221.1, New York Revised Penal Law § 160.00, and Michigan Revised Criminal Code § 3307. Section 149 subsection (1)(a) embodies, in somewhat different language, the provisions of Michigan's § 3305. Subsection (1)(b) is derived from New York Revised Penal Law § 160.10. Section 150 combines language from Model Penal Code § 221.1, New York Revised Penal Law § 160.15 and Michigan Revised Criminal Code § 3305.

C. Relationship to Existing Law

The Oregon Court has defined robbery succinctly as "open and violent larceny from the person." *State v. Broom*, 135 Or 641, 297 P 340 (1931). In *Merrill v. Gladden*, 216 Or 460, 337 P2d 774 (1959), the court commented that "robbery can only be consummated through an assault" and defined an assault as "an intentional attempt by one person by force or violence to do an injury to the person of another coupled with the present ability to carry the intention into effect." At 463.

The two basic existing statutes are assault and robbery while armed with a dangerous weapon (ORS 163.280) and robbery while not armed with a dangerous weapon (ORS 163.290). There is a counterpart assault with intent to rob statute (ORS 163.270) which has been held to include both the intent to commit armed and unarmed robbery. *Merrill v. Gladden*, supra. There is a special statute covering train robbery (ORS 163.330).

Article 17 retains the rationale of the present statutes, *i.e.*, the prohibition against forcible taking of property from another; however, the scope of the basic concept of the crime is altered markedly. As the Michigan reporters observe, the present approach is that unless property is actually taken from the person or presence of the victim, there is no robbery. If the actor tries to rob and is prevented or is otherwise unsuccessful, the matter must be treated as attempted robbery or assault with intent to rob. This emphasizes the property aspects of the crime and treats it as an aggravated form of theft. If, however, the primary concern is with the physical danger to the victim and his difficulty in protecting himself from sudden attacks against his person or property, then the actual taking of property becomes less important. (Michigan Revised Criminal Code, 257). The draft follows this line of reasoning and adopts the view that repression of violence is the principal reason for being guilty of robbery. The language of "in the course of committing or attempting to commit theft" is not further defined, but is intended to extend from the attempt state through the phase of flight.

The policy reason underlying the shift of em-

phasis in the fundamental concept of robbery is well stated by the Model Penal Code:

> "The thief's willingness to use force against those who would restrain him in flight strongly suggests he would have employed it to effect the theft had there been need for it." (Tent. Draft No. 11, 68 (1960)).

This proposal also eliminates the question of what is a lesser-included offense to a charge of robbery because it makes it immaterial whether property is or is not obtained. The maximum penalty under existing law for assault with intent to rob is the same as for the greater crime, so the draft will not change the net result in the situation wherein no property is obtained by the robber, except to label the crime as "robbery" instead of "assault with intent to rob."

As provided by ORS 163.280, the single factor that aggravates robbery is that of being armed with a dangerous weapon. As noted previously, that factor is retained, but in terms of a "deadly weapon," and four new factors are added. The crime becomes second degree robbery if the actor represents that he is armed or if he is aided by an accomplice actually present. The crime is enhanced to first degree status if the actor is armed with a "deadly weapon," or uses or attempts to use a "dangerous weapon," or if he causes or attempts to cause serious physical injury to any person. (See § 3 supra for definitions).

The use of the verb "attempts" in the phrases "attempts to use a dangerous weapon" and "attempts to cause serious physical injury" is meant to indicate an act by the defendant that goes beyond a mere threat. If the defendant "tries" to use a dangerous weapon or "tries" to cause serious physical injury to any person, then the first degree robbery sanctions would apply. As it is used in § 150, the word, "attempts," should not be confused with the noun, "attempt," as that word is employed to denote an incomplete or attempted crime.

Examples of robbery under §§ 148 to 150:

1. *A*, who is in fact unarmed, tells *V* that he, *A*, has a gun in his pocket and to hand over his money. *A* is guilty of second degree robbery under § 149(1)(a).

2. *A*, who is in fact unarmed, displays a toy gun to *V* and tells *V* to hand over his money. *A* is guilty of second degree robbery under § 149 (1)(a).

3. *A* and his accomplice *B*, who are both unarmed, accost *V* and demand his money, while *B* remains behind *V*. Both *A* and *B* are guilty of second degree robbery under § 149 (1)(b).

4. *A* and *B* together decide to rob *V's* store. *A*, who is unarmed, goes into the store while *B* waits in the get-away car. *A* tells *V* to hand over his money or *A* will beat him. Both *A and B* are guilty of third degree robbery under § 148 (1)(a). Section 149 (1)(b) is not violated because *B*, although he is a principal to the crime, is not "actually present" so as to present an added threat to *V's* safety.

5. *A*, with a loaded revolver concealed under his coat, tells *V* to hand over his money. *A* is guilty of first degree robbery under § 150 (1)(a).

6. *A* tells *V* to hand over his money. *V* refuses. *A* takes a 6-inch piece of lead pipe from his pocket, and holding it in his hand, tells *V* he "means business." *A* is guilty of first degree robbery under § 150 (1)(b).

7. Same facts as No. 6 above, except that *A* strikes *V* a sharp blow on the head with the pipe, rendering *V* unconscious and fracturing his skull. *A* is guilty of first degree robbery under both 150 (1)(b) and 150 (1)(c).

8. *A* tells *V* to hand over his money. *V* refuses, and *A* strikes *V* in the face with his fist, knocking him down. *A* then kicks *V* numerous times in the ribs and stomach. *V*, who is very durable, is not seriously injured. *A* is clearly guilty of third degree robbery under § 148 (1)(a). Whether *A* is guilty of first degree robbery under § 150 (1)(c) by an attempt to cause serious physical injury to *V* would be a question for the trier of fact.

Under present Oregon law robbery, either armed or unarmed, can only be consummated through an assault plus a taking of property from the person assaulted. The proposed article will change the law in this regard, because the language of § 148 is broad enough to cover instances in which property is taken from someone other than the person threatened. For example: *A* forces *V* to telephone his wife and direct her to take money from *V's* safe and deliver it at a named time and place to *A's* accomplice. Under the traditional "person or presence" test this probably would not be robbery, but will constitute robbery under § 148 (1)(b). Furthermore, the Commission's proposal eliminates the apparent existing requirement that the assault be directed at the victim of the robbery. (See, Merrill v. Gladden, supra, at 464). The language "use or threatens the immediate use of physical force upon another person" encompasses the type of case in which the force or threat is directed at someone other than the owner of the property. *A* forces *V* to open the store safe by threatening to harm *V's* employe if *V* refuses. As noted by the Michigan revisers, the important considerations should be whether the actor by the threat he uses intends to coerce the owner into parting with his property and whether under the circumstances the threat is or might be effective. It will not be necessary, either, to direct the threat or force toward a person "present" in order to commit robbery. Included within the ambit of the proposed revision are situations such as this: *A* enters *V's* store at the same time *A's* accomplice, *B*, forces his way into *V's* home. *B* telephones *V* and threatens immediate harm to his family unless *V* opens the store safe for *A*.

NOTE ON ASSAULTS: The draft would repeal

part of ORS 163.270 relating to assault with intent to rob. Article 11 contains no "assault with intent to commit" provisions since an assault with intent to commit another offense will in every case constitute an attempt to commit the greater offense. Consequently, the remainder of the statute covering assault with intent to commit rape or mayhem, as well as that part of ORS 163.280 on assault with intent to kill are dealt with as attempts to commit the particular offenses. (See Article 6, Inchoate Crimes).

ORS 163.330, train robbery and assault of passenger or member of crew, also would be repealed and no comparable provision retained, inasmuch as train robbery does not appear to present any special problem in this day and age requiring separate treatment apart from any other types of robbery or assault. This represents the view taken by the American Law Institute:

"A more difficult question is posed by the fairly common statutes penalizing with special severity robbery or burglary of banks or trains. Here are particularly desirable and well-defended prizes, presumably chosen as targets by the most desperate and well-organized criminals. On the other hand, one reads of pathetic attempts of clumsy amateurs to rob banks; and the criteria which would lead to designating bank robbery for special treatment take us logically on to building and loan companies, credit unions, express companies, paymasters, post offices, jewelry stores, and truck loads of whiskey, silk, or other valuable commodities. It is difficult if not impossible to draft an acceptable legislative definition of this category of unusually tempting victims. This, plus the fact that most states get along without special laws on the subject, supports our judgment against making exceptional provision here." Model Penal Code, Tent. Draft No. 11 at 72.

ARTICLE 18. FORGERY AND RELATED OFFENSES

Section 151. Forgery and related offenses; definitions. As used in sections 151 to 161 of this Act, unless the context requires otherwise:

(1) "Written instrument" means any paper, document, instrument or article containing written or printed matter or the equivalent thereof, whether complete or incomplete, used for the purpose of reciting, embodying, conveying or recording information or constituting a symbol or evidence of value, right, privilege or identification, which is capable of being used to the advantage or disadvantage of some person.

(2) "Complete written instrument" means one which purports to be a genuine written instrument fully drawn with respect to every essential feature thereof.

(3) "Incomplete written instrument" means one which contains some matter by way of content or authentication but which requires additional matter in order to render it a complete written instrument.

(4) To "falsely make" a written instrument means to make or draw a complete written instrument in its entirety, or an incomplete written instrument which purports to be an authentic creation of its ostensible maker, but which is not, either because the ostensible maker is fictitious or because, if real, he did not authorize the making or drawing thereof.

(5) To "falsely complete" a written instrument means to transform, by adding, inserting or changing matter, an incomplete written instrument into a complete one, without the authority of anyone entitled to grant it, so that the complete written instrument falsely

appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by him.

(6) To "falsely alter" a written instrument means to change, without authorization by anyone entitled to grant it, a written instrument, whether complete or incomplete, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner, so that the instrument so altered falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by him.

(7) To "utter" means to issue, deliver, publish, circulate, disseminate, transfer or tender a written instrument or other object to another.

(8) "Forged instrument" means a written instrument which has been falsely made, completed or altered.

COMMENTARY

This section substantially adopts the comprehensive definitions of New York Revised Penal Law § 170.00. Subsection (7) has been added by the Commission.

"Written instrument" includes every kind of writing or other article that may be the subject of forgery. Distinctions are made between the terms "complete written instrument" and "incomplete written instrument." Particularly important are the terms "falsely make," "falsely complete" and "falsely alter" which collectively constitute the crime of forgery.

The relationship of the draft provisions to existing law is discussed in the commentary to subsequent sections.

Section 152. Forgery in the second degree. (1) A person commits the crime of forgery in the second degree if, with intent to injure or defraud, he:

(a) Falsely makes, completes or alters a written instrument; or

(b) Utters a written instrument which he knows to be forged.

(2) Forgery in the second degree is a Class A misdemeanor.

COMMENTARY

A. Summary

This section defines the basic offense of "forgery". Falsely making, completing or altering a written instrument or uttering same with knowledge that it is forged is punishable as forgery in the second degree. Following the pattern of the proposed drafts for other crimes, the article provides for two ascending degrees of forgery, scaled according to the type of writing forged.

B. Derivation

This section is adapted from New York Revised Penal Law § 170.05, but differs from that statute in one material aspect in that it incorporates "uttering" into the basic definition of the crime, whereas the New York Code (§§ 170.20, 170.25, 170.30) equates uttering with possession rather than forgery, but punishes it the same as its forgery counterpart.

C. Relationship to Existing Law

Forgery is defined at common law as the false making or materially altering, with intent to defraud, of any writing, which if genuine, might apparently be of legal efficacy or the foundation of a legal liability. *Willetts v. Scudder*, 72 Or 535, 144 P 87 (1914). The requisite intent is the intent to defraud. *State v. Wheeler*, 20 Or 192, 25 P 394 (1890). It is not necessary that anyone be actually defrauded or injured. *State v. Leonard*, 73 Or 451, 144 P 681

(1914). The prosecution need not prove an intent to defraud a particular person, a general intent to defraud being sufficient. *State v. Frasier*, 94 Or 90, 180 P 520 (1919); ORS 165.190. Forgery may be committed by the use of a fictitious or assumed name. *State v. Kelliher*, 49 Or 647, 88 P 867 (1907).

The term "falsely" does not refer to the contract or tenor of the instrument, or the fact stated in the writing. The writing itself must be false, *i.e.*, not the true instrument which it purports to be. *State v. Wheeler*, supra. In order to establish that the instrument was falsely made, the state must prove a lack of authority by the defendant, unless a fictitious name is used. *State v. Fitzgerald*, 186 Or 301, 205 P2d 549 (1949).

A receipt, canceled check or voucher may be the subject of forgery. *State v. Frasier*, supra. A note which on its face appears to be barred by the statute of limitations may be the subject of forgery because the note could become the foundation of a legal liability. *State v. Dunn*, 23 Or 562, 32 P 621 (1893).

The primary criminal code sections on forgery are ORS 165.105, 165.110 and 165.115. A score of other sections, some of which are duplicative, sound of forgery or counterfeiting.

C. Relationship to Existing Law

ORS	Crime and Maximum Penalty
165.105	Making, forging or counterfeiting writing or money—10 years
165.110	Forging note, draft or check—10 years
165.115	Uttering forged instrument—10 years
165.120	Possession of instrument with intent to utter or pass it—5 years
165.125	Making or possessing plate, tool, implement or material for forging instrument—5 years
165.130	Making or uttering false warehouse receipt —5 years
165.135	Connecting parts of bank notes or other instruments—10 years
165.145	Transmission and delivery of false and forged messages—1 yr., $1,000 fine, or both
165.150	Forgery of railroad tickets—1 yr., $1,000 fine, or both
165.155	Restoring or uttering canceled railroad ticket—1 yr., $1,000 fine, or both
165.160	Counterfeiting coins—10 years
165.165	Possession of counterfeiting equipment—10 years
165.175	Counterfeiting or removing serial number—6 mos., $100 or both
165.180	Receiving or concealing article from which serial number has been removed—$500 fine
165.185	Use of counterfeit label or empty container —6 mos., $300 fine, or both
165.250	Destruction or falsification of corporate records or securities—1 yr., $1,000 fine, or both
165.295	Unlawful possession, alteration or use of credit card—5 years
165.525	Manufacture or sale of slugs for coin boxes —6 mos., $500 fine, or both
323.992	Counterfeiting cigarette tax stamps or meters—10 yrs., $10,000 fine, or both
94.990	Forgery and fraud in registration of titles—10 yrs., $1,000 fine, or both

Sections 151, 152 and 153 retain the crimes of forgery and uttering as now stated in the statutes, though with explicit definitions. The criminal intent, an "intent to injure or defraud," is identical to that set forth in the present statutes.

The definition of "written instrument" as proposed by the draft encompasses the kinds of documents now covered by ORS 165.105 and 165.110.

Whether the crimes of forgery and uttering or passing of forged instruments are separate and distinct offenses in Oregon is not clear. *State v. Swank*, 99 Or 571, 195 P 168 (1921), held that under the statute (OCLA 23-560 bisected in 1953 into ORS 165.105 and 165.115) the forgery of an instrument and the uttering of a forged instrument were separate and distinct crimes. However, in the case of *Dougharty v. Gladden*, 217 Or 567, 341 P2d 1069 (1959), *cert. den.* 361 U.S. 867, the court held that OCLA 23-560 "clearly states but a single crime which may be committed by committing forgery or uttering, or both, as these crimes were known to the common law." The court distinguished the *Swank* case, saying that the discussion therein of forgery and uttering as separate offenses was in connection with OCLA 23-561 and 23-562 and applied only to the forging or uttering of an instrument purported to be executed by a sovereign entity "or any corporation, company or person duly authorized" by the sovereign entity to issue a bank bill, promissory note, draft, check, or other evidence of debt. See, Linde, Criminal Law—1959 Oregon Survey, 39 *Or L Rev* 166, for a commentary on the two cases wherein he raises the question of whether *Swank* and *Dougharty* leave us with the possible situation in which forgery and uttering may be two different crimes if the instrument purports to have sovereign backing, but a single crime if it does not. The draft would clarify the law on the point in issue by providing that forgery is a single crime that may be committed by falsely making, completing, or altering a written instrument or by uttering a forged instrument with knowledge of its forged character.

Section 153. Forgery in the first degree. (1) A person commits the crime of forgery in the first degree if he violates section 152 of this Act and the written instrument is or purports to be any of the following:

(a) Part of an issue of money, securities, postage or revenue stamps, or other valuable instruments issued by a government or governmental agency; or

(b) Part of an issue of stock, bonds or other instruments representing interests in or claims against any property or person; or

(c) A deed, will, codicil, contract, assignment, commercial instrument or other document which does or may evidence, create, transfer, alter, terminate, or otherwise affect a legal right, interest, obligation or status; or

(d) A public record.

(2) Forgery in the first degree is a Class C felony.

COMMENTARY

A. Summary

This section makes forgery more serious if the instrument is of the kind specified. Paragraphs (a) and (b) deal with instruments having an inherent pecuniary value, constituting part of a larger issue by a government or business entity. Paragraph (c) covers instruments that directly affect a deed, will, contract or commercial instrument transactions. The Commission is of the opinion that the language "or otherwise affect a legal right, interest, obligation or status" is broad enough to include "plat, draft or survey of land"; therefore, the latter language from ORS 165.105 (7) has not been retained. Paragraph (d) places public records within the ambit of first degree forgery.

B. Derivation

New York Revised Penal Law is the source of the section. Sections 170.10 and 170.15 have been combined. Model Penal Code § 224.1 is similar to the New York law in its grading of forgery. The more severe punishment is reserved for those cases in which the writing is or purports to be part of an issue of money, securities or other government issued instruments, or part of an issue of stock, bonds or other instruments representing claims against or interests in a commercial enterprise.

C. Relationship to Existing Law

The primary forgery statutes, ORS 165.105, 165.110, 165.115, each prescribe a maximum penalty of 10 years imprisonment, so it may be said that Oregon has no more than one degree of forgery. Orbiting these central forgery statutes, however, is a ring of satellite sections which provide for lesser penalties: Transmission of forged messages (ORS 165.145); forging railroad tickets (ORS 165.150); restoring or uttering canceled railroad ticket (ORS 165.155); counterfeiting serial number or article (ORS 165.175); counterfeiting label or trademark (ORS 165.185). Forgery of the kind of instruments not included in this section is covered by § 152 which consolidates the above sections.

Present law is not changed by the draft insofar as it concerns forgery of negotiable instruments, public records, contracts, wills and similar writings. These continue to be the highest degree of forgery. Counterfeiting of coins (ORS 165.160) is proscribed by subsection (1)(a).

Section 154. Criminal possession of a forged instrument in the second degree. (1) A person commits the crime of criminal possession of a forged instrument in the second degree if, knowing it to be forged and with intent to utter same, he possesses a forged instrument.

(2) Criminal possession of a forged instrument in the second degree is a Class A misdemeanor.

COMMENTARY

ORS 165.120 prescribes a maximum penalty of five years imprisonment for possession of a forged "evidence of debt specified in ORS 165.110" with intent to utter or pass it. Possession of forged writings other than those specified is not prohibited. The draft extends the scope of the statute to include all "forged instruments" as the term is defined in subsection (8) of § 159. The section is derived from New York Revised Penal Law § 170.20 but differs from that statute in that it does not combine uttering with possession.

Section 155. Criminal possession of a forged instrument in the first degree. (1) A person commits the crime of criminal possession of a forged instrument in the first degree if, knowing it to be forged and with intent to utter same, he possesses a forged instrument of the kind specified in section 153 of this Act.

(2) Criminal possession of a forged instrument in the first degree is a Class C felony.

COMMENTARY

A. Summary

This section corresponds to § 153, forgery in the first degree, and aggravates criminal possession of a forged instrument if the instrument is of the kind designated therein.

B. Derivation

This section combines the provisions of §§ 170.25 and 170.30 of New York Revised Penal Law.

C. Relationship to Existing Law

The draft continues to forbid the possession of the type of forged documents set forth in ORS 165.110 and 165.120 and broadens the scope of the statute to prohibit criminal possession of instruments of the kind enumerated in ORS 165.105, such as public records, deeds, wills, contracts, etc. This will have the effect of making the possession sections consistent with the forgery sections, and recognizes that the threat to the community is essentially the same in either case.

Section 156. Criminal possession of a forgery device. (1) A person commits the crime of criminal possession of a forgery device if:

(a) He makes or possesses with knowledge of its character any plate, die or other device, apparatus, equipment or article specifically designed for use in counterfeiting or otherwise forging written instruments; or

(b) With intent to use, or to aid or permit another to use, the same for purposes of forgery, he makes or possesses any device, apparatus, equipment or article capable of or adaptable to such use.

(2) Criminal possession of a forgery device is a Class C felony.

COMMENTARY

A. Summary

Subsection (1)(a) designates the manufacture or possession of devices or articles specifically designed for criminal use as criminal per se.

Subsection (1)(b) requires the additional element of an intent to use unlawfully with respect to items designed for legitimate use but adaptable to criminal purposes.

B. Derivation

Section 156 is derived from New York Revised Penal Law § 170.40.

C. Relationship to Existing Law

ORS 165.125 penalizes the manufacture or possession of devices "adapted and designed for forging or making any false or counterfeit evidence of debt." The intent element is an "intent to use the same, or to cause or permit the same to be used in forging or making any such false or counterfeit evidence of debt." Maximum punishment provided is five years imprisonment. ORS 165.165 employs essentially the same language with respect to the manufacture or possession of implements for counterfeiting coins. However, the maximum punishment provided is 10 years imprisonment.

The draft section combines the substance of the two existing statutes, but with two significant modifications: (1) the prohibition is extended to include devices for forging any "written instrument" as that term is defined by § 151 of the draft and, consequently, is not limited to "evidence of debt" (2) the manufacture or possession of a device *specifically designed* for use in counterfeiting or forging written instruments is made a criminal act, and an intent to use the device unlawfully is required only with respect to devices "capable of or adaptable to" use in such counterfeiting or forgery. Under subsection (1)(a) the state must prove the requisite knowledge by the defendant, but need not prove an intent to use the item for forgery, as is required under subsection (1)(b).

Section 157. Criminal simulation. (1) A person commits the crime of criminal simulation if:

(a) With intent to defraud, he makes or alters any object in such manner that it appears to have an antiquity, rarity, source or authorship that it does not in fact possess; or

(b) With knowledge of its true character and with intent to defraud, he utters or possesses an object so simulated.

(2) Criminal simulation is a Class A misdemeanor.

COMMENTARY

This section is directed at fraudulent misrepresentation and simulation of antique or rare objects. It is taken from New York Revised Penal Law § 170.45 and is similar to Model Penal Code § 224.2. There is no Oregon statute covering "forgery" of "objects" other than writings; however the Commission believes that such a provision is a desirable one because, as the Michigan commentators state, "the preparation of this sort of object shows careful advance planning, and since the monetary stakes are often very high, it appears appropriate to penalize the preparation as such, particularly when apprehension of the criminal after the final frauds have been perpetrated is often very difficult." (Michigan Revised Criminal Code § 4025).

Section 158. Fraudulently obtaining a signature. (1) A person commits the crime of fraudulently obtaining a signature if, with intent to defraud or injure another, he obtains the signature of a person to a written instrument by knowingly misrepresenting any fact.

(2) Fraudulently obtaining a signature is a Class A misdemeanor.

COMMENTARY

Section 158 covers conduct which is not forgery because the resulting written instrument is exactly what it purports to be—a document executed by one who has the authority to do so. A signature is not "property" as defined in the theft article, so obtaining a signature by fraud would not amount to theft by deception.

The section is derived from New York Revised Penal Law § 165.20 and resembles Michigan Revised Criminal Code § 4030.

phasis in the fundamental concept of robbery is well stated by the Model Penal Code:

> "The thief's willingness to use force against those who would restrain him in flight strongly suggests he would have employed it to effect the theft had there been need for it." (Tent. Draft No. 11, 68 (1960)).

This proposal also eliminates the question of what is a lesser-included offense to a charge of robbery because it makes it immaterial whether property is or is not obtained. The maximum penalty under existing law for assault with intent to rob is the same as for the greater crime, so the draft will not change the net result in the situation wherein no property is obtained by the robber, except to label the crime as "robbery" instead of "assault with intent to rob."

As provided by ORS 163.280, the single factor that aggravates robbery is that of being armed with a dangerous weapon. As noted previously, that factor is retained, but in terms of a "deadly weapon," and four new factors are added. The crime becomes second degree robbery if the actor represents that he is armed or if he is aided by an accomplice actually present. The crime is enhanced to first degree status if the actor is armed with a "deadly weapon," or uses or attempts to use a "dangerous weapon," or if he causes or attempts to cause serious physical injury to any person. (See § 3 supra for definitions).

The use of the verb "attempts" in the phrases "attempts to use a dangerous weapon" and "attempts to cause serious physical injury" is meant to indicate an act by the defendant that goes beyond a mere threat. If the defendant "tries" to use a dangerous weapon or "tries" to cause serious physical injury to any person, then the first degree robbery sanctions would apply. As it is used in § 150, the word, "attempts," should not be confused with the noun, "attempt," as that word is employed to denote an incomplete or attempted crime.

Examples of robbery under §§ 148 to 150:

1. *A*, who is in fact unarmed, tells *V* that he, *A*, has a gun in his pocket and to hand over his money. *A* is guilty of second degree robbery under § 149(1)(a).

2. *A*, who is in fact unarmed, displays a toy gun to *V* and tells *V* to hand over his money. *A* is guilty of second degree robbery under § 149 (1)(a).

3. *A* and his accomplice *B*, who are both unarmed, accost *V* and demand his money, while *B* remains behind *V*. Both *A* and *B* are guilty of second degree robbery under § 149 (1)(b).

4. *A* and *B* together decide to rob *V's* store. *A*, who is unarmed, goes into the store while *B* waits in the get-away car. *A* tells *V* to hand over his money or *A* will beat him. Both *A and B* are guilty of third degree robbery under § 148 (1)(a). Section 149 (1)(b) is not violated because *B*, although he is a principal to the crime, is not "actually present" so as to present an added threat to *V's* safety.

5. *A*, with a loaded revolver concealed under his coat, tells *V* to hand over his money. *A* is guilty of first degree robbery under § 150 (1)(a).

6. *A* tells *V* to hand over his money. *V* refuses. *A* takes a 6-inch piece of lead pipe from his pocket, and holding it in his hand, tells *V* he "means business." *A* is guilty of first degree robbery under § 150 (1)(b).

7. Same facts as No. 6 above, except that *A* strikes *V* a sharp blow on the head with the pipe, rendering *V* unconscious and fracturing his skull. *A* is guilty of first degree robbery under both 150 (1)(b) and 150 (1)(c).

8. *A* tells *V* to hand over his money. *V* refuses, and *A* strikes *V* in the face with his fist, knocking him down. *A* then kicks *V* numerous times in the ribs and stomach. *V*, who is very durable, is not seriously injured. *A* is clearly guilty of third degree robbery under § 148 (1)(a). Whether *A* is guilty of first degree robbery under § 150 (1)(c) by an attempt to cause serious physical injury to *V* would be a question for the trier of fact.

Under present Oregon law robbery, either armed or unarmed, can only be consummated through an assault plus a taking of property from the person assaulted. The proposed article will change the law in this regard, because the language of § 148 is broad enough to cover instances in which property is taken from someone other than the person threatened. For example: *A* forces *V* to telephone his wife and direct her to take money from *V's* safe and deliver it at a named time and place to *A's* accomplice. Under the traditional "person or presence" test this probably would not be robbery, but will constitute robbery under § 148 (1)(b). Furthermore, the Commission's proposal eliminates the apparent existing requirement that the assault be directed at the victim of the robbery. (See, Merrill v. Gladden, supra, at 464). The language "use or threatens the immediate use of physical force upon another person" encompasses the type of case in which the force or threat is directed at someone other than the owner of the property. *A* forces *V* to open the store safe by threatening to harm *V's* employe if *V* refuses. As noted by the Michigan revisers, the important considerations should be whether the actor by the threat he uses intends to coerce the owner into parting with his property and whether under the circumstances the threat is or might be effective. It will not be necessary, either, to direct the threat or force toward a person "present" in order to commit robbery. Included within the ambit of the proposed revision are situations such as this: *A* enters *V's* store at the same time *A's* accomplice, *B*, forces his way into *V's* home. *B* telephones *V* and threatens immediate harm to his family unless *V* opens the store safe for *A*.

NOTE ON ASSAULTS: The draft would repeal

appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by him.

(6) To "falsely alter" a written instrument means to change, without authorization by anyone entitled to grant it, a written instrument, whether complete or incomplete, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner, so that the instrument so altered falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by him.

(7) To "utter" means to issue, deliver, publish, circulate, disseminate, transfer or tender a written instrument or other object to another.

(8) "Forged instrument" means a written instrument which has been falsely made, completed or altered.

COMMENTARY

This section substantially adopts the comprehensive definitions of New York Revised Penal Law § 170.00. Subsection (7) has been added by the Commission.

"Written instrument" includes every kind of writing or other article that may be the subject of forgery. Distinctions are made between the terms "complete written instrument" and "incomplete written instrument." Particularly important are the terms "falsely make," "falsely complete" and "falsely alter" which collectively constitute the crime of forgery.

The relationship of the draft provisions to existing law is discussed in the commentary to subsequent sections.

Section 152. Forgery in the second degree. (1) A person commits the crime of forgery in the second degree if, with intent to injure or defraud, he:

(a) Falsely makes, completes or alters a written instrument; or

(b) Utters a written instrument which he knows to be forged.

(2) Forgery in the second degree is a Class A misdemeanor.

COMMENTARY

A. Summary

This section defines the basic offense of "forgery". Falsely making, completing or altering a written instrument or uttering same with knowledge that it is forged is punishable as forgery in the second degree. Following the pattern of the proposed drafts for other crimes, the article provides for two ascending degrees of forgery, scaled according to the type of writing forged.

B. Derivation

This section is adapted from New York Revised Penal Law § 170.05, but differs from that statute in one material aspect in that it incorporates "uttering" into the basic definition of the crime, whereas the New York Code (§§ 170.20, 170.25, 170.30) equates uttering with possession rather than forgery, but punishes it the same as its forgery counterpart.

C. Relationship to Existing Law

Forgery is defined at common law as the false making or materially altering, with intent to defraud, of any writing, which if genuine, might apparently be of legal efficacy or the foundation of a legal liability. *Willetts v. Scudder*, 72 Or 535, 144 P 87 (1914). The requisite intent is the intent to defraud. *State v. Wheeler*, 20 Or 192, 25 P 394 (1890). It is not necessary that anyone be actually defrauded or injured. *State v. Leonard*, 73 Or 451, 144 P 681

Section 153. Forgery in the first degree. (1) A person commits the crime of forgery in the first degree if he violates section 152 of this Act and the written instrument is or purports to be any of the following:

(a) Part of an issue of money, securities, postage or revenue stamps, or other valuable instruments issued by a government or governmental agency; or

(b) Part of an issue of stock, bonds or other instruments representing interests in or claims against any property or person; or

(c) A deed, will, codicil, contract, assignment, commercial instrument or other document which does or may evidence, create, transfer, alter, terminate, or otherwise affect a legal right, interest, obligation or status; or

(d) A public record.

(2) Forgery in the first degree is a Class C felony.

COMMENTARY

A. Summary

This section makes forgery more serious if the instrument is of the kind specified. Paragraphs (a) and (b) deal with instruments having an inherent pecuniary value, constituting part of a larger issue by a government or business entity. Paragraph (c) covers instruments that directly affect a deed, will, contract or commercial instrument transactions. The Commission is of the opinion that the language "or otherwise affect a legal right, interest, obligation or status" is broad enough to include "plat, draft or survey of land"; therefore, the latter language from ORS 165.105 (7) has not been retained. Paragraph (d) places public records within the ambit of first degree forgery.

B. Derivation

New York Revised Penal Law is the source of the section. Sections 170.10 and 170.15 have been combined. Model Penal Code § 224.1 is similar to the New York law in its grading of forgery. The more severe punishment is reserved for those cases in which the writing is or purports to be part of an issue of money, securities or other government issued instruments, or part of an issue of stock, bonds or other instruments representing claims against or interests in a commercial enterprise.

C. Relationship to Existing Law

The primary forgery statutes, ORS 165.105, 165.110, 165.115, each prescribe a maximum penalty of 10 years imprisonment, so it may be said that Oregon has no more than one degree of forgery. Orbiting these central forgery statutes, however, is a ring of satellite sections which provide for lesser penalties: Transmission of forged messages (ORS 165.145); forging railroad tickets (ORS 165.150); restoring or uttering canceled railroad ticket (ORS 165.155); counterfeiting serial number or article (ORS 165.175); counterfeiting label or trademark (ORS 165.185). Forgery of the kind of instruments not included in this section is covered by § 152 which consolidates the above sections.

Present law is not changed by the draft insofar as it concerns forgery of negotiable instruments, public records, contracts, wills and similar writings. These continue to be the highest degree of forgery. Counterfeiting of coins (ORS 165.160) is proscribed by subsection (1)(a).

Section 154. Criminal possession of a forged instrument in the second degree. (1) A person commits the crime of criminal possession of a forged instrument in the second degree if, knowing it to be forged and with intent to utter same, he possesses a forged instrument.

(2) Criminal possession of a forged instrument in the second degree is a Class A misdemeanor.

C. Relationship to Existing Law

ORS 165.125 penalizes the manufacture or possession of devices "adapted and designed for forging or making any false or counterfeit evidence of debt." The intent element is an "intent to use the same, or to cause or permit the same to be used in forging or making any such false or counterfeit evidence of debt." Maximum punishment provided is five years imprisonment. ORS 165.165 employs essentially the same language with respect to the manufacture or possession of implements for counterfeiting coins. However, the maximum punishment provided is 10 years imprisonment.

The draft section combines the substance of the two existing statutes, but with two significant modifications: (1) the prohibition is extended to include devices for forging any "written instrument" as that term is defined by § 151 of the draft and, consequently, is not limited to "evidence of debt" (2) the manufacture or possession of a device *specifically designed* for use in counterfeiting or forging written instruments is made a criminal act, and an intent to use the device unlawfully is required only with respect to devices "capable of or adaptable to" use in such counterfeiting or forgery. Under subsection (1)(a) the state must prove the requisite knowledge by the defendant, but need not prove an intent to use the item for forgery, as is required under subsection (1)(b).

Section 157. Criminal simulation. (1) A person commits the crime of criminal simulation if:

(a) With intent to defraud, he makes or alters any object in such manner that it appears to have an antiquity, rarity, source or authorship that it does not in fact possess; or

(b) With knowledge of its true character and with intent to defraud, he utters or possesses an object so simulated.

(2) Criminal simulation is a Class A misdemeanor.

COMMENTARY

This section is directed at fraudulent misrepresentation and simulation of antique or rare objects. It is taken from New York Revised Penal Law § 170.45 and is similar to Model Penal Code § 224.2. There is no Oregon statute covering "forgery" of "objects" other than writings; however the Commission believes that such a provision is a desirable one because, as the Michigan commentators state, "the preparation of this sort of object shows careful advance planning, and since the monetary stakes are often very high, it appears appropriate to penalize the preparation as such, particularly when apprehension of the criminal after the final frauds have been perpetrated is often very difficult." (Michigan Revised Criminal Code § 4025).

Section 158. Fraudulently obtaining a signature. (1) A person commits the crime of fraudulently obtaining a signature if, with intent to defraud or injure another, he obtains the signature of a person to a written instrument by knowingly misrepresenting any fact.

(2) Fraudulently obtaining a signature is a Class A misdemeanor.

COMMENTARY

Section 158 covers conduct which is not forgery because the resulting written instrument is exactly what it purports to be—a document executed by one who has the authority to do so. A signature is not "property" as defined in the theft article, so obtaining a signature by fraud would not amount to theft by deception.

The section is derived from New York Revised Penal Law § 165.20 and resembles Michigan Revised Criminal Code § 4030.

A phrase in the false pretenses statute (ORS 165.205), "or who obtains or attempts to obtain the signature of any person to any writing, the false making of which would be punishable as forgery," is the only existing Oregon law directed at the problem.

Section 159. Unlawfully using slugs. (1) A person commits the crime of unlawfully using slugs if:

(a) With intent to defraud the supplier of property or a service sold or offered by means of a coin machine, he inserts, deposits or otherwise uses a slug in such machine; or

(b) He makes, possesses, offers for sale or disposes of a slug with intent to enable a person to use it fraudulently in a coin machine.

(2) As used in this section:

(a) "Coin machine" means a coin box, turnstile, vending machine, or other mechanical or electronic device or receptacle designed to receive a coin or bill of a certain denomination or a token made for such purpose, and in return for the insertion or deposit thereof, automatically to offer, provide, assist in providing or permit the acquisition or use of some property or service.

(b) "Slug" means an object, article or device which, by virtue of its size, shape or any other quality is capable of being inserted, deposited, or otherwise used in a coin machine as a fraudulent substitute for a genuine coin, bill or token.

(3) Unlawfully using slugs is a Class B misdemeanor.

COMMENTARY

A. Summary

The purpose of the section is to prevent the use of slugs or other devices in coin-operated machines and the professional manufacture of the slugs themselves. The culpability requirement that must accompany the use of a slug is an "intent to defraud the supplier" of property or services. The intent that must accompany the manufacture or possession of a slug is an "intent to enable a person to use it fraudulently in a coin machine."

"Coin machine" is defined broadly to include any type of vending machine or similar device designed to receive bills or tokens as well as coins, and which dispenses any property or service. "Slug", as the term is defined, includes, in addition to the familiar fake coin, any other device which is capable of being used in a coin machine as a fraudulent substitute for the genuine article.

B. Derivation

Subsection (1) is adapted from Michigan Revised Criminal Code § 4052, which, in turn, is based on New York Revised Penal Law § 170.55. Both of those states provide for two degrees of the crime, however, making it a more serious offense to possess or make slugs exceeding $100 in "value" as they define the term. The proposed draft is limited to a single degree, which should be adequate to cover the problem in this state. Subsection (2) is taken from New York Revised Penal Law § 170.50 with minor variations.

C. Relationship to Existing Law

Two existing statutes, ORS 165.525 and 165.530, now governing the problem will be repealed. The former statute prohibits the manufacture or sale of slugs, and the latter relates to possession of a "machine, appliance, contrivance or device" used or intended to be used to obtain a telephone or telegraphic service or any merchandise or service. ORS 165.530 also prohibits obtaining a service or merchandise without depositing money in the coin-collecting attachment. Such activity would amount to "theft of services" under the provisions of § 133 of the proposed Code.

Section 160. Fraudulent use of a credit card. (1) A person commits the crime of fraudulent use of a credit card if, with intent to injure or defraud, he uses a credit card for the purpose of obtaining property or services with knowledge that:

(a) The card is stolen or forged; or

(b) The card has been revoked or canceled; or

(c) For any other reason his use of the card is unauthorized by either the issuer or the person to whom the credit card is issued.

(2) "Credit card" means a card, booklet or other identifying symbol or instrument evidencing an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer.

(3) Fraudulent use of a credit card is:

(a) A Class A misdemeanor if the total amount of property or services the person obtains or attempts to obtain is under $250;

(b) A Class C felony if the total amount of property or services the person obtains or attempts to obtain is $250 or more.

COMMENTARY

This section is intended to cover instances that probably do not constitute either theft or theft of services. Commentary to § 224.6 of the Model Penal Code indicates the reasons for having a separate statute on the subject:

> "This is a new section to fill a gap in the law relating to false pretense and fraudulent practices. Sections 223.3 and 223.7 cover theft of property or services by deception. It is doubtful whether they reach the credit card situation because the user of a stolen or cancelled credit card does not obtain goods by any deception practiced upon or victimizing the seller. The seller will collect from the issuer of the credit card, because credit card issuers assume the risk of misuse of cards in order to encourage sellers to honor the cards readily. Thus it is the non-deceived issuer who is the victim of the practice."

B. Derivation

The section is based on Model Penal Code § 224.6 and Michigan Revised Criminal Code § 4045. The stated intent "to injure or defraud" is the same as that which is set forth in the forgery sections of the draft. The existing statute (ORS 165.300) requires an intent "to defraud." The definition of "credit card" is an amended version of ORS 165.290 (1).

C. Relationship to Existing Law

Three existing sections of ORS cover credit card crimes. ORS 165.290 defines the terms "credit card" and "card holder." ORS 165.295 deals with the unlawful taking, procuring, possession, alteration or use of a credit card. ORS 165.300 prohibits the fraudulent use of a revoked or canceled card.

The card itself would constitute "property"; consequently stealing it would be "theft" as defined in article 14. Possession of a stolen card would probably amount to "theft by receiving." Forging a credit card or possession of a forged card is prohibited by the forgery sections of the draft. Therefore, there are no separate sections relating specifically to theft or forgery of credit cards.

What remains of the present statutes, then, is the gist of ORS 165.300, restated in slightly different and simplified language, with the scope of the crime enlarged to include use of a forged or stolen credit card. The dividing line between a misdemeanor and a felony is set at $250, the value used in the theft article. The total amount involved in the fraudulent use of a credit card committed pursuant to one scheme or course of conduct may be aggregated in determining the grade of the offense.

Section 161. Negotiating a bad check. (1) A person commits the crime of negotiating a bad check if he makes, draws or utters a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee.

(2) For purposes of this section, unless the check or order is postdated, it is prima facie evidence of knowledge that the check or order would not be honored if:

(a) The drawer has no account with the drawee at the time the check or order is drawn or uttered; or

(b) Payment is refused by the drawee for lack of funds, upon presentation within 30 days after the date of utterance, and the drawer fails to make good within 10 days after receiving notice of refusal.

(3) Negotiating a bad check is a Class A misdemeanor.

COMMENTARY

A. Summary

This section prohibits issuing or passing "bad checks" or other worthless sight orders for the payment of money. Subsection (1) defines the crime itself and subsection (2) establishes certain prima facie evidence provisions that will be applicable.

B. Derivation

The section is based on Model Penal Code § 224.5 and Michigan Revised Criminal Code § 4040.

C. Relationship to Existing Law

Oregon first adopted a bad check statute in 1917 and since that time it has coexisted with the false pretenses statute. In *State v. Cody*, 116 Or 509, 241 P 983 (1925), the court distinguished the two statutes on the basis of whether property is transferred, saying that the worthless check violation consists of drawing a bad check with intent to defraud and no property need change hands. The court recognized the *Cody* "property transfer" test in *Gumm v. Heider*, 220 Or 5, 348 P2d 455 (1960), in which it held that ORS 165.225 is not violated by the making or delivering of a postdated check in payment of a debt if the payee accepts it knowing that it was postdated and if there is no other representation that the check is good, the rationale being that the party receiving the check has not been defrauded. See, 25 *Op Atty Gen* 40–41 (1950-52).

The *Cody* test was discarded by the Oregon Court in *Broome v. Gladden*, 231 Or 502, 373 P2d 611 (1962), in which it said:

> "We construe ORS 165.205 and ORS 165.225 as defining mutually exclusive crimes. ORS 165.225 applies only where the accused has, prior to presenting the check, established an account in the bank upon which the check is drawn. Where no debtor-creditor relationship exists between the accused and the drawee bank the drawer may be prosecuted under ORS 165.205 but not under ORS 165.225." At 505.

The *Broome* doctrine was extended to cover the case in which there is an account but which has no funds at the time the check was drawn in *State v. Scott*, 237 Or 390, 390 P2d 328 (1964). Therefore, if there is a bank account the state must charge the defendant under the bad check statute, whereas if property is obtained by the use of a check drawn on a non-existent account, the false pretense statute must be used. The draft section treats no account and insufficient funds checks alike.

Both statutes have the common element of "an intent to defraud," with the bad check statute containing certain prima facie evidence provisions relating to such an intent. The knowledge of the defendant of insufficient funds under ORS 165.225 is "at the time of the making, drawing, uttering or delivering." The draft section changes this to one of "knowing that it will not be honored by the drawee." As the Michigan commentary states:

> "This (knowledge at the time of the making) hardly appears to correspond to commercial practice or popular expectation. The important thing is not whether at the exact time that the instrument is written or passed the drawee happens to have received funds from or on behalf of the drawer. Rather, the important thing is that by the time the instrument is presented there is some reason to honor it." (Michigan Revised Criminal Code, 277).

Under the prima facie evidence provisions of the section the state meets its initial burden of proving intent if it shows either that the issuer of the instrument had no account with the drawee or that the instrument was not made good within ten days after receipt of a notice of dishonor. This does not mean that the state cannot prosecute until after the ten day period has elapsed, but merely that the prima facie evidence provisions are not available against a defendant who has an account with the drawee until this time has gone by. The same provisions are contained in theft by deception (§ 128 supra).

As observed by the Model Penal Code reporters, special bad check legislation has two practical ad-

vantages that should be retained, even though a comprehensive theft statute is enacted: (1) no actual obtaining of property need be proven and (2) prima facie evidence provisions take care of the intent or knowledge factors. Moreover, there is a sound policy rationale behind a criminal statute that helps to safeguard public confidence in a commercial system that is so widely used in society on a daily basis. However, since the more serious depredations could be prosecuted for theft by deception, it is anticipated that misdemeanor penalties would provide adequate protection for the system under the proposed section.

ARTICLE 19. BUSINESS AND COMMERCIAL OFFENSES

Section 162. Business and commercial offenses; definitions. As used in this Act, unless the context requires otherwise:

(1) "Benefit" means gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary.

(2) "Business records" means any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activities.

(3) "Enterprise" means any private entity of one or more persons, corporate or otherwise, engaged in business, commercial, professional, charitable, political, industrial or organized fraternal activity.

(4) "Fiduciary" means a trustee, guardian, executor, administrator, receiver or any other person acting in a fiduciary capacity as agent or employe of an organization which is a fiduciary.

(5) "Financial institution" means a bank, insurance company, credit union, savings and loan association, investment trust or other organization held out to the public as a place of deposit of funds or medium of savings or collective investment.

(6) "Government" means the state, any political subdivision thereof, or any governmental instrumentality within the state.

(7) "Misapplies" means dealing with property contrary to law or governmental regulation governing the custody or disposition of that property; governmental regulation includes administrative and judicial rules and orders as well as statutes and ordinances.

(8) "Sports contest" means any professional or amateur sport or athletic game or contest viewed by the public.

(9) "Sports official" means any person who acts in sports contests as an umpire, referee, judge or sports contest official.

(10) "Sports participant" means any person who directly or indirectly participates in sports contests as a player, contestant, team member, coach, manager, trainer, or any other person directly associated with a player, contestant or team member in connection with a sports activity.

COMMENTARY

A. Summary

The term "benefit" covers any gain or advantage accruing to the actor or to a third person pursuant to his desire or consent. "Gain" and "advantage" are to be given their ordinary meaning.

"Business records" includes all records maintained incident to a business enterprise. It is intended to include written material prepared for use or distribution outside the normal recordation system, *e.g.*, stock offer prospectus, reports of business activities.

"Enterprise" includes virtually every type of private organized activity for which permanent records are maintained. It does not include any form of governmental instrumentality.

"Financial institution" includes every kind of organization that deals in the acceptance or management of money, savings or other collective investments.

The term "property" used in this article is defined in § 121. The definitions of "fiduciary" and "misapplies" are self-explanatory.

The definitions in subsections (8), (9) and (10) are designed to bring brevity and precision to the sections dealing with sports bribery.

B. Derivation

Section 162 is derived from Michigan Revised Criminal Code § 4125 (2) and (3) and 4155, and New York Revised Penal Law § 175.00 and 180.35.

C. Relationship to Existing Law

The definitions are new to Oregon law.

Section 163. Falsifying business records. (1) A person commits the crime of falsifying business records if, with intent to defraud, he:

(a) Makes or causes a false entry in the business records of an enterprise; or

(b) Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or

(c) Fails to make a true entry in the business records of an enterprise in violation of a known duty imposed upon him by law or by the nature of his position; or

(d) Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

(2) Falsifying business records is a Class A misdemeanor.

COMMENTARY

A. Summary

Section 163 makes punishable falsifying, destroying or otherwise impairing business records. The culpability element is an intent to defraud.

Current legislation is moving toward the extension of criminal sanctions in this field. New York Revised Penal Law § 175.05 and 175.10 and Michigan Revised Criminal Code § 4125 deal with this type of falsification. The New York provisions include public records, which under our proposed Code is treated as tampering with public records. The modern trend has been to make the falsification of private and public records a distinct substantive offense. It is recognized, of course, that the basic elements of forgery law are inextricably involved in such statutes.

The Model Penal Code commentary makes this observation in support of the rationale behind such legislation:

> "In a highly organized society like ours where accuracy of corporate and other records is nearly as important as accuracy of public records, the need for deterring tampering with such records seems reasonably clear, and there is no occasion to distinguish in this regard between corporate records and those of a church, union or club." (Tent. Draft No. 11 at 98 (1960)).

It should be noted that it is not the intention of the proposed section to preserve the integrity of business records. Instead, the prohibition is directed at conduct preliminary to the commission of a fraud, in that it requires "intent to defraud."

B. Derivation

Section 163 is derived from Michigan Revised Criminal Code § 4125 and New York Revised Penal Law § 175.00 and 175.05.

C. Relationship to Existing Law

There are a number of Oregon statutes dealing with falsification of business and commercial records that would be repealed: ORS 165.235, issuing a false invoice, bill of lading or estimate of property; ORS 165.250, destruction or falsification of corporate records; ORS 165.255, officer or agent of savings and loan association distributing false material; ORS 165.655, issuing receipt where no goods are received; ORS 165.660, issuing receipt containing false statements; ORS 165.665, fraudulently issuing duplicate or additional receipts.

No Oregon cases deal directly with falsification of private business records. Reported cases in this area concern themselves primarily with forgery offenses. In that connection it is essential to distinguish between a false instrument and false statements in an instrument. No amount of misstatement of fact and no amount of fraud will make a false instrument out of what purports to be the very instrument which it is in fact and in law. As stated by Perkins:

> "If a man fraudulently executes a deed to real estate with a covenant that it is free and clear of encumbrances, this is a genuine deed even if the grantor knows that the land is subject to a heavy mortgage. It is a genuine deed with a false covenant. This is a case of the false making of a writing with intent to defraud, but it will not support a conviction of forgery because for this purpose it would be necessary to show that the deed itself was false. Typical instances of writings which are falsely made with intent to defraud but are not forgery because they are genuine writings with false statements rather than false writings, are (1) a 'padded' time roll issued by the one authorized to issue it, (2) a warehouse receipt fraudulently issued by a warehouse which did not have the grain purportedly represented thereby, (3) a check wrongfully drawn on a bank in which the drawer has no funds, or insufficient funds, or (4) a false entry made in one's own account book." Perkins, *Criminal Law* 345 (Foundation Press 1969). See also, 41 *ALR* 231; 2 Burdick, *Law of Crime*, § 661 (1946).

Section 164. Sports bribery. (1) A person commits the crime of sports bribery if he:

(a) Offers, confers or agrees to confer any benefit upon a sports participant with intent to influence him not to give his best effort in a sports contest; or

(b) Offers, confers or agrees to confer any benefit upon a sports official with intent to influence him to improperly perform his duties.

(2) Sports bribery is a Class C felony.

COMMENTARY

See commentary under § 165 infra.

Section 165. Sports bribe receiving. (1) A person commits the crime of sports bribe receiving if:

(a) As a sports participant he solicits, accepts, or agrees to accept any benefit from another person with the intent that he will thereby be influenced not to give his best effort in a sports contest; or

(b) As a sports official he solicits, accepts, or agrees to accept any benefit from another person with the intent that he will improperly perform his duties.

(2) Sports bribe receiving is a Class C felony.

COMMENTARY TO SECTIONS 164 AND 165

A. Summary

Article 21 deals with bribery of public officials. The sections on sports bribery were placed in Article 19 because of the purely commercialized aspect of the offense.

Section 164 concerns itself with the bribe giver. Paragraph (a) of subsection (1) prohibits offering, giving or agreeing to give a benefit to a sports participant with the intent that the athlete not give his best effort in a sports contest. "Benefit" is defined in § 162 to include any kind of gain or advantage. The *mens rea* requirement is focused here, as it is in all the bribery sections, on the wrongful intent of the actor; it is not necessary to show a bilateral agree-

ment or understanding. Paragraph (b) of subsection (1) prohibits the same conduct in relation to a sports official. The culpability factor here is an intent to influence the official to improperly perform his duties. It should be noted that since the wrongful intent of the actor is the gravamen of the offense, it is immaterial whether the sports participant or sports official was in fact influenced. Section 165 contains the same elements as found in section 164, except that it relates to bribe receiving.

B. Derivation

The proposed sections are derived from Michigan Revised Criminal Code §§ 4211 and 4212, and New York Revised Penal Law §§ 180.40 and 180.45.

C. Relationship to Existing Law

Sections 164 and 165 would replace four statutes governing bribery of participants in athletic contests and bribery of athletic coaches and officials. (ORS 167.720-167.735). The proposed sections on sports bribery do not depart from the present substantive coverage. The term "with the intent, understanding or agreement that [the participant, contestant or player] shall not use his best effort," is replaced with "intent to influence him not to give his best effort."

Section 166. Misapplication of entrusted property. (1) A person commits the crime of misapplication of entrusted property if, with knowledge that the misapplication is unlawful and that it involves a substantial risk of loss or detriment to the owner or beneficiary of such property, he intentionally misapplies or disposes of property that has been entrusted to him as a fiduciary or that is property of the government or a financial institution.

(2) Misapplication of entrusted property is a Class A misdemeanor.

COMMENTARY

A. Summary

The *mens rea* requirements of § 166 include: (1) knowledge that the conduct or action is contrary to the legally established rules governing care of entrusted property; and (2) knowledge that such conduct or action involves a substantial risk of loss or detriment to the actual owner or beneficiary of the property; and (3) an intentional misapplication or disposition of that property.

Section 166 is intended to reach recklessness in the handling of certain kinds of property by those acting in a fiduciary capacity, *e.g.*, trustees, administrators, executors, attorneys at law, as well as persons who have access to property of the government or financial institutions that do not come within the definition of "fiduciary." This type of nonfraudulent misdealing with property is distinguished from theft by the moral quality of the conduct. Misdemeanor sanctions should be sufficient to deter persons from wrongful dealing with property involving no gain or advantage to the actor or to a third person in whom he is interested.

To the extent that state regulatory statutes govern banking, insurance, trust companies and investment funds, a knowing violation of such law may reasonably be subject to criminal sanction.

B. Derivation

Section 166 is derived from Michigan Revised Criminal Code § 4155, which was modeled after Model Penal Code § 224.13.

C. Relationship to Existing Law

There are a number of Oregon statutes covering conversion and misapplication of property designated as embezzlement. These provisions require an intent to deceive, injure or defraud and are covered by Article 14.

Numerous other provisions impose an extraordinary standard of duty in connection with the care and disposition of entrusted property. See, ORS 8.130, 126.225, 126.250, 127.060, 128.020, 128.410, 128.415, 128.990, 156.650, 180.370, 251.610, 279.722, 292.316, 293.265, 297.120, 423.070, 462.260, 707.720, 707.990 and chapters 708, 709, 716, 722, 723, 724, 725 and 733. The above-listed statutes would be retained; however, the Commission recommends that the penalties therefor be made uniform by grading them the same as § 166.

Some of the persons covered by these statutes do not act in a fiduciary capacity as defined in § 162. Public servants who misapply property entrusted to them in their official capacity are covered by the sections on official misconduct if the misapplication violates a statute relating to their office, or if they act with an intent to benefit themselves or to harm another.

The described conduct must be clearly dis-

tinguished from the *fraudulent* misapplication of entrusted property. The deviations from fiducial duty contemplated by this section involve the reckless or grossly negligent management of entrusted property. It does not include the culpability element of intent to deceive, injure or defraud.

Ferguson v. State, 80 Tex Cr R 383, 189 SW 271, construed a statute similar in import to the present Oregon embezzlement statutes:

> "Under statute declaring guilty of a felony an officer or clerk of a state bank who 'embezzles, abstracts, or wilfully misapplies' its funds, 'embezzle' refers to acts done for the benefit of the actor as against the bank, 'misapply' covers acts having no relation to pecuniary profit or advantage to the doers, while 'abstracts' means only to take and withdraw from the possession and control of the bank; and while 'embezzlement' may include the offenses of abstraction and wilful misapplication, either of these offenses may be committed without embezzlement."

A recent Oregon case construed the *mens rea* requirements of the Oregon embezzlement statutes. *State v. Hanna*, 224 Or 588, 356 P2d 1046 (1960), held that criminal intent is necessary to make out the crime of embezzlement by bailee, mortgagor or purchaser under a conditional sales contract. (ORS. 165.010). The court quoted Perkins, *Criminal Law* 817 (1957):

> "This intent, while perhaps not strictly an intent to steal, is an intent to deprive the owner of his property and is for practical purposes the counterpart of the animus ferandi required for larceny. Hence the unauthorized retention of the property of another under a bona-fide claim of right is not embezzlement even if the error is one of law." The court went on to say:
>
> "The crime of conversion of public funds (ORS 165.015) has been generally regarded as not requiring proof of a specific intent to defraud. As explained by Perkins, *Criminal Law*, pp. 247-249 (1957), this offense is considered to be a special type of crime designed to hold public officers strictly accountable for the conversion of public funds, even though they may not embezzle or fraudulently convert the property." At 591.

Marshall v. Frazier, 159 Or 491, 80 P2d 42, 81 P2d 132 (1938), cites *U.S. Nat. Bank & Trust Co. v. Sullivan*, 69 Fed (2d) 412, for the proposition that:

> "If a trustee acts within his power, good faith is a defense to a charge of mistake in judgment, and, if the trust provision gives the trustee wide powers of investment, he may exercise his sound discretion within those limits, and his actions are not to be tested by considerations of 'hindsight' judgment. Discretion to a trustee does not mean arbitrary or unlimited or absolute discretion, but a reasonable one, and trustee must use judgment and prudence, and, if no limits are placed on his discretion, must nevertheless invest funds according to approved rules for trust investments.
>
> "Good faith alone will not protect a trustee, but he must also exercise diligence, prudence and absolute fidelity, as respects investments." At 527, 528.

Section 167. Issuing a false financial statement. (1) A person commits the crime of issuing a false financial statement if, with intent to defraud, he:

(a) Knowingly makes or utters a written statement which purports to describe the financial condition or ability to pay of himself or some other person and which is inaccurate in some material respect; or

(b) Represents in writing that a written statement purporting to describe a person's financial condition or ability to pay as of a prior date is accurate with respect to that person's current financial condition or ability to pay, knowing the statement to be materially inaccurate in that respect.

(2) Issuing a false financial statement is a Class A misdemeanor.

COMMENTARY

A. Summary

This section covers the preparation or issuance of a false financial report, or the certification of such a report. The *mens rea* requirement is knowledge that the written statements are false coupled with an intent to defraud. Culpability attaches to issuance of the false statement with the specified intent, regardless of the success or failure of the fraudulent scheme. If property is actually obtained, the crime of theft by deception will have been committed.

Paragraph (a) of subsection (1) applies to the primary source of the fraudulent statement. Paragraph (b) extends beyond the original source of the misstatement to reach the person who either (1) affirms it because of his position, *e.g.*, accountant or auditor, or (2) employs the misstatement for his own fraudulent purposes. While both require an intent to defraud, the benefit need not flow to the defendant. The term "defraud" is used in its ordinary dictionary sense, "to deprive a person of property or any interest, estate, or right by fraud, deceit, or artifice." *Black's Law Dic* (4th ed 1951). The requirement that the misstatement be "material" is intended to exempt minor inaccuracies not inducing an element of reliance.

B. Derivation

With minor changes the section is a composite of Michigan Revised Criminal Code § 4145 and New York Revised Penal Law § 175.45.

C. Relationship to Existing Law

The section would repeal ORS 165.615, false statements as to financial condition or ability to pay; 165.620, procuring benefit from false statement concerning financial condition; 165.625, publication of false statement concerning liabilities or assets of company.

ORS 165.615 was discussed in *State v. Bosch*, 139 Or 150, 7 P2d 554 (1932). The court reviewed the legislative history of the statute:

> "OC 14–335 (now ORS 165.615) was enacted by the legislature at its 1921 session, being 'An act relating to false statements in writing to obtain credit . . . any person who shall knowingly make . . . any false statement in writing, with intent that it shall be relied upon, respecting the financial condition, or means or ability to pay of himself . . . for the purpose of procuring . . . the making of a loan or credit, the extension of credit . . . shall be guilty of a misdemeanor.' Section (3) of the act makes it a misdemeanor for any person to make, in writing, a false statement to the effect that any former statement so made was and still is a correct statement, for the purpose of procuring credit or other benefits." At 151, 152.

The proposed section is not a departure from existing Oregon law. The present statutes relating to securities should be retained as they are designed to provide increased protection in an area that demands a high degree of public confidence. (See ORS 59.135).

Section 168. Obtaining execution of documents by deception. (1) A person commits the crime of obtaining execution of documents by deception if, with intent to defraud or injure another or to acquire a substantial benefit, he obtains by means of fraud, deceit or subterfuge the execution of a written instrument affecting or purporting to affect the pecuniary interest of any person.

(2) Obtaining execution of documents by deception is a Class A misdemeanor.

COMMENTARY

A. Summary

This section is designed to complement coverage provided in other provisions relating to theft by deception and fraudulently obtaining a signature. It avoids the problems involved in the "property" concept inherent in the theft provisions. The same approach was used in drafting § 158, fraudulently obtaining a signature. The execution of some written instruments obtained by deception may not properly be classified as "property" within the theft definition, even though they indirectly represent a beneficial interest, *e.g.*, fishing and hunting license, motor vehicle registration. The basic forgery provisions would not be applicable since the written instrument would legitimately be what it purported to be.

The section does not cover obtaining execution of documents by threats and intimidation. This type of misconduct would constitute coercion. (§ 102 supra.)

The scope of the section is broad enough to include the execution of releases, wills, leases, trust agreements, licenses. election certificates, extension of time for obligation payments and other similar written instruments that involve a pecuniary interest. Although the term "benefit" is defined, the modifying adjective, "substantial", is not. Whether the benefit the actor attempts to acquire is substantial would be a question of fact, depending on the totality of the circumstances in a given case.

Section 185, infra, prohibits making unsworn

written falsifications to a public servant in connection with an application for any benefit. Section 168 extends that prohibition to private transactions by prohibiting all fraudulent means of obtaining written instruments or documents affecting a pecuniary interest.

B. Derivation

The proposed section is derived from Model Penal Code § 224.14.

C. Relationship to Existing Law

There is no counterpart to this section in existing Oregon law.

Section 158 supra, covers fraudulently obtaining a signature with an intent to defraud. Section 168 is directed at fraudulently obtaining execution of a document affecting a pecuniary interest, without necessarily requiring a signature to give validity to the document. The section thereby attempts to focus on certain criminal conduct while avoiding collision with these legal distinctions.

Section 169. Failing to maintain a metal purchase record. (1) A person commits the crime of failing to maintain a metal purchase record if he buys or otherwise obtains new, used or secondhand copper, copper wire, copper cable, brass, electrolytic nickel or zinc, without keeping a record of all such articles purchased or obtained.

(2) The record required by subsection (1) shall be retained by the purchaser for a period of not less than one year and shall be available to any peace officer on demand. The record shall contain:

(a) A general description of all property purchased.

(b) The type and quantity or weight of the property.

(c) The name, address, description and signature of the seller or person making delivery.

(d) A description of any motor vehicle and its license number used in the delivery of such articles.

(3) This section shall not apply to purchases made by or from a manufacturer, remanufacturer or a distributor appointed by a manufacturer of such articles.

(4) Failing to maintain a metal purchase record is a Class B misdemeanor.

COMMENTARY

Section 169 restates ORS 164.385, requiring that purchasers of certain metals maintain a record identifying the metal purchased and the seller. Commonly referred to as a "copper thieves" statute, it is designed to discourage the flow of stolen metal into the legitimate market.

SUPPLEMENTAL COMMENTARY:

A number of proposals were considered by the Commission involving fraud against creditors and commercial bribery, *e.g.*, defrauding secured and judgment creditors, fraud in insolvency, receiving deposits in a failing financial institution. While recognizing that some problems exist in these areas, the Commission rejected coverage herein as being incompatible with the overall objective of criminal code revision. In relegating control of these problems to civil and regulatory provisions outside the criminal code, the Commission was influenced by four considerations:

(1) The current trend towards liberal credit practices makes impracticable enforcement of security interests by the criminal law.

(2) Business and commercial standards are varied and complex. It is difficult to legislate in an area that offers no clear line of demarcation between permissible and impermissible conduct, *e.g.*, standards of accountability between employer and employee, expense account transactions, traffic in trade secrets.

(3) Deposits in financial institutions are federally insured. Banks, trust companies and savings and loan companies are strictly regulated by other Oregon statutes.

(4) Adequate civil remedies are available to creditors, depositors and employers to redress breach of contractual and employment agreements.

OFFENSES AGAINST THE FAMILY

ARTICLE 20. OFFENSES AGAINST THE FAMILY

Section 170. Offenses against the family; definitions. As used in sections 170 to 177 of this Act, unless the context requires otherwise:

(1) "Descendant" includes persons related by descending lineal consanguinity, stepchildren and lawfully adopted children.

(2) "Support" includes, but is not limited to, necessary and proper shelter, food, clothing, medical attention and education.

COMMENTARY

The significance of "descendant" as defined is the inclusion of stepchildren and lawfully adopted children. The term applies to § 172 of this article prohibiting incestuous relationships. Its effect will be to expand existing law which presently excludes stepchildren and adopted children from the scope of criminal incest.

Subsection (2) defines "support" as necessary and proper care and maintenance. Present law, ORS 167.605, lists "shelter, food, care or clothing" as specific examples of support. Medical attention and education have been added as specific areas of support necessarily implied by the term "care." The term "support" is used in § 175, criminal nonsupport.

Section 171. Bigamy. (1) A person commits the crime of bigamy if he knowingly marries or purports to marry another person at a time when either is lawfully married.

(2) Bigamy is a Class C felony.

COMMENTARY

A. Summary

The elements essential to bigamy are a knowing marriage or purported marriage to another person when either person to the contract is lawfully married to a third party.

The *mens rea* element of "knowingly" refers both to the marriage or purported marriage and to the fact that one of the parties has lawfully contracted a prior marriage which has not been dissolved. The prohibition would therefore apply to a married person who contracts a subsequent marriage, and to a single person who contracts a marriage with a person whom he knows to be lawfully married to another.

The language "purports to marry" is intended to negate the defense that since a prior existing marriage was still in full force and effect, the subsequent marriage was null and void and therefore not in law or in fact a marriage.

B. Derivation

Section 171 is derived from Model Penal Code § 230.1 and Connecticut Revised Penal Code § 200.

C. Relationship to Existing Law

ORS 167.020 defines polygamy. The statute encompasses two types of conduct. First, "Any person who while having a husband or wife living, marries another person . . . is guilty of polygamy." Discussing this portion of the statute, *State v. Durphy*, 43 Or 79, 71 P 63 (1903), states:

> "It is indispensable under the statute to show that the former husband or wife, as the case may be, is not only living, but is still, or was at the time of the commission of the offense, the husband or wife of the accused, for it may have transpired that the parties were in the meantime lawfully divorced . . . ." At 81-82.

Without two marriages and two husbands at one and the same time there can be no bigamous marriage. *Lahey v. Lahey*, 109 Or 146, 219 P 807 (1923). To establish the invalidity of a second marriage it is necessary to allege and prove that the spouse of the former marriage is still living and that the former marriage has not been dissolved by divorce. *Marcus v. Marcus*, 173 Or 693, 147 P2d 191 (1944); *In re Estate of De Force*, 119 Or 556, 249 P 632 (1926).

There are two important aids in proving the existence and continuance of a previous marriage. First, by virtue of ORS 139.320, either the husband or wife is competent to testify to the fact of marriage against the other without his or her consent. Second, both the refusal of the courts to apply the presumption in favor of the validity of a second marriage in prosecutions for bigamy and the utilization in such prosecutions of the presumption of the continuance of life of the former spouse aid in establishing the validity and continuance of a previous marriage.

The defense of mistake of fact or mistake of law has been interposed with varying success in American jurisdictions. Generally, courts have taken the position that bigamy is a statutory crime and where the Legislature has not required an element of intent, the courts have no right to do so.

In many states the statutes provide that a person shall not be deemed guilty of bigamy where the former spouse has been absent or unheard of for a specified number of years. In Oregon it is seven years, and requires that the party does not know the former spouse was living within that time. (See ORS 167.020 (2)). This type of statute is usually construed to mean that one who marries within the statutory period has no defense if the first spouse is still alive, although the second marriage is contracted with an honest belief in the death of the first spouse.

Although the Oregon Court has never ruled expressly on the validity of either the defense of mistake of fact or mistake of law, it was faced with an issue of mistake of law in *State v. Locke*, 77 Or 492, 151 P 717 (1915). Affirming the defendant's conviction, the court declined to discuss the defense at great length since the trial court in its charge to the jury had considered an invalid divorce decree as a complete defense to all acts committed by the defendant in relation to his marital status after the date of its issuance. Clearly, the trial court's instructions recognized defendant's reliance upon the earlier decree as a mistake of law constituting a valid defense. The court's refusal to affirm or reverse the conviction solely on this basis leaves the question undecided in Oregon as to the general availability of the defense in bigamy prosecutions.

Section 171 is intended to clarify the issue to the extent of requiring proof that the actor knowingly contracted a marriage at a time when he *knew* that one of the parties was lawfully married. A defendant could therefore defend on the ground of reasonable mistake of law or fact negating the requisite knowledge.

It should be noted that without such a defense, ORS 107.110 presents a "trap" for the unwary party who remarries immediately after obtaining a divorce. That statute provides that a decree of divorce shall not be effective insofar as it affects the marital status of the parties until the expiration of 60 days from the date of the decree. Thus the decree of divorce is, in effect, interlocutory for 60 days. If during this time a party remarries he technically would commit bigamy.

Section 172. Incest. (1) A person commits the crime of incest if he marries or engages in sexual intercourse or deviate sexual intercourse with a person whom he knows to be related to him, either legitimately or illegitimately, as an ancestor, descendant or brother or sister of either the whole or half blood.

(2) Incest is a Class C felony.

COMMENTARY

A. Summary

Section 172 defines the crime of incest in terms of three specified acts committed with a person known to be within a particular degree of consanguinity: (1) marriage, (2) an act of sexual intercourse, or (3) an act of deviate sexual intercourse. (See § 104 supra for definitions of sexual intercourse, deviate sexual intercourse). The degree of consanguinity within the prohibited class includes: (1) ancestors, (2) descendants, and (3) brothers or sisters of either the whole or half blood.

The *mens rea* requirement is that the actor commit the prohibited act with knowledge that the other person is related to him within the degree of consanguinity as defined by the statute.

B. Derivation

Section 172 is derived from Model Penal Code § 230.2. The relationship of stepchild has been added by the Commission.

C. Relationship to Existing Law

The crime of incest was not indictable at common law but is only so by statute. *State v. Jarvis*, 20 Or 437 (1891). Oregon defines the crime of incest in ORS 167.035. The statute states:

"Any persons, being within the degree of con-

sanguinity within which marriages are prohibited by law, who intermarry or commit adultery or fornication with each other, such person or either of them shall be punished upon conviction . . . ."

The Oregon statute which defines the degrees of consanguinity referred to in the incest statute is ORS 106.020. It prohibits marriage "When the parties thereto are first cousins or any nearer of kin to each other, whether of the whole or half blood, computing by the rules of the civil law."

Although there are valid reasons for prohibiting sexual relations between stepparent and stepchild and between parents and adoptive children, ORS 106.020 does not include them within the degrees of relationships among which marriages are prohibited. The Model Penal Code does not include stepparent and stepchild relationships within its incest definition, but does include the parent and adopted child relationship.

The traditional basis for incest legislation has been relationships of consanguinity and affinity. Affinity arises from marriage, creating an affinity between the stepparent and the stepchild. While no affinity relationship is created between a parent and an adopted child, the civil law accords the relationship all the rights and liabilities that attach to natural parentage. In view of these considerations, the judgment of the Commission was to include both stepchildren and adopted children within the purview of the incest statute. Deciding that the preservation of family security is the primary purpose behind the incest legislation, the Commission then narrowed the scope of the section by deleting coverage for cousins and aunts and uncles. However, under ORS 106.020 marriage between persons so related will remain void.

Section 173. Abandonment of a child. (1) A person commits the crime of abandonment of a child if, being a parent, lawful guardian or other person lawfully charged with the care or custody of a child under 15 years of age, he deserts the child in any place with intent to abandon it.

(2) Abandonment of a child is a Class C felony.

COMMENTARY

ORS 167.605, the nonsupport statute, prohibits a person from "deserting or abandoning his or her minor children, born in or out of wedlock, under the age of 18 years, without providing necessary and proper shelter, food, care or clothing . . . ."

ORS 167.215 prohibits a person from doing any act which "causes or tends to cause any child under the age of 18 years to become a dependent child . . . ." "Dependant child" is defined in ORS 418.035 (1).

State v. Hodges, 88 Adv Sh 721, — Or —, 457 P2d 491 (1969), held ORS 167.210 (contributing to the delinquency of a minor) unconstitutionally vague, stating:

> ". . . [T]he terms of a penal statute creating an offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." At 726.

ORS 167.215, causing child to become or remain dependent, may be constitutionally infirm on the same grounds enunciated by *Hodges*.

It is now an indictable misdemeanor under ORS 167.605 for a parent to desert or abandon his minor children under 18 without providing necessary care and support for them. The gravamen of the crime is nonsupport, so that it is not necessary to charge and prove abandonment before a conviction can be had.

The designated age of 15 is arbitrary; the criterion should be the ability of the child under the circumstances to "fend for himself," and, if in difficulty, to seek aid and assistance. Section 173 is taken from Michigan Revised Criminal Code § 7030.

Section 174. Child neglect. (1) A person having custody or control of a child under eight years of age commits the crime of child neglect if, with criminal negligence, he leaves the child unattended in or at any place for such period of time as may be likely to endanger the health or welfare of such child.

(2) Child neglect is a Class A misdemeanor.

COMMENTARY

Section 174 is intended to complement the sections on child abandonment and criminal nonsupport by providing coverage for situations involving criminal neglect. The crucial issue here is not whether the child was deserted or left without nominal support, but whether it was left unattended under circumstances likely to endanger its health or welfare.

The term "custody or control of a child" extends the reach of the section beyond the child's parent or guardian; it includes the temporary custodian, *e.g.*, baby-sitter, relative, teacher.

While recognizing that any age is arbitrary, the Commission believes that an age of eight is reasonable when measured by a criterion of relative self-reliance.

The *mens rea* element of criminal negligence is defined in § 7 of the Code to mean "that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstances exists. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." The actor would, of course, be subject to prosecution under § 174 if a higher degree of culpability were present, *e.g.*, intentional or knowing conduct.

The term "unattended" means that the child is left under circumstances in which no responsible person is present to attend to his needs. Leaving a three month old child in the care of a nine year old child might, in some cases, amount to child neglect. An alleged offense under this section must be viewed as a totality of circumstances; the age of the child, place where left, whether it was left alone or in the company of others, period of time left and, finally, whether the sum of these circumstances are such as would endanger the health or welfare of the child.

Oregon presently has no comparable statute. Child neglect cases have generally been handled through the juvenile court process, with irresponsible parents prosecuted for other crimes resulting from such neglect.

Section 175. Criminal nonsupport. (1) A person commits the crime of criminal nonsupport if, being the parent, lawful guardian or other person lawfully charged with the support of a child under 18 years of age, born in or out of wedlock, he refuses or neglects without lawful excuse to provide support for such child.

(2) It is no defense to a prosecution under this section that either parent has contracted a subsequent marriage, that issue has been born of a subsequent marriage, that the defendant is the parent of issue born of a prior marriage or that the child is being supported by another person or agency.

(3) Criminal nonsupport is a Class C felony.

COMMENTARY

See commentary under § 176 infra.

Section 176. Criminal nonsupport; special rules of evidence. (1) Proof that a child was born to a woman during the time a man lived and cohabited with her, or held her out as his wife, is prima facie evidence that he is the father of the child. This subsection does not exclude any other legal evidence tending to establish the parental relationship.

(2) No provision of law prohibiting the disclosure of confidential communications between husband and wife apply to prosecutions for criminal nonsupport. A husband or wife is a competent and compellable witness for or against either party.

COMMENTARY TO SECTIONS 175 AND 176

A. Summary

Section 175 makes it a crime for a parent or a person in loco parentis of a child less than 18 years old to intentionally fail or refuse to provide support for such child. The failure to provide support must be "without lawful excuse."

Subsection (2) of § 175 negatives the defense to a charge of criminal nonsupport that the actor has remarried or is supporting children born of a prior or subsequent marriage.

Section 176 codifies two special rules of evidence applicable to criminal nonsupport actions. Subsection (1) provides that if a child is born to a woman during the time a man lived and cohabited with her, or held her out as his wife, it is prima facie evidence that he fathered the child. This, of course, could be rebutted by other competent evidence. Subsection (2) takes away the privilege of confidential communications between husband and wife in criminal nonsupport prosecutions. It provides further that both husband and wife are *competent and compellable* witnesses for or against each other.

Section 175 departs from the present nonsupport statute, ORS 167.605, in two particulars. It broadens the definition of support by specifically including medical attention and education. It narrows the scope of the existing statute by limiting coverage to children less than 18 years old, thereby excluding nonsupport of a wife. The Commission believes that adequate civil remedies exist to deal effectively with nonsupport of a spouse.

B. Derivation

Section 175 is taken from New York Revised Penal Law § 260.05 and ORS 167.630. Section 176 is a restatement of ORS 167.625.

C. Relationship to Existing Law

The offense of criminal nonsupport is defined by ORS 167.605:

> "Any person who, without just or sufficient cause, deserts or abandons his wife, or who deserts or abandons any of his or her minor children, born in or out of wedlock, under the age of 18 years, without providing necessary and proper shelter, food, care or clothing for any of them, or who, without just or sufficient cause, fails or neglects to support his wife, or any such minor children, shall be punished . . . ."

The statute covers two distinct areas: (1) abandonment of a wife or minor children without providing necessary support, or (2) failure to provide support for a wife or minor children. The essential factor is the failure to provide support. However, failure to support alone is not sufficient to constitute the crime; the failure must be accompanied with circumstances that indicate it was without just or sufficient cause. Thus there are two essential elements of the crime: (1) failure to provide support, and (2) lack of a just or sufficient cause. *State v. Francis*, 126 Or 253, 269 P 878 (1928); *State v. Langford*, 90 Or 251,176 P 197 (1918).

ORS 131.360 is a special venue provision for criminal nonsupport actions. This statute would be retained but amended to delete the reference to wife.

Section 177. Endangering the welfare of a minor. (1) A person commits the crime of endangering the welfare of a minor if he knowingly:

(a) Induces, causes or permits an unmarried person under 18 years of age to witness an act of sexual conduct or sado-masochistic abuse as defined by section 255 of this Act; or

(b) Permits a person under 21 years of age to enter or remain in a place where unlawful narcotic or dangerous drug activity is maintained or conducted; or

(c) Induces, causes or permits a person under 21 years of age to participate in gambling as defined by section 263 of this Act; or

(d) Sells, or causes to be sold, tobacco in any form to a person under 18 years of age.

(2) Endangering the welfare of a minor is a Class A misdemeanor.

COMMENTARY

A. Summary

Paragraph (a) of subsection (1) prohibits inducing, causing or permitting a person less than 18 years old to view an act of sexual conduct or sadomasochistic abuse. The provision is limited to unmarried persons. The two designated prohibited acts are defined in the obscenity article (Art. 29). The age limit of 18 and marital status distinction conform to the age of consent established in the article on Sexual Offenses (Art. 13). The subsection does not require participation or active conduct on the part of the minor; exposure to the prohibited acts is considered harmful per se.

Paragraph (a) of subsection (1) is not intended to apply to the parents of a minor child who engage in lawful sexual activity within the ambit of family privacy. But, there may be aggravated instances in which the sexual conduct of parents endangers the welfare of their minor children; for this reason, the Commission chose not to write a specific exception into the statute.

Paragraph (b) prohibits allowing a person less than 21 years old to enter or remain on premises where unlawful drug activity is conducted or maintained. If a minor is sold or given illegal drugs, or if the actor maintains a place resorted to by drug users or used for the unlawful keeping or sale of drugs, the crime of criminal activity in drugs or criminal drug promotion would be committed. (Art. 31).

Paragraph (c) prohibits encouraging or allowing a person less than 21 years old to participate in gambling (Art. 30). The age of 21 conforms to that established in Oregon for pari-mutuel wagering. ORS 462.190.

Paragraph (d) prohibits selling tobacco to a person less than 18. In practice, this prohibition may be difficult to enforce, but the Commission believes it advisable to continue to discourage sale to minors of substances that are provably "hazardous to health."

C. Relationship to Existing Law

Paragraphs (a), (b) and (c) are new. Paragraph (d) is a restatement of ORS 167.245.

Throughout the criminal code revision, the Commission has sought to articulate clear and concise statements of the substantive offenses, prohibiting particularized conduct and applying defined elements of culpability. Many of the provisions relate to conduct detrimental to the welfare of minors, *e.g.*:

Recklessly endangering another person, Article 11, Assault and Related Offenses;

Compelling prostitution, inducing or causing a person under 18 years of age to engage in prostitution, Article 28, Prostitution and Related Offenses;

Rape, sodomy, sexual abuse, contributing to the sexual delinquency if a minor, sexual misconduct with a minor, Article 13, Sexual Offenses;

Sale of obscene material to a minor. Article 29, Obscenity and Related Offenses.

An examination of cases prosecuted under ORS 167.210 (contributing to delinquency of a minor) reveals that in almost every instance the same conduct could be prosecuted under one of the sections noted above. Section 177 is designed to provide coverage for specific acts injurious to the welfare of minors not specifically prohibited elsewhere in the proposed Code.

ORS 167.210 would be repealed by the proposed Code. The Oregon Supreme Court recently declared the statute unconstitutional. For a discussion of the statute and *States v. Hodges*, 88 Or Adv Sh 721, — Or —, 457 P2d 491 (1969), see commentary under § 117 supra.

Other statutes that would be repealed: ORS 167.215, 167.220, 167.205, 167.225, 167.235, 167.237, 167.240, 167.245, 167.250, 167.295, 166.480, 163.650, 163.640. ORS 167.240, 167.250 and 167.640 are discussed in commentary to Article 32 infra.

ORS 167.295 prohibits the playing of billiards and pool by minors, unless the "recreational facility" complies with the conditions set forth in the statute. The Commission recommends that such activity should be a matter of local option rather than state law. Where the premises involved are licensed to dispense alcoholic beverages, the OLCC has regulatory authority to control the problem.

ORS 165.245, substituting another child for infant committed to one's care, is replaced by §§ 106 and 107 of the proposed Code. ORS 165.240, producing an infant and falsely pretending heirship is replaced by the sections on theft by deception and attempted crimes. (See §§ 54, 55, 56, 128).

ORS 167.225, taking any female under 16 without consent of parents for purpose of marriage, concubinage or prostitution is replaced by provisions relating to sexual offenses, prostitution and kidnapping. (See Art. 12, 13, 28).

ORS 167.300 which penalizes a minor who misrepresents his age in order to gamble is replaced by a section in Article 32. Several other statutes deal with conduct considered detrimental to the welfare of minors: ORS 419.720, prohibiting parents or guardians from allowing minors to be in public places during curfew hours; 453.050, prohibiting sale of poisons to minors; 462.190, selling wagering tickets to minors; 471.410 and 472.310, prohibiting the sale or furnishing of alcoholic liquors to minors. Earlier drafts of § 177 covered the offenses involving liquor; however, the section as now drafted does not affect the statutes listed immediately above. The section in its present form restates, enlarges or departs from existing law in the following respects: paragraphs (a), (b) and (c) are new; paragraph (d) restates ORS 167.245.

OFFENSES AGAINST PUBLIC ADMINISTRATION

ARTICLE 21. BRIBERY AND CORRUPT INFLUENCES

Section 178. Bribery and corrupt influences; definitions. As used in sections 178 to 216 of this Act, unless the context requires otherwise:

(1) "Pecuniary benefit" means gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary, in the form of money, property, commercial interests or economic gain, but does not include a political campaign contribution reported in accordance with ORS chapter 260.

(2) "Public servant" includes:

(a) A public officer or employe of the state or of any political subdivision thereof or of any governmental instrumentality within the state;

(b) A person serving as an advisor, consultant or assistant at the request or direction of the state, any political subdivision thereof or of any governmental instrumentality within the state;

(c) A person nominated, elected or appointed to become a public servant, although not yet occupying the position; and

(d) Jurors.

COMMENTARY

Insofar as they are reported in accordance with ORS chapter 260 (Corrupt Practices Act), political compaign contributions have been excluded from the scope of "pecuniary benefit." This qualification is intended to make it clear that legitimate political campaign contributions, though made with an intent to advance a political viewpoint, are not to be considered a form of criminal bribery.

A broad interpretation of "pecuniary benefit" could conceivably be applied to prohibit "logrolling," *i.e.*, the offer by a legislator or other public servant to vote in a particular way in exchange for some beneficial act such as political assistance at the polls. Bargaining of this nature is not intended to be covered by this article. Gratuities of an insignificant value, in the form of a social amenity or holiday gift, are also beyond the scope of the bribery sections. The consideration sought to be prohibited is one whose primary significance is economic value and which is transferred with a wrongful intent to influence a public servant's exercise in judgment.

The definition of "public servant" has been drafted to make it clear that all "political subdivisions" and "governmental instrumentalities" within the state are included. Varying elements that fix that status of a public servant have been divided into separate subdivisions. Coverage is intended to reach a broad classification of persons who serve governmental instrumentalities at the request or direction of the state or its agents in advisory and consultative capacities.

No attempt has been made to distinguish between the public servant serving in a compensatory position and one serving gratuitously. The gist of the offense is the intent to wrongfully influence the course of public administration. The public servant functioning gratuitously may often be as effective in corrupting governmental process as the paid functionary.

The proposed definition of "public servant" does not contemplate inclusion of persons advising public officials in a private capacity. A lobbyist, for example, is not a public servant, since in advancing his views he promotes a private interest. A practicing attorney would not normally be a public servant, since he does not exercise the functions of a public officer; his designation as an "officer of the court" does not create a contractual relationship empowering him to act on behalf of the state.

Section 179. Bribe giving. (1) A person commits the crime of bribe giving if he offers, confers or agrees to confer any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, action, decision or exercise of discretion in his official capacity.

(2) Bribe giving is a Class B felony.

COMMENTARY

See commentary under § 181 infra.

Section 180. Bribe receiving. (1) A public servant commits the crime of bribe receiving if he:

(a) Solicits any pecuniary benefit with the intent that his vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced; or

(b) Accepts or agrees to accept any pecuniary benefit upon an agreement or understanding that his vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

(2) Bribe receiving is a Class B felony.

COMMENTARY

See commentary under § 181 infra.

Section 181. Bribery defenses. (1) In any prosecution under section 179 of this Act, it is a defense that the defendant offered, conferred or agreed to confer the pecuniary benefit as a result of the public servant's conduct constituting extortion or coercion.

(2) It is no defense to a prosecution under sections 179 and 180 of this Act that the person sought to be influenced was not qualified to act in the desired way, whether because he had not assumed office, lacked jurisdiction or for any other reason.

COMMENTARY TO SECTIONS 179 TO 181

A. Summary

The gist of the crime of bribery is an effort to secure an improper advantage in the judicial, administrative or legislative decision-making process.

The proposed draft eliminates use of the word "corruptly" and prohibits without qualification the giving or receiving of any pecuniary benefit to influence official or political decision-making.

The consideration applicable to §§ 179 and 180 is represented by the term "pecuniary benefit." The potential for pernicious application of a broad definition of the proscribed benefit outweighs the advantage in insuring coverage of appropriate cases. It is of particular concern that a public servant not become suspect every time he receives a non-pecuniary favor from a member of the public. It should be noted that as defined such benefits are not limited to the distribution of cash, but include all items of economic significance.

Bribe giving and bribe receiving are divided into separate sections. The *mens rea* requirement in the bribe giving section is framed in terms of "with the intent." The thrust of this requirement is to avoid the necessity of proving a "meeting of the minds"

crucial to an agreement or understanding. The subjective wrongful intent of the bribe offeror is the gravamen of bribe giving.

The section on bribe receiving divides into separate paragraphs two variant aspects of the offense. The solicitation of a bribe is coupled with the *mens rea* requirement "with the intent." The acceptance or agreed acceptance of a bribe requires proof that it was based upon an "agreement or understanding." The objective of this qualification is to make it clear that a solicitation for a bribe need not be based upon a bilateral "agreement or understanding," but that the acceptance of a bribe requires such proof.

Section 181 (1) recognizes the tendency of the individual citizen to capitulate to threats by a public servant rather than to resist them. Courts have emphasized that bribery extends only to "voluntary" conferral of benefits, not the product of threats. (See People v. Ritholz, 359 Mich 539, 103 NW2d 481 (1960)).

Section 181 (2) is derived from Model Penal Code § 240.1, which rejects "impossibility" as a defense to bribery. The New York Revised Penal Law commentators (§ 200.00), point out that it is immaterial and no defense to a prosecution for bribery of a public servant that the public servant sought to be influenced was not qualified to act in the particular way desired. They emphasize that the gist of the crime of bribery is the *effort* to secure an impermissible advantage in the decision-making process of government.

B. Derivation

Sections 179 to 181 are derived from § 240.1, Model Penal Code; § 4705, Michigan Revised Criminal Code; and § 200.00 to 200.15, New York Revised Penal Law.

C. Relationship to Existing Law

Bribery, under the common law, is usually defined to be the giving or receiving anything of value, or any valuable service intended to influence one in the discharge of a legal duty. (See People v. Peters, 265 Ill 122, 128, 106 NE 513, 515 (1914)).

Oregon Constitution, § 7, Article II: "Every person shall be disqualified from holding office, during the term for which he may have been elected, who shall have given, or offered a bribe, threat, or reward to procure his election."

State v. Coffey, 157 Or 457, 72 P2d 35 (1937), involved the conviction of a municipal police officer for accepting money in consideration for allowing an illegal slot machine to operate unabated. A municipal police officer was held to be an "executive officer" within the statute prohibiting executive officers from accepting bribes.

State v. Packard, 4 Or 157 (1871), involved the conviction of a county clerk for knowingly receiving compensation for official duty other than that authorized by law. The indictment was held insufficient for failure to designate the service for which compensation was received.

ORS 162.210 defines the judicial, legislative and executive officers covered by the bribery statutes. This statute would be repealed.

ORS 162.220 and 162.230 deal with bribery and intimidation of public officials. The material dealing with bribery would be repealed by this draft. The material dealing with intimidation of public officials is covered by § 102, supra.

ORS 162.670 prohibits any person from inducing the deposit of funds by offering or giving any gift, compensation or reward to the Multnomah County Treasurer. This statute would be repealed.

ORS 162.655 prohibits any offer of gift, compensation, reward or inducement by any persons to the State Treasurer to induce him to deposit funds in any bank, contrary to state law. This statute would be repealed.

ORS 162.240 deals with gratuities to public officials for services rendered. In the absence of circumstances giving rise to bribery, coverage is not continued in this article. Acceptance of such consideration may, in certain cases, subject the public servant to criminal liability under Art. 25, Abuse of Public Office.

ORS 162.510 prohibits the taking of any fee or compensation not authorized by law by any state officer, excepting the Governor, judges of the Supreme Court and members of the Legislative Assembly. See commentary to ORS 162.240, above.

ORS 561.210 prohibits the offering or accepting a bribe to improperly perform duties imposed by law relating to agriculture, including ORS 616.405 through ORS 616.475, relating to grades and standards. This statute would be repealed.

ORS 260.680, Corrupt Practices and Other Election Offenses, prohibits giving, offering or promising to give any gift, gratuity or valuable consideration to a voter to influence his vote. This statute would not be affected.

ORS 260.690 prohibits the acceptance of consideration by a voter upon an understanding that he will vote a particular way. This statute would not be affected. The definition of "public servant" as used in this section does not include voters. The Oregon Corrupt Practices and Election Act would not be affected by the criminal code revision.

ARTICLE 22. PERJURY AND RELATED OFFENSES

Section 182. Perjury and related offenses; definitions. As used in sections 182 to 216 of this Act, unless the context requires otherwise:

(1) "Benefit" means gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary.

(2) "Material" means that which could have affected the course or outcome of any proceeding or transaction. Whether a false statement is "material" in a given factual situation is a question of law.

(3) "Statement" means any representation of fact and includes a representation of opinion, belief or other state of mind where the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation.

(4) "Sworn statement" means any statement knowingly given under oath or affirmation attesting to the truth of what is stated.

COMMENTARY

A. Summary

"Benefit" is defined to include any gain or advantage accruing to the actor or to a third person pursuant to his desire or consent. The words "gain" and "advantage" are to be given their ordinary dictionary meaning.

A "sworn statement" is defined as one given under oath or affirmation and includes any legally authoried mode of swearing a person to the truth of his statements.

"Statement" is defined to include any representation. Representations of opinion, belief or other state of mind are included only if they relate to state of mind as distinguished from the facts which are the subject of the representation.

For a false statement to be "material" it must be one that could influence the course or outcome of the proceeding or transaction. "Proceeding" refers to the official hearing or inquiry in which the statement is received. "Transaction" has been defined as including "all that takes place in the conducting of any item of business or an affair." (See Benton Co. State Bank v. Nichols, 153 Or 73, 78, 54 P2d 1166 (1936)). At common law and in almost all American jurisdictions "materiality" is an expressly required element of perjury. Materiality has been defined to include anything which could be "capable of influencing the tribunal on the issue before it." (See Blackman v. United States, 108 F2d 572 (5th Cir 1940)).

An examination of Oregon cases indicates adherence to the "potential effect" rule in testing the materiality of testimony. A majority of the cases deal with perjured testimony given during the course of judicial proceedings. The issue in these cases is whether the alleged falsification was *material* to a central issue in the proceeding wherein the falsification was made. Since § 183, infra, applies to all false sworn statements in regard to a material issue regardless of the forum or circumstances wherein given, "transaction" has been made part of the "material" definition.

The cases affirm that it is a question of law whether or not an alleged falsification was material to a given proceeding or transaction.

"Public servant" is defined in § 178, supra.

B. Derivation

The definitions are derived from Michigan Revised Criminal Code §§ 4901 and 4701. The definition of "statement" is suggested by Model Penal Code § 241.0 (2).

C. Relationship to Existing Law

ORS 44.330 stipulates the form of the oath to be administered in Oregon; 44.340 provides for variation in the form of the oath; 44.350 provides for a form of solemn affirmation by persons with conscientious scruples against taking an oath; 44.360 states that an affirmation as prescribed by ORS 44.350 is equivalent to an oath and that a false affirmation is perjury equally with a false oath.

The problem of providing an adequate definition for "materiality" has proved troublesome to the courts. The leading Oregon case is *State v. Stilwell*, 109 Or 643, 221 P 174 (1924), wherein the court stated:

> "[In a perjury prosecution,] it is always necessary to show that the testimony given, which

must be alleged to have been willful, was material to an issue in the controversy, wherein it was given . . .

"Testimony may be given aliunde the record to show the state of the cause and its precise posture at the time the alleged false testimony was introduced in order to demonstrate its materiality . . .

". . . the materiality of the alleged false testimony may be shown by introducing all or so much of the pleadings in the action as to show the issues, together with the proof of such facts as tend to show testimony to be on a material issue.

". . . the materiality of testimony in question must be established by evidence, and cannot be left to presumption or inference, and proof that the testimony was admitted on the trial is not sufficient to warrant a jury in inferring that such testimony was material to the issue.

"On the 'facts offered' in a case of perjury, it is the duty of the court to instruct the jury as to what facts constitute 'material testimony'." At pp. 659-668.

Trullinger v. Dooly & Co., 125 Or 269, 265 P 1117 (1928), held that to support a charge of perjury there must be some statement of fact showing the testimony given was not only false but wilfully false, and that the false testimony was material to the issue in the case on trial in which such testimony was given.

The cases indicate that section 182 does not depart from existing Oregon law.

Section 183. Perjury. (1) A person commits the crime of perjury if he makes a false sworn statement in regard to a material issue, knowing it to be false.

(2) Perjury is a Class C felony.

COMMENTARY

See commentary under § 184 infra.

Section 184. False swearing. (1) A person commits the crime of false swearing if he makes a false sworn statement, knowing it to be false.

(2) False swearing is a Class A misdemeanor.

COMMENTARY TO SECTIONS 183 AND 184

The elements necessary to prove perjury are: (1) a false statement (2) given under oath or affirmation (3) material to the issue, and made with (4) present knowledge that the statement is false. False swearing applies to sworn falsifications that lack the element of materiality.

The prevalence of perjury has become a matter of increasing concern in the United States. In a prefacatory note to the *Model Act on Perjury* (1952), the National Conference of Commissioners on Uniform State Laws discuss the defects in current perjury law:

"In the first place . . . a person may not be convicted of perjury if he mades contradictory statements under oath, unless the indictment charges and the prosecution proves that one of the contradictory statements is false. In the second place, proof of falsity of a statement alleged to be false must be established by two independent witnesses or by one witness and corroborating circumstances. In the third place, a false statement must be proved not only to be false but also to be material to the proceeding for which it was made. This rule has meant immunity for many witnesses who have wilfully given false evidence in court, and much delay and uncertainty have arisen in the course of the interpretation and application of the rule. In the fourth place, a great difficulty in administering the law of perjury has been the severity of the penalties specified by the statutes. In the less aggravated forms of perjury, much could be gained in effectiveness and respect by making penalties less severe in the books and more frequently applied in the court rooms. In some states, an effort was made to classify perjury by degrees. In other states, the attempt has been made to

classify it according to the crimes of perjury, false swearing, and false information to authorities. In the fifth place, the attempt to define the crime as 'wilful' or 'voluntary,' rather than 'intentional' or by description of the actual state of mind of the defendant, has resulted in metaphysical distinctions by the courts, which have not aided prompt and successful prosecution."

The general scheme of Model Penal Code § 241.1 is to define situations where sworn falsification should constitute a felony. The Code determines that four elements distinguish felonious perjury: (1) oath or equivalent affirmation, (2) intentional false statement, (3) materiality of the falsification and (4) requirement that the falsification be in an official proceeding involving a hearing.

Falsification made while not under an oath or affirmation would constitute a misdemeanor under Model Penal Code § 241.3 (1). If the falsification is under oath, it is nevertheless a misdemeanor under § 241.2 if element (3) or (4) is missing.

Sections 183 and 184 attempt to incorporate these elements, with the exception of an official proceeding requirement.

The sections require actual knowledge of the falsity of the proffered statement. It is intended that both offenses should be predicated upon an intentional, knowing misstatement. A reckless disregard for the truth may in some cases be sufficient to impute an intentional falsification.

B. Derivation

Sections 183 and 184 are a composite of Model Penal Code §§ 241.1 and 241.2, and Michigan Revised Criminal Code §§ 4905, 4906 and 4910.

C. Relationship to Existing Law

ORS 162.110 establishes the necessary elements of perjury as (1) taking a legally required oath or affirmation, and (2) wilful swearing or affirming falsely, and (3) doing so in regard to a material matter.

ORS 162.120 establishes three grades of punishment for perjury and subornation of perjury. Subsection (1) applies to perjury committed in a criminal proceeding for a crime punishable by death or life imprisonment. A maximum 20 year penalty is provided. Subsection (2) applies to perjury committed in all other judicial proceedings and provides a maximum 10 year penalty. Subsection (3) applies to perjury committed other than before a court of justice and to subornation of perjury. It provides a maximum penalty of five years. This draft repeals ORS 162.110 and 162.120.

ORS 162.130 provides a maximum three year penalty for attempting to procure another to commit perjury. This statute will be repealed by § 57, supra, solicitation.

ORS 162.140, the Oregon false swearing statute, is identical to the perjury statute with the exception of the materiality requirement. It would also be repealed.

False swearing was not made a crime in Oregon until the enactment of chapter 180, Laws of Oregon, 1937. At the same session of the Legislature § 14–401, Oregon Code 1930, was amended by adding thereto the word "material." (See chapter 139, Laws of Oregon, 1937). To constitute perjury the false statement must be *material* to the matter concerning which the oath is taken, whereas the materiality of the false statement is not an element of the crime of false swearing.

State v. Smith, 47 Or 485, 83 P 865 (1905), held that in a prosecution for perjury it is incumbent on the state to show not only that the accused made the alleged false statements, but that he knew them to be false, or that he stated them under such circumstances that knowledge of the falsity would be imputed to him.

ORS 132.690 sets out the required contents of an indictment charging perjury and false swearing. (See State v. King, 165 Or 26, 103 P2d 751 (1940)). This statute will be considered under the revision of the procedural criminal law but is not affected by the instant proposal.

There is presently scattered throughout ORS a needless proliferation of statutes dealing with false statements made to governmental agencies. The Legislature may decide to retain some of these provisions while repealing others as no longer necessary. A conscientious analysis of each statute would require careful examination of every ORS volume. The time available for the criminal law revision project does not permit such an in-depth study.

The Commission recommends that as it becomes apparent that a specific statute provides double coverage it be repealed by the Legislature. Of course, statutes incorporating by reference existing perjury and false swearing sections in the criminal code should be amended to conform to the new sections proposed by this article. A list of those statutes found by the Commission follows:

ORS 94.990 (1) (f) provides a felony penalty for false swearing concerning any matter or proceeding involving registration of title under the Torrens Law. This would be repealed by the false swearing section.

ORS 241.990 (2) states that a wilful false swearing in any hearing or investigation before the county employes civil service commission is perjury and is punishable as such; ORS 247.121 prohibits an elector who requests registration from supplying informa-

tion knowing it to be false. Subsection (1) requires such information to be submitted under oath or affirmation; ORS 247.420 prohibits supplying false information in connection with applications for special registration certificates. This information is required to be submitted under oath or affirmation; ORS 247.991 (1), penalty section for ORS 247.121 and 247.420; ORS 253.990 (2) states that any person who makes a false statement in his oath upon the envelope containing an absentee ballot shall be guilty of perjury; ORS 254.510 to .570 and 254.990 punish misrepresentations, false statements, false or fraudulent signatures and false affidavits and certificates in the circulation, certification and filing of initiative, referendum and recall petitions; ORS 260.500 states that the making of a false oath or affidavit in connection with any of the provisions of the election laws shall be deemed perjury and be punished accordingly.

ORS 305.815 prohibits the making and subscribing of a false return, statement or document submitted to the State Tax Commission, under penalty of false swearing; ORS 305.990 (1) and (2) prohibit public officials from furnishing the State Tax Commission with false and fraudulent statements, and the giving of false testimony before the State Tax Commission or Court, both punishable as perjury; ORS 308.990 (6) punishes as perjury furnishing the State Tax Commission with false or fraudulent statements in connection with assessments of designated utilities and companies and optional gross earnings tax on revenues from rural telephone exchanges; ORS 309.990 (3) penalizes as perjury furnishing the State Tax Commission with false information regarding equalization of property taxes; ORS 311.990 (7), perjury statute directed at the making of a false oath in connection with the collection of property taxes; ORS 314.075 prohibits making a false income tax return and supplying false information to the State Tax Commission; ORS 314.991 (1), the penalty provision for ORS 314.075, in addition to a misdemeanor penalty and $1,000 fine it contains a $1,000 penalty provision; ORS 321.225 (2) prohibits making false statements on timber tax returns; ORS 321.350 (2) prohibits making any false return or false representation on reforestation tax returns; ORS 321.955 (5) prohibits making a false or incorrect report upon severance of merchantable timber; ORS 321.991, the penalty provision for the three named ORS chapter 321 statutes. Subsection (1) penalizes violation of ORS 321.225 as a misdemeanor. Subsection (3) penalizes violation of ORS 321.350 as a misdemeanor. Subsection (6) penalizes ORS 321.955 as perjury; ORS 321.730 (6) states that no person shall make a false statement in an application for forest land classification; ORS 321.991 (5) penalizes violation of ORS 321.730 (6) with a $500 fine and three months imprisonment; ORS 323.990 (2) and (3) punish as a misdemeanor the rendering of false reports in connection with state cigarette tax revenues; ORS 342.935 sets out the procedure for teacher tenure hearings. Subsection (3) provides that witnesses shall be subject to perjury penalties.

ORS 407.060 prohibits any false oath or false statement in veterans' bonus or loan applications; ORS 407.430 prohibits any written or oral false statement in support of a World War II veteran's bonus; ORS 407.990 provides a misdemeanor penalty for violation of ORS 407.060 or 407.430; ORS 416.990 penalizes false statements made in connection with the relatives' responsibility law; ORS 473.170(1)(b) prohibits false statements by manufacturers in reports to the State Liquor Commission. ORS 473.990 (1) punishes violation of ORS 473.170 (1)(b) with a $500 fine and six months imprisonment; ORS 481.150 (4) prohibits false statements in vehicle registration applications; ORS 481.225 (7) penalizes as false swearing false statements in applications for special licenses for farm vehicles; ORS 481.990 (4) makes a false statement of a material fact in an application for a motor vehicle certificate of title punishable as a felony. Subsection (10) makes false swearing in regard to any matter required by ORS chapter 481 punishable as perjury. Subsection (12) makes violation of ORS 481.225 (7) a misdemeanor; ORS 482.990 (3) treats as perjury any false sworn statement made in connection with applications for operators' and chauffeurs' licenses; ORS 484.990 penalizes the false certification of matters set forth in a traffic offense citation; ORS 486.211 (4)(b) gives as one ground for revocation or suspension of license and vehicle registration perjury or the making of a false affidavit; ORS 486.991 (3) makes it a misdemeanor to submit false information in any report required by ORS chapter 486; ORS 488.820 penalizes giving false statements or information to the State Marine Board. ORS 488.990 (8) punishes violation of ORS 488.820 by a $50 fine and 30 days imprisonment; ORS 488.995 penalizes certifying falsely in connection with a boating offense citation or complaint; ORS 497.230 prohibits false statements of residence on fish and game license applications; ORS 497.990 states that violation of any provisions of ORS chapter 497 is a misdemeanor; ORS 543.990 (3) treats as perjury the giving of false testimony in any hearing before the State Engineer.

ORS 604.380 prohibits making any false certificate, affidavit or record of transfer in connection with livestock brands and marks; ORS 604.992 penalizes violation of any provisions of ORS chapter 604 as a misdemeanor; ORS 610.990 (3) states that the making of a false affidavit in an application for a predatory animal bounty is perjury; ORS 656.990 (1) makes it a misdemeanor to submit a false statement or representation, or false payroll report, to the State Workmen's Compensation Board; ORS 657.300 prohibits false statements by an employer to the Department of Employment Commissioner; ORS 657.305 prohibits making a false statement to obtain a benefit under the state unemployment compensation law;

ORS 657.495 prohibits making a false statement to lower contributions paid to the unemployment compensation fund; ORS 657.990 (2) penalizes violation of ORS 657.300 as a misdemeanor. Subsection (3) penalizes violation of ORS 657.305 and 657.495 by a $500 fine and 90 days imprisonment; ORS 658.991(3) states that any person who swears or affirms falsely in an application for a farm labor contractor's license is subject to two years imprisonment and a $5,000 fine; ORS 659.260 prohibits an employer of labor from filing a false statement with an employment agency to secure labor; ORS 659.990 (5) punishes violation of ORS 659.260 with a $100 fine and 60 days imprisonment; ORS 671.440 (2) prohibits making a false oath or affirmation in connection with application for registration as architect to State Board of Landscape Architect Examiners; ORS 671.990 penalizes violation of ORS 671.440 (2) as a misdemeanor; ORS 677.080 prohibits making any false statement on a matter relative to the right of a person to practice medicine or to obtain a license under ORS chapter 677; ORS 677.990 penalizes violation of ORS 677.080 (1) as a misdemeanor; ORS 678.085 prohibits making a false statement or representation in applying for a nurses' or nursing home license; ORS 678.990 (1) penalizes violation of ORS 678.085 with a $200 fine and 30 days imprisonment for the first offense, and a $500 fine and 30 days imprisonment for each subsequent offense; ORS 679.170 (6) prohibits making a false statement in an affidavit required by the State Board of Dental Examiners; ORS 679.991 (1) punishes violation of ORS 679.170 (6) as a misdemeanor; ORS 683.150 (5) declares that a sworn witness in a hearing before the Oregon State Board of Examiners in Optometry shall be guilty of perjury if he gives false testimony; ORS 683.180 (6) prohibits making any false statement in an application for an examination before the State Board of Examiners in Optometry; ORS 688.120 prohibits making false or fraudulent statements in obtaining registration as a physical therapist; ORS 688.990 makes violation of ORS 688.120 a misdemeanor; ORS 689.990 (4) makes it a misdemeanor to secure the registration of a person as a pharmacist by making any false representations; ORS 690.220 (2) prohibits obtaining a barber's certificate of registration by fraudulent misrepresentations; ORS 690.270 states that the making of any false statement as to a material matter in any oath or affivadit required by ORS chapter 690 is perjury and punishable as such; ORS 694.145 prohibits making a false, material statement in an application for registration as a hearing aid dealer.

ORS 707.660 (3) states that no bank director, in taking the oath required by ORS chapter 707, shall swear or affirm falsely as to the ownership of stock; ORS 707.990 (1) penalizes violation of ORS 707.660 (3) as a felony; ORS 708.705 (1) prohibits an officer, director, owner or employe of a bank or trust company from making any false statement or report to the Superintendent of Banks; ORS 708.990 (6) penalizes violation of ORS 708.705 (1) as a felony; ORS 725.200 prohibits making false statements in any record or report filed with the Superintendent of Banks; ORS 725.990 (1) makes violation of ORS 725.200 a misdemeanor; ORS 726.140 prohibits pawnbrokers from making false statements in records or reports filed with the Superintendent of Banks; ORS 726.990 makes violation of ORS 726.140 punishable by a $500 fine and six months imprisonment; ORS 731.260 prohibits filing with the Insurance Commissioner any information known to be false or misleading; ORS 731.992 (1) makes violation of ORS 731.260 punishable as a misdemeanor; ORS 757.450 (2) prohibits making any false statement in a Public Utilities Commission hearing or filing with the Commissioner a false statement or representation; ORS 757.990 (1) penalizes violation of ORS 757.450 (2) as a felony; ORS 760.315 (3) prohibits giving a false answer in any records submitted to the PUC by an officer, agent or employe of any railroad; ORS 760.990 (4) penalizes violation of ORS 760.315 (3) with a $1,000 fine.

Section 185. Unsworn falsification. (1) A person commits the crime of unsworn falsification if he knowingly makes any false written statement to a public servant in connection with an application for any benefit.

(2) Unsworn falsification is a Class B misdemeanor.

COMMENTARY

A. Summary

The purpose of § 185 is to broaden the reach of existing perjury legislation. The section does not require that the false statement be made under oath. The essential elements of the offense are: (1) a written application for any benefit, including (2) a false written statement, with (3) express knowledge of its falsity.

If a pecuniary benefit is unlawfully obtained, it would probably be actionable under statutes pro-

hibiting theft by fraud and deception. The Michigan Revised Criminal Code reporters point out one possible flaw in this approach:

> "We believe this interference in itself justifies a separate criminal provision which, as a practical matter, will probably be used primarily in the cases of unsuccessful falsifications as an alternative to the attempted theft provisions. In any event, reliance solely upon the theft provisions would be unsatisfactory because the theft provisions usually will not cover falsifications in reports or applications for permits and licenses since such items ordinarily will not be 'property' under the definition of Section 3201 (9)." At 408.

The proposed section offers a number of advantages over existing law:

(1) It fills any present or future gaps in the law. It avoids the problem presented by the Legislative Assembly authorizing a new form of economic grant or special license and failing to enact a companion provision punishing falsification in the written application for such benefits.

(2) It restores the oath taking process to a legitimate level of solemnity by providing practical legislative alternatives. The notarial oath is too often today treated as a meaningless formality.

(3) It provides a uniform *mens rea* requirement for unsworn falsification.

(4) It provides uniformity in penalty provisions.

Section 121 provides a broad definition of "property." Since the attempt provisions in §§ 54 to 56 are applicable to the theft by deception section, it is obvious that the same conduct may violate both statutes, *i.e.*, a false unsworn statement submitted to obtain state veteran's benefits would constitute both an attempt to obtain "benefits" by deception and unsworn falsification.

B. Derivation

Section 185 is derived from Model Penal Code § 241.3 and Michigan Revised Criminal Code § 4940.

C. Relationship to Existing Law

No reported Oregon cases deal directly with unsworn falsification. A number of existing statutes prohibit unsworn falsification in official matters. The Commission was again faced with a proliferation of statutes that mitigated against close examination and specific recommendation. A summary of those statutes follow, with the ultimate decisions as to their retention or repeal left to later legislative determination:

ORS 57.991 prohibits a corporation officer or director from signing or filing a false statement with the Corporation Commissioner; ORS 59.135 (2) prohibits any person from making untrue statements in connection with the sale or purchase of securities. Subsection (4) prohibits making or filing with the Commissioner any false statement, report or document; ORS 59.991 (1) provides a felony penalty for violation of any provision of ORS chapter 59, the Oregon Securities Law; ORS 61.990 (3) penalizes as a felony the preparation or filing of a false or fraudulent report required under the nonprofit corporation law; ORS 106.079 prohibits the making of any material false statement by an applicant, laboratory director or physician in connection with marriage license applications; ORS 106.990 (1) punishes violation of ORS 106.079 with a $100 fine and 30 days imprisonment; ORS 240.710 prohibits making any false statement, certificate, mark, rating or report with regard to any civil service test, certification or appointment; ORS 242.640 prohibits certain conduct in connection with the Custodian's Civil Service Law, including false examination reports and false representations concerning the examination; ORS 242.822 covers the same type of prohibited conduct in regard to civil service for firemen; ORS 242.990 (1) and (2) provide a misdemeanor penalty for violation of ORS 242.640 and 242.822; ORS 288.991 provides a felony penalty for making false representations in writing in support of an application for payment or reissuance of an instrument as defined in ORS 288.140. This statute covers both theft by deception and unsworn falsification; ORS 307.990 penalizes making a false statement of a material fact to an officer charged with assessment of county property taxes; ORS 319.875 prohibits making a false statement in any report, petition or application required under motor vehicle and aircraft fuel tax law; ORS 319.990 (4) makes violation of ORS 319.875 a misdemeanor; ORS 319.990 (1) penalizes the making of any false statement in a statement required for the refund of money or taxes under ORS chapter 319; ORS 508.530 (2) prohibits any person from falsifying reports required by the Fish and Game Commission; ORS 520.155 prohibits false entries or statements in reports to the State Board of Geology; ORS 571.055 (2)(b) prohibits making a false statement to the Department of Agriculture in an application for a nurseryman's license; ORS 579.230 prohibits a purchaser from making a false report to the Oregon Potato Commission; ORS 587.990 (1) penalizes making any false statement in an application provided for storage of grain by the Department of Agriculture.

Section 186. Perjury and false swearing; irregularities no defense. It is no defense to a prosecution for perjury or false swearing that:

(1) The statement was inadmissible under the rules of evidence; or

(2) The oath or affirmation was taken or administered in an irregular manner; or

(3) The defendant mistakenly believed the false statement to be immaterial.

COMMENTARY

A. Summary

Subsection (1) is designed to prevent a person from defending perjured statements on the ground that the testimony was subject to objection and should not have been received.

Subsection (2) codifies the general rule that irregularities in the administration of the oath is not a defense to perjury prosecution. (See 3 Wharton 1297). It should be noted that while a defense to perjury cannot be predicated upon irregularities in the oath, the defense of lack of legal authority or jurisdiction of the person administering the oath may be raised.

Subsection (3) negatives any defense on the ground that the declarant mistakenly believed the false statement to be immaterial. This is in accord with a legislative trend exemplified by California and New York. This would subject some persons to criminal liability for making what they felt to be inconsequential false statements to public officials. In some instances the intent to mislead a public official might be absent. The Model Penal Code commentators answer this argument:

> "Witnesses are not usually qualified to make judgments on materiality in the technical sense in which that concept is here employed; and at least one of our purposes is to compel the witness to make his objections to immaterial questions openly, rather than by swearing to false answers. Furthermore, a defense of mistake on this point would in practice probably prevent convictions except where the significance of the information was obvious. Thus a difficult requirement of materiality would be reintroduced in practice, despite the policy expressed in our definition of the term." (Tent. Draft No. 6, at 112-13 (1957)).

B. Derivation

Subsections (1) and (2) are derived from Michigan Revised Criminal Code § 4935 and Model Penal Code § 241.1. Subsection (3) is taken from New York Revised Penal Law § 210.35.

C. Relationship to Existing Law

State v. Craig, 94 Or 302, 303, 185 P 764 (1919), involved a false statement made under oath administered by a county assessor. In affirming a demurrer to the complaint, the court stated:

> "It requires no citation of authorities to show that perjury cannot be predicated upon a false oath taken before an officer or person not authorized by law to administer it."

Christman v. Salway, 103 Or 666, 205 P 541 (1922), involved an improperly notarized mechanic's lien. The notary seal was affixed but the notary had not attested to the seal by signing his name. Taking judicial notice that a notary public is a state officer, the court stated:

> "The authority conferred upon a notary to administer an oath is a statutory power and must be exercised in conformity with the directions of the statute. Where the statute expressly requires the officer to sign his name as an attestation of the administering of an oath, the direction is mandatory. (See *Lindsay v. Huth*, 74 Mich 712, 42 NW 358) . . . As the statute requires that every instrument executed before a notary public shall contain his official signature in order that full faith and credit shall be given to such instrument, it follows that a pretended certificate of any notary public without such signature is inoperative and void." At 691, 695.

State v. Walton, 53 Or 557, 101 P 389 (1909), concerned perjured testimony given in a prior trial that was reversed on appeal. The court stated:

> "Perjury cannot be committed in a judicial proceeding absolutely void for want of jurisdiction. But where the Court, before whom the oath of a witness is taken, has jurisdiction of the subject matter and of the parties, and the testimony given is material to the inquiry then before the court, false swearing is perjury, though the proceedings may be so irregular or erroneous as to require a reversal on appeal . . . . it would be most unreasonable to require that all proceedings of a court, in which a witness testified falsely,

should be in strict conformity to law before the witness could be proceeded against for perjury." At 567, 568.

Model Penal Code commentary states:

"The guiding principle is that when the community commands or authorizes certain statements to be made with special formality or on notice of special sanction, the seriousness of the demand for honesty is sufficiently evident to warrant application of criminal sanctions. Upon this principle it makes little difference what formula is employed to set this seal of special importance on the declaration." (Tent. Draft No. 6, at 127 (1957)).

Oregon cases support the following views:

(1) Authority to administer a valid oath or affirmation is conferred by statute. Lacking statutory authority, an oath or affirmation is without sufficient legal validity to support a perjury prosecution. *State v. Craig*, supra.

(2) Where a statute confers authority to administer an oath or affirmation and expressly sets out the procedure to be followed, such direction is mandatory. Failure to adhere to the statutory procedure invalidates the oath. *Christman v. Salway*, supra.

(3) Perjury cannot be committed in a proceeding absolutely void for want of jurisdiction. *State v. Walton*, supra.

Subsection (2) of § 186 does not depart from existing Oregon law. *State v. Craig*, supra, turned on the legal authority to administer the oath, not the legal sufficiency of an oath administered by one with authority. *Christman v. Salway*, supra, might be viewed as contra, but the issue in that case was not perjury but the legal effect of a notarized, but unattested, mechanic's lien. *State v. Walton*, supra, involved not the regularity of the oath, but concerned itself with the validity of the proceedings wherein it was taken.

The Oregon perjury statute, ORS 162.110, extends to false swearing where an oath is authorized as well as where testimony is required to be sworn. Thus under subsection (2), if the person administering the oath acts under legal authority, but gives the oath in an irregular manner, the irregularity would provide no defense to perjury. *Christman v. Salway*, supra, would be overruled to the extent that it holds that a legally authorized oath administered in an irregular manner is void for purposes of perjury prosecution. No Oregon cases dealing with the issue of perjury predicated upon testimony inadmissible under the rules of evidence were found.

Section 187. Perjury and false swearing; retraction. (1) It is a defense to a prosecution for perjury or false swearing committed in an official proceeding that the defendant retracted his false statement:

(a) In a manner showing a complete and voluntary retraction of the prior false statement; and

(b) During the course of the same official proceeding in which it was made; and

(c) Before the subject matter of the official proceeding is submitted to the ultimate trier of fact.

(2) "Official proceeding", as used in this section, means a proceeding before any judicial, legislative or administrative body or officer, wherein sworn statements are received, and includes any referee, hearing examiner, commissioner, notary or other person taking sworn statements in connection with such proceedings. Statements made in separate stages of the same trial or administrative proceeding shall be considered to have been made in the course of the same proceeding.

COMMENTARY

Under common law, while retraction may be used to show inadvertence in making the false statement, perjury once committed cannot be purged even by a correction during the same hearing. See *U. S. v. Norris*, 300 US 564, 57 S Ct 535 (1937).

There is increasing authority in support of a retraction defense to perjury, based upon the theory that it serves a socially desirable purpose in the search for truth. Similar provisions have recently been adopted by the states of Michigan, Illinois and

New York. The U. S. Supreme Court argues against this rationale in *Norris*, supra:

> "The argument overlooks the tendency of such a view to encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have its intended effect, but, if discovered, the witness may purge himself of crime by resuming his role as witness and substituting the truth for his previous falsehood. It ignores the fact that the oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross-examination, by extraneous investigation or other collateral means." At 574.

The Model Penal Code reporters support their adoption of a retraction provision as follows:

> "The draft attempts to preserve incentive to correct falsehoods, without impairing the compulsion to tell the truth in the first place. The danger that witnesses might be encouraged to take a chance on perjury is limited by the draft's requirement that recantation take place before the falsity becomes manifest." (Tent. Draft No. 6, at 129 (1957)).

The New York retraction section adopted the Model Penal Code language. (See New York Revised Penal Law § 210.25). The Michigan and Illinois retraction sections do not require proof that the correction was made "before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding."

A conflicting judicial policy is represented by the New York and federal rule as espoused by the *Norris* case, supra. This conflict is discussed in 64 *ALR* 2d 276:

> "The difference between the federal and New York rule may perhaps be explained by a difference in judicial policy. The federal rule requires a witness to testify truthfully at all times, and subjects him to punishment for perjury if he intentionally falsifies his testimony, without regard for any change of heart by the witness, on the theory that to do otherwise is to encourage false swearing.
>
> "The policy behind the New York rule, however, seems to be that it is highly important that the tribunal receiving the testimony know that truth and, as a means of achieving this end, it may be wise to encourage even one who wilfully testifies falsely to come forward with the truth, so that justice may be done.
>
> "Under the New York rule the recantation must be prompt and must come before harm has been done to the inquiry under way, and before the witness has learned that his falsehood has been discovered by others. . . . Under the federal rule, recantation may be effective to show an absence of criminal intent on the part of a witness offering false testimony. . . . It may well be that these two rules tend to coalesce, producing similar results under a similar set of circumstances.
>
> "Some courts have stated or held that if the witness recants within an appropriate time and under satisfactory circumstances, and tells the truth to the tribunal before which he originally appeared, then the offense of perjury and of false swearing has not been committed by him. (Florida, Missouri, New York, Pennsylvania)."

The special safeguards incorporated into the New York and Model Penal Code sections make them overly complex. These safeguards require a showing that (1) the retraction was made before the prior falsification substantially affected the proceeding, and (2) before it became manifest that the falsification was or would be exposed.

In regard to (1) above, logic leads to the conclusion that an effective retraction is most imperative *after* the false testimony has "substantially affected the proceedings." It is at this stage of the proceedings that the rights of the parties have been clearly prejudiced. In regard to (2), substantial problems are raised by requiring a determination that the retraction be made "before it became manifest that the falsification . . . would be exposed."

Section 187 attempts to avoid the potential problems posed by the language in Model Penal Code § 241.1(4). As drafted, retraction as a defense to perjury or false swearing will be valid only under the following conditions:

(1) To qualify for the defense of retraction, subsection (1)(a) requires that the retraction be "complete and voluntary." In determining its voluntariness, it is not sufficient if the actor is frightened into retracting by imminent exposure of his falsehood, or if the retraction is prompted by external compulsion, persuasion or promise of some valuable consideration. The retraction must be complete. The actor cannot rely on retraction where he has corrected only part of a false statement, leaving a remaining portion uncorrected; and

(2) The retraction is made during the course of the same official proceeding in which the false statement was made. Subsection (2) defines "official proceeding" and makes it clear that separate stages of the same trial or administrative hearing are to be considered part of the same "official proceeding"; and

(3) The retraction is made before the subject matter of the proceeding wherein the false statement was made is submitted to the *ultimate* trier of fact. Once the issues framed by the proceedings have been submitted to the ultimate trier of fact, a party

cannot effectively retract, even though there may be subsequent proceedings involving the same subject matter.

Subsection (2) defines "official proceeding" to include proceedings before any judicial, legislative or administrative agency or officer, and extends to authorized persons acting on their behalf. A retraction defense will not be available to prosecutions based upon false sworn statements made in connection with matters not involving official proceedings. The underlying policy decision giving vitality to a retraction defense does not apply to these areas.

Section 188. Perjury and false swearing; corroboration required. In any prosecution for perjury or false swearing, falsity of a statement may not be established solely through contradiction by the testimony of a single witness.

COMMENTARY

A. Summary

In most criminal prosecutions the degree of proof necessary to convict is the traditional "reasonable doubt" standard. An historical exception to this rule is the perjury case. Since the age of Blackstone, perjury has been declared not capable of proof on the uncorroborated testimony of a single witness, "because there is then but one oath against another." *U. S. v. Wood*, 39 US 430 (1840). The "two witness rule" is now a statutory requirement in England. (See Perjury Act of 1911, 1 & 2 Geo 5, c 6, 13).

The leading case on the "two witness rule" is *Weiler v. United States*, 65 S Ct 548, 323 US 606, 89 L Ed 495 (1945), where a unanimous Court reversed a perjury conviction on the ground that failure to charge the "two witness rule" was error. Recent criminal law revision studies have shown a marked ambivalence in regard to the rule.

The Commissioners on Uniform State Laws in their 1952 Model Act on Perjury concluded that the rule had no place in modern practice. Section (4)(1) of the Model Act on Perjury provides that proof of guilt beyond a reasonable doubt is sufficient, ". . . and it shall not be necessary also that proof be by a particular number of witnesses or by documentary or other type of evidence."

The Model Penal Code advisory committee recommended elimination of the corroboration rule. Their position was supported by the Council. The Model Penal Code reporters favored retention of the rule and prevailed. As the reporters pointed out:

> "The reporter continues to favor retention of some special proof safeguards in this area . . . this would apply to a narrow class of cases, which would rarely be prosecuted anyway: namely, where there is *no* other evidence but the testimony of a single contradictory witness . . . the recommended alternative is really a special gloss on 'reasonable doubt'—equivalent to saying that no pure case of oath-against-oath can satisfy the general requirement of proof beyond reasonable doubt in a perjury case." (Tent. Draft No. 6 at 137 (1957)).

New York Revised Penal Law § 210.50 adopted the rule, which represented a codification of a well established rule of law in New York. Michigan Revised Criminal Code § 4920 also adopted the provision. The Commission believes that the rationale behind the corroboration rule is sound and should be retained.

B. Derivation

Michigan Revised Criminal Code § 4920.

C. Relationship to Existing Law

ORS 162.160 is a statutory enunciation of the common law requirement in perjury cases for two corroborating witnesses or one witness and corroborating circumstances. The statute has a long Oregon history (1862). The same basic provision is found in ORS 41.270 relating to usage and ORS 162.040 relating to treason.

State v. Buckley, 18 Or 228 (1889), first considered application of the Oregon statute:

> "Our own statute (Hill's Code, 778) has prescribed the quantum of evidence necessary to a conviction in this class of cases as follows . . . Perjury shall be proved by the testimony of more than one witness. . . . by the testimony of two witnesses, or one witness and corroborating circumstances . . . what is meant by 'corroborating' circumstances is evidence aliunde which tends to prove the prisoner's guilt independent of his declaration."

State v. King, 165 Or 26, 103 P2d 751 (1940), held that the statute requiring that perjury be proved by testimony of two witnesses, or one witness and corroborating circumstances, does not apply to false swearing, and such crime can be established by circumstantial evidence. The court felt that the legislative history of the false swearing statute (ch 180, Laws of Oregon, 1937), as shown by the legislative

journals, plainly indicated the intention of the Legislature to permit false swearing to be established by circumstantial evidence.

The Commission believes that no logical grounds exist for the retention of this distinction. The element of materiality is the factor that distinguishes perjury from false swearing. Materiality goes to the quality of the testimony, while the corroboration rule concerns itself with the quantum of proof required to convict. The arguments in favor of retaining a corroboration rule apply equally to perjury and false swearing.

The adoption of § 188 would overrule *State v. King*, supra, to the extent that it holds that there exists in Oregon law a divergent corroboration requirement for perjury and false swearing.

ARTICLE 23. ESCAPE AND RELATED OFFENSES

Section 189. Escape and related offenses; definitions. As used in sections 189 to 196 of this Act, unless the context requires otherwise:

(1) "Contraband" means any article or thing which a person confined in a correctional facility, juvenile training school or state hospital is prohibited by statute, rule, regulation or order from obtaining or possessing, and whose use would endanger the safety or security of such institution or any person therein.

(2) "Correctional facility" means any place used for the confinement of persons charged with or convicted of a crime or otherwise confined under a court order. "Correctional facility" does not include a juvenile training school, and applies to a state hospital only as to persons detained therein charged with or convicted of a crime, or detained therein after acquittal of a crime by reason of mental disease or defect under sections 36 to 53 of this Act.

(3) "Custody" means the imposition of actual or constructive restraint by a peace officer pursuant to an arrest or court order, but does not include detention in a correctional facility, juvenile training school or a state hospital.

(4) "Escape" means the unlawful departure of a person from custody or a correctional facility.

(5) "Juvenile training school" means the MacLaren School for Boys, Hillcrest School of Oregon and any other school established by law for similar purposes, and includes the other camps and programs maintained under ORS chapter 420.

(6) "State hospital" means the Oregon State Hospital, F. H. Dammasch State Hospital, Columbia Park Hospital and Training Center, Eastern Oregon Hospital and Training Center, Fairview Hospital and Training Center and any other hospital established by law for similar purposes.

(7) "Unauthorized departure" means the unauthorized departure of a person confined by court order in a juvenile training school or a state hospital that, because of the nature of the court order, is not a correctional facility as defined in subsection (2) of this section.

COMMENTARY

A. Summary

Subsection (1) defines "contraband" as any article a person confined in a correctional facility, juvenile training school or state hospital is prohibited by law or administrative regulation from obtaining or possessing and which by its use presents a danger to the safety or security of the institution or persons therein. "Custody," as distinguished from a "correctional facility," is not part of the contraband definition. If contraband is passed to a person in custody and is used as an implement in escape, the actor might be an accomplice. A person in custody, not yet committed to a correctional facility, should not be held responsible for restrictions on contraband since such knowledge is not ordinarily available to him during the initial period of restraint.

No attempt is made to detail the articles constituting contraband. The designation of specific articles as contraband is properly a prerogative of those in charge of correctional institutions, juvenile training schools and state hospitals. Before criminal liability would attach for supplying contraband it must be shown that the article supplied is prohibited *and* that its use would endanger the safety or security of the institution or any persons therein.

Subsection (2) defines "correctional facility" as any place used for the confinement of persons charged with or convicted of a crime, or detained therein under a court order. The definition is intended to reach persons under civil arrest and those detained for purposes of deportation, extradition or as a material witness. Facilities maintained for the rehabilitation of dependent and delinquent children are expressly excluded. ORS chapter 420 provides the procedure for the apprehension of students who depart from juvenile training schools without authority. Section 193, "aiding an unauthorized departure," covers persons who aid or abet in the unauthorized departure of such students. A state hospital is a "correctional facility" for purposes of escape in regard to two classes of persons: (1) those detained therein charged with or convicted of a crime; and (2) those detained therein after acquittal by reason of mental disease or defect. Criminal escape sanctions do not apply to patients committed to a state hospital as a result of noncriminal proceedings.

Subsection (3) defines "custody" as the imposition of actual or constructive restraint by a peace officer pursuant to either (a) an arrest, or (b) a court order. "Peace officer" is defined in § 3. "Custody" is intended to apply to custodial situations other than correctional facility confinement, *i.e.*, while the actor is under actual or constructive restraint but not yet committed to a correctional facility.

"Escape" is defined in subsection (4) as the unlawful departure of a person from custody or a correctional facility. The definition of "custody" refers expressly to both actual and constructive restraint. It is intended that the same rule apply to restraint imposed by a "correctional facility," *i.e.*, an inmate is considered confined within a "correctional facility" from time of original commitment until lawfully discharged, regardless of his actual presence within the institution. It has been argued that since some situations involve no actual restraint, *e.g.*, work release programs, temporary leave, the actor's unauthorized departure from the limits of his liberty did not constitute an escape. This draft rejects that view.

The definitions of "juvenile training school" and "state hospital" are self-explanatory. The language "and any other school/hospital established for similar purposes" is designed to provide coverage for any like institution that may in the future be authorized.

The term "unauthorized departure" is defined for use in § 193 which penalizes aiding a juvenile training school student or state hospital patient in departing from his respective institution without administrative authority.

B. Derivation

The definitions, with substantial alteration, are derived from New York Revised Penal Law § 205.00 and Michigan Revised Criminal Code § 4601. The definition of "escape" is a restatement of its generally accepted legal meaning. The definition of "unlawful departure" is new.

C. Relationship to Existing Law

ORS 29.510-740 is the Oregon civil arrest provision; ORS 420.905-915 provides the procedure for the apprehension of escaped or absent students from juvenile training schools; ORS 420.005 (4) defines "juvenile training schools"; ORS 420.855 (4) defines "youth care center"; ORS 419.472 (4) and 419.602 (2) define "detention facility" as used in connection with the provisions on the detention of dependent and delinquent children. These statutes would not be affected by the proposed draft.

ORS 162.322 defines "escape" and "official detention." ORS 162.340 prohibits aiding an inmate of a state institution to escape, specifying seven state institutions, including MacLaren and Hillcrest. These statutes would be repealed.

Application of the proposed definitions works some change in existing law. Escape from civil arrest and escape from custody based upon a court order will be punishable. A juvenile will not be chargeable for escape from a juvenile training school, although he will be liable for any independent criminal offenses committed thereby. A juvenile in *custody* pursuant to an arrest or court order may be guilty of escape regardless of the means employed.

Section 190. Escape in the third degree. (1) A person commits the crime of escape in the third degree if he escapes from custody.

(2) It is a defense to a prosecution under this section that the person escaping or attempting to escape was in custody pursuant to an illegal arrest.

(3) Escape in the third degree is a Class A misdemeanor.

COMMENTARY

See commentary under § 192 infra.

Section 191. Escape in the second degree. (1) A person commits the crime of escape in the second degree if:

(a) He uses or threatens to use physical force escaping from custody; or

(b) Having been convicted or found guilty of a felony, he escapes from custody imposed as a result thereof; or

(c) He escapes from a correctional facility.

(2) Escape in the second degree is a Class C felony.

COMMENTARY

See commentary under § 192 infra.

Section 192. Escape in the first degree. (1) A person commits the crime of escape in the first degree if:

(a) Aided by another person actually present, he uses or threatens to use physical force in escaping from custody or a correctional facility; or

(b) He uses or threatens to use a dangerous or deadly weapon escaping from custody or a correctional facility.

(2) Escape in the first degree is a Class B felony.

COMMENTARY TO SECTIONS 190 TO 192

A. Summary

Escape in the third degree, § 190, applies to persons in custody on a misdemeanor or felony charge who escape without resort to force or a deadly weapon.

Under § 191 it is escape in the second degree when either (1) the escapee uses physical force, (2) the escapee has been convicted of a felony, or (3) the escape is from a correctional facility.

First degree escape, § 192, applies when: (1) the escapee is aided by one or more persons actually present who use physical force in escaping from custody or a correctional facility, and (2) a dangerous or deadly weapon is used in escaping from custody or a correctional facility.

The proposed grading scheme takes as its basic rationale the *risk to others* created by the escape. The least risk is presented by persons charged with a misdemeanor or felony who escape from custody prior to incarceration and without resort to force or a deadly weapon. Factors that raise the offense to second degree escape represent additional risk-producing elements:

(1) Escape from a correctional facility evidences increased planning and premeditation. Such conduct threatens the security of correctional facilities by increasing the risk of escapes by other inmates.

(2) A person convicted of a felony is more apt to create harmful social consequences by escape. A convicted felon may have more incentive to escape and, therefore, a stronger deterrent is required.

(3) The use of force in escapes obviously increases the hazards imposed on those obligated to resist such conduct.

The language "uses or threatens to use . . . escaping from custody or a correctional facility" in paragraph (a) of subsection (1) of § 191, and paragraphs (a) and (b) of subsection (1) of § 192, is not intended to imply that coverage is provided for acts characteristic of an inchoate crime, *e.g.*, conspiracy and attempt. "Escaping" means that the actor has actually effected an escape. If two or more persons conspire to escape, or if a substantial step is taken to escape, but the attempt is unsuccessful, it would be punishable under the provisions of Article 6.

The language "having been convicted or found guilty of a felony" in paragraph (b) of subsection (1) of § 191 means conviction by judge or jury, or conviction after formal entry of a guilty plea.

The proposed section on resisting arrest (see § 206) denies a person the right to resist by force or violence an arrest he believes to be illegal. In the judgment of the Commission the same rationale does not apply to escape in the third degree. The use of force or violence in effecting an escape will be punishable under first and second degree escape. If an arrest and subsequent custody is illegal, a person should not be deprived of the defense if he merely "runs away" from the detaining officer. Subsection (2) of § 190 therefore gives the escapee a defense if he was in custody pursuant to an illegal arrest. This, of course, applies an objective test. If the person escaping is mistaken in his belief that the arrest is illegal, he will be guilty of escape.

ORS 162.326 provides that it shall not be a defense to a prosecution for escape from official detention that there was an irregularity in commitment or a lack of jurisdiction in the committing or detaining authority. Since the only defense to escape is provided by subsection (2) of § 190, the proposed revision will not change existing law.

B. Derivation

Section 190 is derived from Michigan Revised Criminal Code § 4607; § 191 is from Michigan Revised Criminal Code § 4604; and § 192 is from Michigan Revised Criminal Code § 4605. See also Model Penal Code § 242.6.

C. Relationship to Existing Law

ORS 162.322, 162.324, 162.330, 162.340 would be repealed. ORS 169.340 provides civil liability of a sheriff for escape of a defendant in a civil action. This statute would not be affected. ORS 144.500 (2)(b) provides that unauthorized absence of a person from a work release program assignment constitutes an escape from official detention. This statute would be amended to delete reference to ORS 162.322 to 162.326.

In *Kelley v. Meyers*, 124 Or 322, 263 P 903 (1928), defendant was convicted of first degree murder for the killing of a prison guard during an escape from the Oregon State Penitentiary. Defendant sought a writ of habeas corpus on the ground that the statute under which he was first convicted and imprisoned was unconstitutional. The court sustained a judgment dismissing the writ, holding:

> ". . . Even if the statute under which prisoner was convicted was unconstitutional, such fact did not afford justification to prisoner to make escape prior to judicial determination of unconstitutionality or to assist escape of others legally confined in penitentiary . . . ." At 331. This is the majority rule even though it is later held that the imprisonment was void from the very beginning. See *People v. Jones*, 163 Cal App2d 118, 329, P2d 37 (1958).

The issue of what constitutes "official detention" was raised in *State v. Gilmore*, 236 Or 349, 388 P2d 451 (1964). Affirming a conviction for escape from the Jackson County Farm Home, an adjunct of the Jackson County Jail, the court held:

> "The Jackson County Jail is a 'facility for custody of persons' under charge or conviction of crime within the statute making escape from official detention a crime, even though the county jail might also be used for imprisonment of municipal offenders . . . . An escape from the county farm by prisoner serving county jail sentence constituted escape from county jail. . . ." At 353, 355.

A recent Michigan case discussed irregularity in confinement as a defense to escape from a penal institution: *People v. Mullreed*, 166 NW2d 820 (Mich 1969), held:

> "Under the modern view, a defendant may not successfully contend that an escape from lawful confinement is not a crime because the conviction leading to his imprisonment was allegedly faulty. One does not challenge the law by violating its mandates. . . . An individual is not justified in escaping from prison if he was validly sentenced and confined under color of law."

Section 193. Aiding an unauthorized departure. (1) A person commits the crime of aiding an unauthorized departure if, not being an inmate therein, he aids a person in making or attempting to make an unauthorized departure from a juvenile training school or a state hospital.

(2) Aiding an unauthorized departure is a Class A misdemeanor.

COMMENTARY

A. Summary

"Unauthorized departure" is defined in § 189 to apply to persons detained in juvenile training schools and state hospitals who, because of the nature of their commitment, are not considered to be within a "correctional facility."

Section 193 penalizes giving aid or assistance to a student or patient who departs without authority from a juvenile training school or state hospital. The prohibited aid refers to assistance that contributes to the unauthorized departure; it does not contemplate "after the fact" complicity. The sections on escape do not punish students who leave juvenile training schools without authority, or state hospital patients confined by civil commitment unrelated to criminal proceedings.

It should be noted that since juvenile training school students and certain state hospital patients cannot be charged with escape, they are not chargeable under § 193 for aiding a fellow student or patient to effect an unauthorized departure.

B. Derivation

Section 193 is new.

C. Relationship to Existing Law

ORS 162.330 prohibits aiding imprisoned or committed persons to escape. It is directed at conveying articles useful to an escape into correctional facilities with the intent to effect or facilitate an escape. ORS 162.340 is a similar statute, but is limited to seven specified institutions. Both statutes would be repealed.

The sections on escape, with attendant complicity liability under Article 3 of the proposed Code, and supplying contraband (§ 194) would repeal ORS 162.330. The section on aiding an unauthorized departure would replace ORS 162.340.

Section 194. Supplying contraband. (1) A person commits the crime of supplying contraband if:

(a) He knowingly introduces any contraband into a correctional facility, juvenile training school or state hospital; or

(b) Being confined in a correctional facility, juvenile training school or state hospital he knowingly makes, obtains or possesses any contraband.

(2) Supplying contraband is a Class C felony.

COMMENTARY

A. Summary

Section 194 does not require proof of an intent to aid in an escape. The only requirement is that the actor "knowingly" introduce contraband into one of the specified institutions. The "knowing introduction of contraband" would therefore require proof of knowledge on the part of the actor that the article was, in fact, classified as contraband. This shifts the focus of the inquiry to the issue of whether the actor knew that the inmate, student or patient was prohibited by institutional rule or regulation from receiving the article. The same rationale applies to paragraph (b), which prohibits an inmate, student or patient from knowingly making, obtaining or possessing contraband. The section applies to juvenile training schools and state hospitals. Smuggling contraband into these institutions presents as serious a problem as introducing such articles into a prison.

B. Derivation

The section is derived from New York Revised Penal Law §§ 205.20 and 205.25.

C. Relationship to Existing Law

ORS 475.090 which would be amended prohibits furnishing inmates of penal or correctional institu-

tions, or state, county or city hospitals, alcoholic beverages or drugs. The penalty provision is ORS 475.990, which provides for a maximum punishment of five years imprisonment. Chapters 474 and 475 are amended also by Article 31, infra.

ORS 162.330 penalizes the conveyance into any penitentiary, jail or house of correction a disguise, material, instrument, tool, weapon or other thing adapted to aiding a person detained therein to escape and requires an intent to effect or facilitate the escape of such person. This statute would be repealed.

Section 194 represents new law in two respects: (1) no existing criminal statute applies directly to the control of unlawful contraband; and (2) the proposed law extends coverage beyond penal institutions to cover juvenile schools and state hospitals.

It is recommended that the appropriate regulatory chapters contain a reference to the administrative regulations that determine what articles are classified as "contraband," *e.g.*, ORS chapter 420, Juvenile Training Schools, Youth Care Centers; ORS chapter 421, Penal and Correctional Institutions; ORS chapters 426, 427, 428, 429, 430, Mental Health Institutions. Municipal and county correctional facilities should likewise adopt a procedure for providing notice of prohibited contraband if they are not already doing so.

Section 195. Bail jumping in the second degree. (1) A person commits the crime of bail jumping in the second degree if, having by court order been released from custody or a correctional facility upon bail or his own recognizance upon the condition that he will subsequently appear personally in connection with a charge against him of having committed a misdemeanor or violation, he intentionally fails to appear as required.

(2) Bail jumping in the second degree is a Class A misdemeanor.

COMMENTARY

See commentary under § 196 infra.

Section 196. Bail jumping in the first degree. (1) A person commits the crime of bail jumping in the first degree if, having by court order been released from custody or a correctional facility upon bail or his own recognizance upon the condition that he will subsequently appear personally in connection with a charge against him of having committed a felony, he intentionally fails to appear as required.

(2) Bail jumping in the first degree is a Class C felony.

COMMENTARY TO SECTIONS 195 AND 196

A. Summary

The aim of §§ 195 and 196 is to punish persons who intentionally fail to appear in response to a criminal action lodged against them after having been released on bail or their own recognizance. Requiring an "intentional" failure to appear excludes from criminal liability negligent or excusable nonappearance.

The proposed sections apply equally to those released on bail and those released on their own recognizance. An offender is not afforded a "grace period" after default during which an appearance negatives criminal liability.

B. Derivation

Section 195 is derived from New York Revised Penal Law § 215.56 and Michigan Revised Criminal Code § 4621. Section 196 is derived from New York Revised Penal Law § 215.57 and Michigan Revised Criminal Code § 4620. Both sections were patterned after Model Penal Code § 242.8.

C. Relationship to Existing Law

Sections 195 and 196 restate the existing law in ORS 162.450. ORS chapter 140 governs the admission of defendants to bail or release on recognizance and would not be affected by the draft. ORS 133.045 to 133.080 dealing with citations in lieu of bail would not be affected.

ARTICLE 24. OBSTRUCTING GOVERNMENTAL ADMINISTRATION

Section 197. Obstructing governmental administration; definitions. As used in sections 197 to 213 of this Act, unless the context requires otherwise:

(1) "Fireman" means any fire or forestry department employe, or authorized fire department volunteer, vested with the duty of preventing or combating fire or preventing the loss of life or property by fire.

(2) "Official proceeding" means a proceeding before any judicial, legislative or administrative body or officer, wherein sworn statements are received, and includes any referee, hearing examiner, commissioner, notary or other person taking sworn statements in connection with such proceedings.

(3) "Physical evidence" means any article, object, record, document or other evidence of physical substance.

(4) "Public record" means all official books, documents, records or other written material created by or maintained in any governmental office or agency, affording notice or information to the public, or constituting a memorial of an act or transaction of a public office or public servant.

(5) "Testimony" means oral or written statements that may be offered by a witness in an official proceeding.

COMMENTARY

A. Summary

Subsection (1) includes all persons vested with a duty to extinguish or prevent fires. Coverage extends to regular fire department personnel, rural and volunteer firemen, state and local fire marshals and their deputies, and state forestry employes. "Physical evidence" is defined in subsection (3) to mean anything of physical substance that may be introduced in an official proceeding. "Public record" as defined in subsection (4) means any tangible written record created or maintained by a public agency giving notice to the public, or memorializing an official transaction. "Testimony" includes *written* statements.

B. Derivation

The proposed definitions are derived from the following sources: "Fireman" from ORS 242.702; "Official proceeding" from Michigan Revised Criminal Code § 4901 (5); "Physical evidence" from Michigan Revised Criminal Code § 5045 (2); "Public record" from Michigan Revised Criminal Code § 4555 (2) and *Black's Law Dictionary* 1438 (1957); "Testimony" from Michigan Revised Criminal Code § 5001 (3).

C. Relationship to Existing Law

The definitions are new to Oregon criminal statutes.

Section 198. Obstructing governmental administration. (1) A person commits the crime of obstructing governmental administration if he intentionally obstructs, impairs or hinders the administration of law or other governmental function by means of intimidation, force, physical interference or obstacle.

(2) This section shall not apply to the obstruction of unlawful governmental action or interference with the making of an arrest.

(3) Obstructing governmental administration is a Class A misdemeanor.

COMMENTARY

A. Summary

The word "obstruct" is used in the context of its accepted judicial meaning:

> "Obstruction: A term derived from the Latin verb 'obstruere', and variously defined as meaning a barrier, hindrance, impediment, or obstacle. An obstruction is that which impedes progress, and it has been defined as a blocking up; filling with obstacles or impediments. Obstruction does not necessarily imply prevention." 67 *CJS*, Obstruction 69-70.

Section 198 requires that the prohibited conduct be manifested by threats, violence or physical interference, a limitation that recognizes certain constitutional safeguards, *e.g.*, freedom of speech and assembly. As a general rule, under statutes containing the words "obstructs, resist or oppose," the offense of resisting an officer can be committed without the employment of actual violence or direct force. See 48 *ALR* 749.

Subsection (2) exempts two kinds of interference with governmental action. The first is interference with unlawful action of a public servant. The test of illegality, however, is objective and is not determined by the actor's subjective belief as to the validity of the contested action. The illegality defense is not given equivalent recognition in § 206, infra, prohibiting resisting arrest.

It would be inconsistent to prohibit in this section *all* activities intended to obstruct governmental administration, since broadly generalized prohibitory language might be construed as a restriction upon the lawful exercise of political agitation in opposition to governmental policy. The section is limited, therefore, to obstructive threats or violent or physical interference. The use of intimidation is not specifically proscribed unless it creates an unlawful obstruction of governmental process.

Section 198 imposes a uniform *mens rea* requiremens for all illegal obstruction; that the person's conduct be *intentional* and directed towards the obstruction of governmental administration. (See Art. 2).

B. Derivation

Section 198 is a composite of Michigan Revised Criminal Code § 4505; New York Revised Penal Law § 195.05; and Model Penal Code § 242.1.

C. Relationship to Existing Law

ORS 33.010 lists 12 acts or omissions that constitute contempt of court. ORS 1.020 grants the court the power to punish by contempt proceedings. These statutes are not affected by the draft. Recommendation is made to amend or repeal the following statutes dealing generally with obstructing governmental administration: Repeal ORS 433.645, 476.750, 496.685 and 662.990; amend ORS 476.080 by deletion of subsections (2) and (3); amend 597.280 by deleting subsection (2); amend 616.080 by deleting subsection (2).

Section 199. Refusing to assist a peace officer. (1) A person commits the offense of refusing to assist a peace officer if upon command by a person known by him to be a peace officer he unreasonably refuses or fails to assist in effecting an authorized arrest or preventing another from committing a crime.

(2) Refusing to assist a peace officer is a violation.

COMMENTARY

A. Summary

Section 199 has four elements: (1) An unreasonable refusal or unreasonable failure to assist a peace officer (2) in making an authorized arrest or in preventing the commission of a crime (3) after a recognized command for assistance (4) from a person known by the actor to be a peace officer. The definition of "peace officer" is contained in § 3 of this Code. The section limits the duty to render assistance to emergency situations, *i.e.*, securing an arrest and the prevention of crime.

Criminal liability does not attach if the refusal to assist is "reasonable." All possible grounds for "reasonable" refusal cannot be catalogued, but it is submitted that the language "unreasonably refuses or fails" is preferable to an absolute requirement to render assistance upon command.

B. Derivation

Section 199 is derived from Michigan Revised Criminal Code § 4520.

C. Relationship to Existing Law

The power of peace officers to command assistance from private citizens is reflected by existing Oregon law. See ORS 145.020 (2), 145.030, 162.530, 162.540, 206.050, 133.230, 137.340, 483.048.

Section 199 would repeal ORS 162.530. The other statutes listed above would not be affected by § 199 but are discussed in commentary in other articles, *e.g.*, Art. 4 supra. Persons who refuse to assist in riot situations are covered in Article 26. For further discussions see: 1 Burdick, *Law of Crime* 286 (1946); 67 *CJS*, Obstructing Justice, § 4; 22 *Mich L Rev* 798 (1923); Perkins, *Criminal Law* 511 (2d ed 1969); 14 *DePaul L Rev* 159 (1964).

Section 200. Refusing to assist in firefighting operations. (1) A person commits the offense of refusing to assist in firefighting operations if:

(a) Upon command by a person known by him to be a fireman he unreasonably refuses or fails to assist in extinguishing a fire or protecting property threatened thereby; or

(b) Upon command by a person known by him to be a fireman or peace officer he intentionally and unreasonably disobeys a lawful order relating to his conduct in the vicinity of a fire.

(2) Refusing to assist in firefighting operations is a violation.

COMMENTARY

A. Summary

Paragraph (a) of subsection (1) applies a test of reasonableness to the actor's refusal to assist consistent with the section on refusing to assist a peace officer.

Paragraph (b) of subsection (1) makes it a crime to unreasonably disobey lawful orders issued by firemen and peace officers in the vicinity of a fire. Peace officers are included since they often are responsible for maintaining spectator safety.

B. Derivation

Section 200 is derived from Michigan Revised Criminal Code § 4525.

C. Relationship to Existing Law

ORS 476.750 prohibits obstructing firefighting equipment or personnel. ORS 477.370 prohibits an able-bodied man from refusing to assist a fire warden in firefighting. These two statutes would be repealed by § 200 which is new to the extent that it covers *all* firefighting operations.

Section 201. Bribing a witness. (1) A person commits the crime of bribing a witness if he offers, confers or agrees to confer any pecuniary benefit upon a witness in any official proceeding, or a person he believes may be called as a witness, with the intent that:

(a) His testimony as a witness will thereby be influenced; or

(b) He will avoid legal process summoning him to testify; or

(c) He will absent himself from any official proceeding to which he has been legally summoned.

(2) Bribing a witness is a Class C felony.

COMMENTARY

See commentary under § 202 infra.

Section 202. Bribe receiving by a witness. (1) A witness in any official proceeding, or a person who believes he may be called as a witness, commits the crime of bribe receiving by a witness if he solicits any pecuniary benefit with the intent, or accepts or agrees to accept any pecuniary benefit upon an agreement or understanding, that:

(a) His testimony as a witness will thereby be influenced; or

(b) He will avoid legal process summoning him to testify; or

(c) He will absent himself from any official proceeding to which he has been legally summoned.

(2) Bribe receiving by a witness is a Class C felony.

COMMENTARY TO SECTIONS 201 AND 202

A. Summary

"Pecuniary benefit" is defined in § 178 and "official proceeding" in § 197. Sections 201 and 202 are counterparts to provisions dealing with bribery of public servants. Minor changes have been made to adjust the language to the subject of witness testimony and witness amenability to legally required process. The *mens rea* requirement is an intent to influence improperly the course of official proceedings. The definition of "testimony" in § 197 extends coverage to bribes connected with the production of records as well as to written and oral statements by a witness. The section does not contemplate proscription of special fee arrangements with expert witnesses, the basis of which is presumably not to "influence" such testimony.

B. Derivation

Section 201 is derived from Michigan Revised Criminal Code § 5005 and New York Revised Penal Law § 215.00. Section 202 is derived from Michigan Revised Criminal Code § 5010 and New York Revised Penal Law § 215.05.

C. Relationship to Existing Law

No existing Oregon criminal statute deals directly with bribe taking or bribe receiving by a witness. ORS 162.210 (1) defines "judicial officer" as it is used in the bribery statutes. The definition does not include witnesses. The definition of "public servant" in § 178 also excludes witnesses. ORS 162.110 (2) is the present subornation of perjury statute. ORS 162.130 prescribes the penalty for attempting to procure another to commit perjury. ORS 162.140 (2) is the present subornation of false swearing statute.

Existing statutes relating to *procuring or attempting to procure* another to commit perjury or false swearing will be repealed by the proposed section on criminal solicitation. (See Art. 6 supra).

ORS 33.010 (1) defines conduct giving rise to civil or criminal contempt. ORS 44.010 defines witness as:

> ". . . a person whose declaration is received as evidence for any purpose, whether it is made on oral examination, by deposition or by affidavit."

Two Oregon cases involve interference with witness testimony. The circumstances of each case support a finding that a "pecuniary benefit" motivated the witness to evade judicial process. In *State v. Brownell*, 79 Or 123, 154 P 428 (1916), defendant attorney arranged for the complaining witnesses in a rape case to leave the state to avoid trial testimony, paying them money for current and future living expenses. Defendant was convicted of contempt of court and fined $100, the statutory maximum under what is now ORS 33.010. In *State v. Jones*, 111 Or 295, 226 P 433 (1924), the court held, on facts similar

to the *Brownell* case, that an attorney, who urged a mother to absent her children, who were witnesses, from the jurisdiction, paying as inducement, money on a note he owed her, and transportation for a son to accompany the children, though they returned and testified, was guilty of constructive contempt at common law and as defined by ORS 33.010, and not an attempt only.

ORS 33.020 provides that the maximum penalty a court can impose for contempt is a $300 fine and six months imprisonment. This maximum penalty is restricted to three forms of contempt: (1) to preserve and enforce order in the judge's immediate presence, (2) disorderly, contemptuous or insolent behavior toward the judge while holding court, and (3) a breach of the peace tending to interfere with the due course of a trial. In all other instances of contempt, unless it appears that the right or remedy of a party to an action, suit or proceeding was defeated or prejudiced, the maximum penalty is a $100 fine. The Commission believes that witness bribe giving and bribe receiving should be treated as substantive crimes. However, the proposed section is not meant to restrict the inherent contempt power of the courts.

Section 203. Tampering with a witness. (1) A person commits the crime of tampering with a witness if:

(a) He knowingly induces or attempts to induce a witness or a person he believes may be called as a witness in any official proceeding to offer false testimony or unlawfully withhold any testimony; or

(b) He knowingly induces or attempts to induce a witness to absent himself from any official proceeding to which he has been legally summoned.

(2) Tampering with a witness is a Class A misdemeanor.

COMMENTARY

A. Summary

Section 203 prohibits another form of improper conduct involving witnesses. Sections 201 and 202 are concerned with witness bribery, whereas § 203 covers instances where a witness is induced by other means to testify falsely or to disobey legal process. It is not a violation of the section to persuade a witness to lawfully refuse to testify on grounds of personal privilege or to induce a witness to avoid *process* by leaving the jurisdiction of the court. The latter conduct, if engaged in by an attorney, may raise certain ethical questions, but should not be subject to criminal liability since neither the means used nor the end sought is independently unlawful.

B. Derivation

Section 203 is derived from New York Revised Penal Law § 215.10 and Model Penal Code § 241.6.

C. Relationship to Existing Law

No existing Oregon statute is directly in point. Violations would probably be punished under ORS 33.010 and 33.020, the civil and criminal contempt provisions. (See previous commentary). Support for this type of legislation is found in 11 *Op Atty Gen* 296 (1922-24): "It is too well established to need citation of authorities that a witness before a court or grand jury shall not be intimidated or prevented from testifying to facts within his knowledge, and that any person guilty of acts calculated or intended to intimidate or prevent such witness from testifying is amenable to the law, and merits severe punishment."

Section 204. Tampering with physical evidence. (1) A person commits the crime of tampering with physical evidence if, with intent that it be used, introduced, rejected or unavailable in an official proceeding which is then pending or to the knowledge of such person is about to be instituted, he:

(a) Destroys, mutilates, alters, conceals or removes physical evidence impairing its verity or availability; or

(b) Knowingly makes, produces or offers any false physical evidence; or

(c) Prevents the production of physical evidence by an act of force, intimidation or deception against any person.

(2) Tampering with physical evidence is a Class A misdemeanor.

COMMENTARY

A. Summary

Section 204 complements other sections designed to protect against intentional subversion of "official proceedings." Section 205 prohibits tampering with "public records" and applies to the alteration or destruction of documents created or maintained by a governmental agency. Section 204 covers material intended to be introduced as evidence in an official proceeding. "Physical evidence" is defined to mean anything of physical substance. A uniform *mens rea* requirement applies to all three paragraphs: An intent that physical evidence be used, introduced, rejected or made unavailable. There could conceivably be some close question on a person's right to destroy evidence prior to seizure or subpena. If a legal right to destroy the evidence exists, a person would not be criminally liable unless motivated by a specific intent to suppress the evidence.

Under paragraph (b) of subsection (1), which bars the fabrication of physical evidence, the prosecutor must show both knowledge of its falsity and an intent that it be used, introduced or rejected in a pending or prospective official proceeding. Consistent with the Code's overall rejection of the defense of impossibility, the section does not require that the physical evidence be admissible or material.

B. Derivation

Section 204 is a composite of Michigan Revised Criminal Code § 5045 and New York Revised Penal Law § 215.40.

C. Relationship to Existing Law

The section is new to Oregon law. Ample support for such legislation is found in the common law and current authorities. See 1 Burdick, *Law of Crime* 300 (1946); 14 *UCLA L Rev* 670 (1967); 17 *Baylor L Rev* 400 (1965).

Section 205. Tampering with public records. (1) A person commits the crime of tampering with public records if, without lawful authority, he knowingly destroys, mutilates, conceals, removes, makes a false entry in or falsely alters any public record.

(2) Tampering with public records is a Class A misdemeanor.

COMMENTARY

A. Summary

"Public record" is defined in § 197 to include all official written material created by or maintained in a governmental office. Section 205 applies to all records so defined and requires that the conduct be without lawful authority and done knowingly. The section is designed to maintain the integrity of governmental administration. Its central purpose is not the protection of potential victims of altered records. If an alteration of records is accompanied by an intent to defraud, the provisions of Article 18, supra, would apply which make the false alteration of a public record forgery in the first degree. If the false statement is submitted to a governmental office or agency with the intent to obtain a benefit, Article 22 would apply.

B. Derivation

The section is derived from New York Revised Penal Law § 175.20.

C. Relationship to Existing Law

A number of existing Oregon statutes govern the custody and disposition of public records. ORS 162.620, destruction of public records, and 181.420, removing, destroying or mutilating records of Department of State Police, would be repealed by § 205.

State v. Brantley, 201 Or 637, 271 P2d 668 (1954), gives a judicial definition of "public record":

> "A 'public record', strictly speaking, is one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate

information to the public, or to serve as a memorial of official transactions for public reference." At 646.

MacEwan v. Holm, 226 Or 27, 359 P2d 413 (1961), again discussed the problem of defining "public record":

". . . It has been held that writings are regarded as a 'public writing' only if they fulfill two requirements: (1) they must be 'official documents' and (2) they must be 'the written acts or records of acts' of public officials . . . This narrow construction has been criticized. Pickerell, *Secrecy and The Access to Administrative Records*, 44 Cal Law Rev 305 (1956). We believe that the criticism is justified. The terms 'records and files' and 'public writings' as used in defining the scope of the right of inspection must be given a liberal construction consistent with the greatest public interest." At 47-48.

The purpose of § 205 is to maintain the reliability of governmental records. This objective will best be served by a liberal construction of the definitive scope of "public record" as applied to this section.

Section 206. Resisting arrest. (1) A person commits the crime of resisting arrest if he intentionally resists a person known by him to be a peace officer in making an arrest.

(2) "Resists," as used in this section, means the use or threatened use of violence, physical force or any other means that creates a substantial risk of physical injury to any person.

(3) It is no defense to a prosecution under this section that the peace officer lacked legal authority to make the arrest, provided he was acting under color of his official authority.

(4) Resisting arrest is a Class A misdemeanor.

COMMENTARY

A. Summary

Section 198 deals generally with obstruction of governmental activities. Subsection (2) of that section exempts interference with the making of an arrest, which reflects recognition of the variable elements involved in resisting an arrest, *e.g.*, the degree and kind of resistance and the legality or illegality of the arrest.

Resisting arrest is usually manifested by physical violence directed at the arresting officer. Section 206 is limited therefore to the use, or threatened use, of physical violence or other acts producing a "substantial risk of physical injury." As pointed out by the Michigan revisers: "Neither flight from arrest nor passive resistance should be made crimes in themselves. Ordinarily, the officer's authority to use force to effectuate an arrest provides an adequate remedy without any need for additional sanctions." (Commentary § 365). Actual physical injury inflicted on a peace officer in the course of resisting an arrest would, of course, constitute an assault.

Two culpability elements are found in subsection (1): The actor's conduct must be intentional, and must be accompanied by knowledge that the person resisted is a peace officer.

Subsection (2) defines "resists" in terms of physical force or violence. Resistance is prohibited if it "creates a substantial risk of physical injury to *any person*," *i.e.*, the actor, the peace officer or other persons in the immediate area. Subsection (3) negatives the defense that the arrest resisted was unlawful, provided the peace officer is acting "under color of his official authority." "Color of authority" is intended to mean: "That semblance of presumption of authority sustaining the acts of a public officer which is derived from his apparent title to the office or from a writ or other process in his hands apparently valid and regular." (*Black's Law Dictionary* 331 (4th ed 1951)). Subsection (3) departs from common law and the American majority view governing the right to resist an unlawful arrest. The prevailing rule has generally allowed reasonable resistance to an unlawful arrest on the ground of self-defense.

The Commission rejects self-help as a desirable means of challenging arrests made under color of law. Resistance demands an escalation of force by the peace officer. Civil disorder and disrespect for the law is thereby threatened. Two important, and sometimes conflicting, interests must be balanced; the individual's right to bodily security measured against the threat to society posed by violent street confrontations between private citizens and the police. The Commission favors recourse by the aggrieved citizen to traditional tort remedies, which

today have been greatly liberalized in favor of the individual citizen.

B. Derivation

Section 206 is derived from Michigan Revised Criminal Code § 4625 and New York Revised Penal Law § 205.30.

C. Relationship to Existing Law

The requirements for a lawful arrest are set out in ORS chapter 133, which authorizes a peace officer to arrest a person with or without a warrant (1) for a crime committed or attempted in his presence; (2) when the person has committed a felony, although not in his presence; (3) when a felony has in fact been committed; or (4) when notified by telegraph, telephone or other means of communication by another peace officer that he holds a duly issued warrant for arrest.

ORS 133.280 provides that if after notice of intention to arrest the defendant, he either flees or forcibly resists, the officer may use all necessary and proper means to effect the arrest. ORS 133.270 and 133.330 require that the arresting officer disclose his authority when proceeding under warrant and without a warrant. (See Art. 4 for further comment).

ORS chapter 34 codifies the common law remedy of the writ of habeas corpus, available to persons unlawfully held in custody. See also ORS 164.392, 206.050, 206.060, 206.070, 477.365 (d), 401.150, 483.112 (4), 484.100.

Oregon cases on the subject of resisting an unlawful arrest are *State v. Linville*, 127 Or 565, 273 P 338 (1928); *State v. Meyers*, 57 Or 50, 110 P 407 (1910); *State v. Swanson*, 119 Or 522, 250 P 216 (1929).

In prohibiting by statute the forcible resistance of an arrest made under color of law, Oregon will enter the mainstream of progressive legislation evidenced by other recent criminal code revisions. For further discussions see: Waite, The Law of Arrest, 24 *Tex L Rev* 279 (1946); 3 *Tulsa L J* 40 (1966); Perkins, *Criminal Law* 997 (2d ed 1969).

Section 207. Hindering prosecution. (1) A person commits the crime of hindering prosecution if, with intent to hinder the apprehension, prosecution, conviction or punishment of a person who has committed a crime punishable as a felony, or with the intent to assist a person who has committed a crime punishable as a felony in profiting or benefiting from the commission of the crime, he:

(a) Harbors or conceals such person; or

(b) Warns such person of impending discovery or apprehension; or

(c) Provides or aids in providing such person with money, transportation, weapon, disguise or other means of avoiding discovery or apprehension; or

(d) Prevents or obstructs, by means of force, intimidation or deception, anyone from performing an act which might aid in the discovery or apprehension of such person; or

(e) Suppresses by any act of concealment, alteration or destruction physical evidence which might aid in the discovery or apprehension of such person; or

(f) Aids such person in securing or protecting the proceeds of the crime.

(2) Hindering prosecution is a Class C felony.

COMMENTARY

A. Summary

Section 207 defines acts of rendering criminal assistance that amount to hindering prosecution. The *mens rea* requirement is an intent to hinder apprehension, prosecution, conviction or punishment of a person who has committed a felony. The common law required that an accessory after the fact have guilty knowledge that the person aided committed the crime. This rule has been eliminated in modern legislation concerned specifically with aiding offenders to avoid arrest. The requirement of intent to hinder law enforcement makes unnecessary the

further requirement of knowledge. Knowledge that the person aided has committed a crime is simply evidence of the intent to aid the offender to escape justice.

B. Derivation

The section is derived from New York Revised Penal Law §§ 205.50, 205.55 and 205.60, Michigan Revised Criminal Code § 4635 and Model Penal Code § 242.3.

C. Relationship to Existing Law

ORS 161.230 defines an accessory as follows:

". . . [W]ho, after the commission of a felony, conceal or aid the offender, with knowledge that he has committed a felony, and with intent that he may avoid or escape from arrest, trial, conviction or punishment."

ORS 161.240 provides that an accessory shall be punished by imprisonment in the penitentiary for not more than five years, or by imprisonment in the county jail for not less than three months nor more than one year. ORS 161.250 provides that an accessory is punishable though the principal is not tried; ORS 161.210 states that there are no accessories in misdemeanors. These statutes would be repealed.

Section 208. Compounding. (1) A person commits the crime of compounding if he accepts or agrees to accept any pecuniary benefit as consideration for refraining from reporting to law enforcement authorities the commission or suspected commission of any felony or information relating to a felony.

(2) Compounding is a Class A misdemeanor.

COMMENTARY

A. Summary

Compounding a felony is ". . . committed by a person who, having been directly injured by a felony, agrees with the criminal that he will not prosecute him, on condition of the latter's making reparation, or on receipt of a reward or bribe not to prosecute." *Black's Law Dictionary* 358 (4th ed 1951).

Since the actor, in effect, makes a bargain to thwart prosecution of a crime the offense constitutes an obstruction of justice. A passive failure to act does not constitute compounding unless bound by consideration.

Section 208 is limited to the person who accepts or agrees to accept the consideration. This limitation recognizes the intent of the statute to restrain making improper exactions and not to punish persons paying the benefit. It should be noted that the section is not limited to exactions from the *victim* of the crime compounded; it applies to any person with the requisite knowledge.

B. Derivation

The section is derived from New York Revised Penal Law § 215.45 and Model Penal Code § 242.5.

C. Relationship to Existing Law

The section is basically a reenactment of ORS 162.310. ORS 134.010 to 134.040, dealing with compromise of certain crimes, would not be affected.

Section 209. Hindering prosecution and compounding; no defense. It is no defense to a prosecution for hindering prosecution or compounding that the principal offender is not apprehended, prosecuted, convicted or punished.

COMMENTARY

A. Summary

Section 209 states that criminal liability for hindering prosecution or compounding is not contingent upon the arrest or prosecution of the party whose prosecution is hindered or whose crime is compounded. The rule recognizes that hindering prosecution (accessory after the fact) and compounding are separate and distinct substantive offenses controlled by rules of accessorial liability. However, the state bears the burden of proving the actual commission of a crime *and* the unlawful agreement to hinder its prosecution, or to conceal from

law enforcement authorities information relating to its commission.

B. Derivation

The section restates existing law.

C. Relationship to Existing Law

ORS 161.230 defines an accessory as an accessory *after* the commission of a felony; 161.250 provides that an accessory is punishable though the principal is not tried or indicted; and 162.320 states that a person may be indicted for compounding or concealing a crime though the person guilty of the original crime has not been indicted or tried. These three statutes would be repealed.

Section 210. Simulating legal process. (1) A person commits the crime of simulating legal process if he knowingly issues or delivers to another any document that in form and substance falsely simulates civil or criminal process.

(2) Simulating legal process is a Class B misdemeanor.

COMMENTARY

A. Summary

Simulation of legal process is properly classified as a crime involving interference with judicial process. The false simulation of an official legal document subverts the legitimacy of judicial administration by impairing public confidence in the genuine article.

Section 210 is designed to discourage the use of misleading documents in the debt collection process. The *mens rea* requirement is the "knowing" issuance or delivery of *simulated* legal process. Coverage includes both criminal and civil process and is not limited to legal process issued by a court of this state.

B. Derivation

The section is derived from Michigan Revised Criminal Code § 5055 and Illinois Criminal Code § 32–7.

C. Relationship to Existing Law

ORS 165.265, use of false pretense in collecting debts, would be repealed.

Section 211. Criminal impersonation. (1) A person commits the crime of criminal impersonation if with intent to obtain a benefit or to injure or defraud another he falsely impersonates a public servant and does an act in such assumed character.

(2) Criminal impersonation is a Class A misdemeanor.

COMMENTARY

A. Summary

A few penal codes require only a false pretense of official status. (See NJ Stat Ann 2A:135–10 (1953)). However, a majority of the statutes require an act in furtherance of the impersonation. (See Cal Pen Code Ann 146a (West 1955); NY Rev Pen Law 190.25; Mich Rev Crim Code 4545, 4550).

Section 211 adopts the rationale of the majority by requiring that the impersonator do some act in his assumed character. A minority of states limit their impersonation law to law enforcement officials. The majority, however, provide coverage for all public servants. (La Rev Stat Ann 14:112; Wis Stat 946.69, 946.70 (1955)).

A specific *mens rea* requirement is made part of the offense; the intent to either: (1) obtain a benefit for the actor or a third person; (2) injure another person; or (3) defraud another person.

Section 211 does not explicitly reject the defense of non-existence of the public servant impersonated. There are no Oregon cases on this issue. The rejection of this defense is well-recognized in other jurisdictions. Honest mistake of fact would exempt a person from the statute since impersonation under such circumstances would lack the required *mens rea* for criminal liability. Statutes making false personation a crime are generally construed so that an unlawful, usually a fraudulent, intent is an essential

element of the offense. (See Dickson v. U.S., (CA 10 Colo) 182 F2d 131; Thompson v. State, (Tex Crim) 24 SW 298).

Some statutes require proof of reliance on the false impersonation. The Commission believes that since the wrongful intent of the actor gives impetus to the crime, a reliance requirement is not warranted. The purpose of the section is protection of the reputation of public servants, which suffers from false impersonations. Various other sections of the Code are devised to protect victims of theft and other fraudulent practices arising from such impersonations.

The section does not cover impersonating membership in private organizations. The criminal code has accumulated a number of these special interest statutes over the years, but the Commission recommends their repeal. The Commission takes the position that the public interest does not demand criminal sanctions for false personation of membership in private organizations. If the act is coupled with an intent to commit theft or other fraudulent practices, there exist appropriate statutes to deal with such misconduct.

B. Derivation

Section 211 is derived from New York Revised Penal Law § 190.25 (1), Model Penal Code § 241.9 and Michigan Revised Criminal Code §§ 4055, 4545 and 4550.

C. Relationship to Existing Law

There are statutes making it criminal to wear a badge or other official insignia of a society to which the bearer does not belong. Decisions on the constitutionality of such statutes are conflicting. (See State v. Turner, 183 Kan 496, 328 P2d 733, app dismd 359 US 206, 3 L Ed2d 759, 79 S Ct 739; State v. Holland,, 37 Mont 393, 96 P 719). A substantial body of federal law in this field covers federal officers and employes. (18 USC 912, 913 (1948)).

Many existing statutes applicable to impersonation of public officials and police officers and prohibiting pretense of membership in private organizations would be repealed either by § 211 or by other sections of the proposed Code: 165.215, obtaining money or property by falsely impersonating another, covered by § 128; 165.310, using unauthorized misrepresentation to solicit membership in a society, repealed; 165.315, nonmember of organization obtaining aid by representing membership, covered by § 128; 165.320, mailability of letters containing misrepresentations regarding societies, repealed; 165.325, creation of society having name or purpose similar to that of existing body, repealed; 165.330, organization of corporation to violate ORS 165.310 to 165.325, repealed; 165.335, circulating signs or rituals of fraternal society without authority, repealed; 165.340, pretending to be member or agent of religious or charitable society, repealed; 165.345, misrepresenting present or past membership in the Armed Forces, repealed, misrepresentation of present membership covered under federal law; 165.350, wearing uniform of armed services when not a member, repealed, covered by federal law; 165.352, unlawful wearing of uniform or insignia indicating membership in organized militia, repealed; 165.355, unlawfully wearing discharge emblem, repealed; 162.540, assuming to be magistrate or peace officer and requiring assistance, repealed; 162.550, disguising oneself with intent to obstruct execution of law or hinder officer; 162.570, wearing of stars and badges, repealed; 162.580, sales of badges without permit, repealed; 618.290, impersonation of state sealer or his deputies, repealed.

Section 212. Initiating a false report. (1) A person commits the crime of initiating a false report if he knowingly initiates a false alarm or report which is transmitted to a fire department, law enforcement agency or other organization that deals with emergencies involving danger to life or property.

(2) Initiating a false report is a Class C misdemeanor.

COMMENTARY

A. Summary

Criminal statutes dealing with false fire alarms are found in nearly all American jurisdictions. The rationale supporting criminal liability is based upon the waste of government resources involved and the creation of circumstances where personnel and equipment are made unavailable to deal with legitimate emergencies. Section 212 is intended to reach fire and police departments, and all other organizations, public or private, that respond to emergency

alarms involving danger to life or property. The section applies whether the false alarm was directly or indirectly caused to be transmitted. Criminal liability should not be dependent on whether the person acted himself or caused another to act for him.

B. Derivation

Section 212 is derived from Michigan Revised Criminal Code § 4535.

C. Relationship to Existing Law

The existing statute on false fire alarms, ORS 476.740, would be repealed.

Section 213. Unlawful legislative lobbying. (1) A person commits the crime of unlawful legislative lobbying if, having an interest in the passage or defeat of a measure being considered by either house of the Legislative Assembly of this state, as either an agent or principal, he knowingly attempts to influence a member of the assembly in relation to the measure without first disclosing completely to the member his true interest therein, or that of his principal and his own agency therein.

(2) Unlawful legislative lobbying is a Class B misdemeanor.

COMMENTARY

This section restates ORS 162.520. Minor changes have been made to conform with the style of the revised Code, including addition of the culpability requirement of "knowing" conduct. Section 213 imposes a "full disclosure" duty on persons representing special interests in their relations with state legislators, and covers those with a direct interest in pending legislation, as well as those acting on behalf of an interested principal.

ARTICLE 25. ABUSE OF PUBLIC OFFICE

Section 214. Official misconduct in the second degree. (1) A public servant commits the crime of official misconduct in the second degree if he knowingly violates any statute relating to his office.

(2) Official misconduct in the second degree is a Class C misdemeanor.

COMMENTARY

See commentary under § 215 infra.

Section 215. Official misconduct in the first degree. (1) A public servant commits the crime of official misconduct in the first degree if with intent to obtain a benefit for himself or to harm another:

(a) He knowingly fails to perform a duty imposed upon him by law or one clearly inherent in the nature of his office; or

(b) He knowingly performs an act constituting an unauthorized exercise in his official duties.

(2) Official misconduct in the first degree is a Class A misdemeanor.

COMMENTARY TO SECTIONS 214 AND 215

A. Summary

Section 214 states the basic offense of official misconduct. Section 215 raises the offense to first degree official misconduct if the public servant is motivated by obtaining a benefit for himself or causing injury to another. Second degree official misconduct does not require this specific intent, but does require a knowing violation of a statute relating to the actor's office. The term "benefit" is defined in § 182 supra. "Public servant" is defined in § 178 supra.

B. Derivation

The official misconduct sections are taken from Michigan Revised Criminal Code §§ 4805 and 4806.

C. Relationship to Existing Law

Misconduct in office is defined as "corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office." Perkins, *Criminal Law* 485 (2d ed 1969). The *mens rea* element in §§ 214 and 215 recognizes that inadequate performance of official duties should ordinarily be regulated by civil remedies. Criminal liability is justified only when the public servant acts with either an intent to benefit himself or to harm another, or with knowledge that the act violates an applicable statute. Both sections require a "knowing" violation of duty. Coverage is not intended for ordinary neglect or negligent performance of duty. The negligent performance of an official function does not imply an intent to violate a known duty. This type of misconduct is best regulated by civil service procedures and election alternatives.

Section 215 (1)(a), the "omission to act" offense, refers to a failure to perform an official nondiscretionary duty. It requires knowledge of that nondiscretionary duty, which must be one that is imposed by law, or one that is clearly inherent in the nature of the office. A significant aspect is its specific *mens rea* requirement not presently found in existing Oregon statutes relating to official misconduct. The culpability requirements in those statutes are vague and uncertain in that, for the most part, they are controlled by the nebulous term "wilfully."

A number of existing statutes deal directly or indirectly with misconduct in public office. See ORS 162.240, 162.510, 162.430, 162.440, 162.620, 162.630, 162.640, 162.650, 162.680, 162.690, 165.015, 167.515, 167.555. These statutes would be replaced by §§ 214 and 215 or by other sections of the proposed Code. (Articles 14, 19, 21, 27).

Section 6, Article VII, Oregon Constitution provides: "Public officers shall not be impeached; but incompetency, corruption, malfeasance or delinquency in office may be tried in the same manner as criminal offenses, and judgment may be given of dismissal from office, and such further punishment as may have been prescribed by law."

There are no reported Oregon cases discussing criminal liability for official misconduct; however, a number of cases make it clear that such liability is recognized in this state. See *Svenson v. Brix*, 156 Or 236, 64 P2d 830 (1937); *Fleischner v. Florey*, 111 Or 35, 224 P 831 (1924); *Secretary of State v. Hanover Insurance Co.*, 242 Or 541, 411 P2d 89 (1966).

Section 216. Misuse of confidential information. (1) A public servant commits the crime of misuse of confidential information if in contemplation of official action by himself or by a governmental unit with which he is associated, or in reliance on information to which he has access in his official capacity and which has not been made public, he acquires or aids another in acquiring a pecuniary interest in any property, transaction or enterprise which may be affected by such information or official action.

(2) Misuse of confidential information is a Class B misdemeanor.

COMMENTARY

A. Summary

Section 216 prohibits misconduct manifested by speculation and wagering on official action which a public servant is in a position to influence, or on the basis of confidential information to which he has access for official purposes. The section does not attempt to govern the duty of a public servant with regard to an investment, perhaps antedating his public service, in an enterprise subject to official action by himself or a governmental unit with which he is associated.

alarms involving danger to life or property. The section applies whether the false alarm was directly or indirectly caused to be transmitted. Criminal liability should not be dependent on whether the person acted himself or caused another to act for him.

B. Derivation

Section 212 is derived from Michigan Revised Criminal Code § 4535.

C. Relationship to Existing Law

The existing statute on false fire alarms, ORS 476.740, would be repealed.

Section 213. Unlawful legislative lobbying. (1) A person commits the crime of unlawful legislative lobbying if, having an interest in the passage or defeat of a measure being considered by either house of the Legislative Assembly of this state, as either an agent or principal, he knowingly attempts to influence a member of the assembly in relation to the measure without first disclosing completely to the member his true interest therein, or that of his principal and his own agency therein.

(2) Unlawful legislative lobbying is a Class B misdemeanor.

COMMENTARY

This section restates ORS 162.520. Minor changes have been made to conform with the style of the revised Code, including addition of the culpability requirement of "knowing" conduct. Section 213 imposes a "full disclosure" duty on persons representing special interests in their relations with state legislators, and covers those with a direct interest in pending legislation, as well as those acting on behalf of an interested principal.

ARTICLE 25. ABUSE OF PUBLIC OFFICE

Section 214. Official misconduct in the second degree. (1) A public servant commits the crime of official misconduct in the second degree if he knowingly violates any statute relating to his office.

(2) Official misconduct in the second degree is a Class C misdemeanor.

COMMENTARY

See commentary under § 215 infra.

Section 215. Official misconduct in the first degree. (1) A public servant commits the crime of official misconduct in the first degree if with intent to obtain a benefit for himself or to harm another:

(a) He knowingly fails to perform a duty imposed upon him by law or one clearly inherent in the nature of his office; or

(b) He knowingly performs an act constituting an unauthorized exercise in his official duties.

(2) Official misconduct in the first degree is a Class A misdemeanor.

COMMENTARY TO SECTIONS 214 AND 215

A. Summary

Section 214 states the basic offense of official misconduct. Section 215 raises the offense to first degree official misconduct if the public servant is motivated by obtaining a benefit for himself or causing injury to another. Second degree official misconduct does not require this specific intent, but does require a knowing violation of a statute relating to the actor's office. The term "benefit" is defined in § 182 supra. "Public servant" is defined in § 178 supra.

B. Derivation

The official misconduct sections are taken from Michigan Revised Criminal Code §§ 4805 and 4806.

C. Relationship to Existing Law

Misconduct in office is defined as "corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office." Perkins, *Criminal Law* 485 (2d ed 1969). The *mens rea* element in §§ 214 and 215 recognizes that inadequate performance of official duties should ordinarily be regulated by civil remedies. Criminal liability is justified only when the public servant acts with either an intent to benefit himself or to harm another, or with knowledge that the act violates an applicable statute. Both sections require a "knowing" violation of duty. Coverage is not intended for ordinary neglect or negligent performance of duty. The negligent performance of an official function does not imply an intent to violate a known duty. This type of misconduct is best regulated by civil service procedures and election alternatives.

Section 215 (1)(a), the "omission to act" offense, refers to a failure to perform an official nondiscretionary duty. It requires knowledge of that nondiscretionary duty, which must be one that is imposed by law, or one that is clearly inherent in the nature of the office. A significant aspect is its specific *mens rea* requirement not presently found in existing Oregon statutes relating to official misconduct. The culpability requirements in those statutes are vague and uncertain in that, for the most part, they are controlled by the nebulous term "wilfully."

A number of existing statutes deal directly or indirectly with misconduct in public office. See ORS 162.240, 162.510, 162.430, 162.440, 162.620, 162.630, 162.640, 162.650, 162.680, 162.690, 165.015, 167.515, 167.555. These statutes would be replaced by §§ 214 and 215 or by other sections of the proposed Code. (Articles 14, 19, 21, 27).

Section 6, Article VII, Oregon Constitution provides: "Public officers shall not be impeached; but incompetency, corruption, malfeasance or delinquency in office may be tried in the same manner as criminal offenses, and judgment may be given of dismissal from office, and such further punishment as may have been prescribed by law."

There are no reported Oregon cases discussing criminal liability for official misconduct; however, a number of cases make it clear that such liability is recognized in this state. See *Svenson v. Brix*, 156 Or 236, 64 P2d 830 (1937); *Fleischner v. Florey*, 111 Or 35, 224 P 831 (1924); *Secretary of State v. Hanover Insurance Co.*, 242 Or 541, 411 P2d 89 (1966).

Section 216. Misuse of confidential information. (1) A public servant commits the crime of misuse of confidential information if in contemplation of official action by himself or by a governmental unit with which he is associated, or in reliance on information to which he has access in his official capacity and which has not been made public, he acquires or aids another in acquiring a pecuniary interest in any property, transaction or enterprise which may be affected by such information or official action.

(2) Misuse of confidential information is a Class B misdemeanor.

COMMENTARY

A. Summary

Section 216 prohibits misconduct manifested by speculation and wagering on official action which a public servant is in a position to influence, or on the basis of confidential information to which he has access for official purposes. The section does not attempt to govern the duty of a public servant with regard to an investment, perhaps antedating his public service, in an enterprise subject to official action by himself or a governmental unit with which he is associated.

B. Derivation

Section 216 is taken from Michigan Revised Criminal Code § 4810.

C. Relationship to Existing Law

Existing Oregon law has no specific statute comparable to this section although there are provisions designed to reach the same type of evil. See ORS 198.110-198.990, 279.360, 279.990, 332.275, 462.273, 561.170, 706.285, 731.228, 731.992. Section 216 is not intended to repeal the above statutes, but is meant to cover public servants not now specially provided for.

Two sections dealing with official oppression and concealing a conflict of interest were considered and rejected by the Commission. The draft section on "official oppression" covered the public servant who, knowing that his conduct is illegal, infringes upon a citizen's personal or property right, or denies another in the exercise of any right, privilege, power or immunity. In the judgment of the Commission, most, if not all, of the conduct reached by an official oppression statute is adequately covered by the sections on official misconduct. A considerable amount of time and attention was devoted to the area of conflicts of interest. Various approaches were considered in drafting a conflict of interest statute applicable to all officials. Difficult problems were encountered, both in substance and in form, *e.g.*, when does a conflict exist; how is the prohibited interest to be qualitatively and quantitatively determined; must the conflict be actual or potential and how is this distinguished; what disclosure requirements best resolve the problem? The Commission decided that in the absence of any substantial regulatory guidelines, a conflict of interest statute should not be included in the criminal code. Oregon law is not bereft of penal sanctions directed against public officials influenced by palpable conflicts of interest. ORS 198.120, adopted by the 1969 Legislative Assembly, revised special service district law regarding conflicts of interest, consolidating within its provisions nineteen separate districts. Public servants are subject to other forms of discipline; the elected official is subject to recall, forfeiture of office and defeat at the polls; the appointed civil servant is subject to internal rules and regulations governing his official conduct.

OFFENSES AGAINST PUBLIC ORDER

ARTICLE 26. RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES

Section 217. Treason. (1) A person commits the crime of treason if he levies war against the State of Oregon or adheres to its enemies, giving them aid and comfort.

(2) No person shall be convicted of treason unless upon the testimony of two witnesses to the same overt act or upon confession in open court.

(3) A person convicted of treason shall be punished by imprisonment for life.

COMMENTARY

Oregon Constitution, § 24, Art. I, defines treason against the state:

> "Treason against the State shall consist only in levying war against it, or adhering to its enemies, giving them aid or comfort. —No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or confession in open Court.—"

An assemblage of men for the purpose of executing a treasonable design by force would be covered by § 218, riot. Also, where there is a combination of persons to prevent the execution of some public law by force, § 198, obstructing governmental administration, would encompass the prohibited acts. Although neither of these sections punishes the offenses with the severity prescribed for treason, it might fairly be argued that any "treason" against the state which was not also treason against the United States would be adequately covered. The purpose

of the proposed section is to preserve the statutory crime of treason as defined in the Oregon Constitution. It would seem that the classical definition of treason is broad enough to cover overt acts that might occur, and most of the activities would probably violate other sections of the draft.

Section 218. Riot. (1) A person commits the crime of riot if while participating with five or more other persons he engages in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm.

(2) Riot is a Class C felony.

COMMENTARY

A. Summary

The common law definition of riot states:

> "There are five necessary elements in a riot: (1) there must be at least three persons; (2) they must have a common purpose; (3) there must be execution or inception of the common purpose; (4) there must be an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose; (5) there must be force or violence, not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage." Kenney's Outlines of Criminal Law, § 437 (17th ed 1958).

The proposed section adopts the modern concept of a "riot" by requiring a greater number of rioters and by shifting the emphasis from the commission of some other crime to the "conduct" that creates a risk of causing "public alarm."

It must be shown that the rioters were involved in a common disorder; it is not enough to show that numerous individuals were engaged in similar unrelated activities. Mere presence without taking part by word or deed is not participation.

The term "tumultuous and violent conduct" is intended to represent more than mere loud noise or disturbance. The language is designed to imply terroristic mob behavior involving ominous threats of personal injury and property damage. Persons participating in large urban riots would probably be punished for individual criminal acts rather than for riot.

B. Derivation

Section 218 is derived from New York Revised Penal Law § 240.05. The language "participating with five or more others" is derived from Model Penal Code § 250.1 (1).

C. Relationship to Existing Law

ORS 145.020, dispersal of unlawful or riotous assemblages and 145.990, penalty provision for ORS 145.020 would be amended; 166.040, riot and unlawful assembly; and 166.050, punishment for participating in riot, would be repealed. ORS 166.050 does not include a penalty provision for unlawful assembly as defined in ORS 166.040 (2). This anomaly is discussed in connection with § 219, infra.

The emphasis in existing law is on conduct preparatory to the commission of a separate criminal offense and on individual acts of misconduct committed in group situations. Under the proposed criminal code revision, these offenses will be reached by provisions on inchoate crimes, parties to crime and particularized substantive sections. The thrust of the proposed riot section is directed toward unlawful group action producing or creating a grave risk of public "alarm." A comprehensive analysis of ORS 166.040 is found in *State v. Mizis*, 48 Or 165, 86 P 361 (1906).

There is considerable authority holding that the proscribed conduct creating the "alarm" need not itself be unlawful:

> "[A] group of cases sets forth the rule that tumultuous and violent, though not necessarily unlawful, acts which result in fright to persons may constitute a riot. One case, which has been frequently cited with approval, held that a riot existed when 8 or 10 disguised men paraded up and down the street at night shooting guns and blowing horns for several hours, terrifying a number of persons. *State v. Brazil*, Rice 257 (S.C. 1839) . . . . It is sufficient if the action of the parties implicated is so violent and tumultuous as to be likely to cause fright and individuals are frightened. *Spring Garden Ins. Co. v. Imperial Tobacco Co.*, 132 Ky 7, 116 SW 234 (1909)." 18 *Or L Rev* 254 (1939).

In *Salem Mfg. Co. v. First American Fire Ins. Co. of N. Y.*, 111 F2d 797 (9th Cir 1940), the court stated:

> "To constitute a riot it is not necessary that there should be actual fright to the public generally. It is enough if the action of the parties

implicated be so violent and tumultuous as to be likely to cause fright, and if individuals are frightened."

The court then quoted with approval *International Wire Works v. Hanover Fire Ins. Co.*, 230 Wis 72, 283 NW 293:

"The generally understood meaning of the word 'riot' is an assembly of individuals who commit a lawful or unlawful act in a violent or tumultuous manner, to the terror or disturbance of others . . . ."

Section 218 imposes a single penalty provision for the crime of riot. Aggravating factors enhancing the penalty contained in ORS 166.050 would be reached by the various sections on parties to crime, assault, criminal solicitation, etc.

Section 219. Unlawful assembly. (1) A person commits the crime of unlawful assembly if:

(a) He assembles with five or more other persons with the purpose of engaging in conduct constituting a riot; or

(b) Being present at an assembly that either has or develops the purpose of engaging in conduct constituting a riot, he remains there with the intent to advance that purpose.

(2) Unlawful assembly is a Class A misdemeanor.

COMMENTARY

A. Summary

The purpose of § 219 is stated in the Michigan Revised Criminal Code:

". . . . [It] is intended to reach those who have assembled for the purpose of rioting or who are on their way to the scene of a riot, but who have not yet begun to riot, or who associate with a group of known potential rioters with intent to aid their cause. It thus comprises both unlawful assembly and rout at the common law, and constitutes in effect an expanded concept of attempted riot . . . ." (Commentary, § 5515).

Paragraph (a) prohibits a person from assembling with five or more other persons with the purpose of pursuing a course of conduct that would subject him to prosecution for riot.

Paragraph (b) is directed at a person present at an assembly whose purpose it is to riot, and who remains there with the intent to personally advance that purpose.

The policy behind § 219 is to give law enforcement authorities flexibility in dispersing groups gathered for an unlawful purpose prior to the inception of riotous conduct. It is not intended to infringe upon the right to lawfully assemble and exercise First Amendment prerogatives.

B. Derivation

The section is based on Michigan Revised Criminal Code § 5515.

C. Relationship to Existing Law

ORS 166.040 (2) defines an unlawful assembly. The penalty provision in ORS 166.050 refers only to riot. This statutory flaw was construed in 30 *Op Atty Gen* 419 (1960-62):

". . . . There is no penalty assigned by the statutes to acts described in ORS 166.040 (2). ORS 166.050 assigns penalties for riot as defined by ORS 166.040 (1). And, ORS 145.020 provides certain penalties for failure to assist police officers in dispersal of unlawful assemblies, or for the refusal to disperse upon properly being ordered to do so by enforcement officers. But . . . there is no penalty assigned to acts not amounting to riot but which do become unlawful assembly. It is therefore my view that ORS 166.040 (2) does not in itself describe a crime, either a misdemeanor or a felony." See also 40 *Or L Rev* 60 (1960); *State v. Stephanus*, 53 Or 135, 99 P 428 (1909).

Section 219 would therefore be a new crime inasmuch as existing law defines an "unlawful assembly" without providing a penalty.

Section 220. Disorderly conduct. (1) A person commits the crime of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(a) Engages in fighting or in violent, tumultuous or threatening behavior; or

(b) Makes unreasonable noise; or

(c) Uses abusive or obscene language, or makes an obscene gesture, in a public place; or

(d) Disturbs any lawful assembly of persons without lawful authority; or

(e) Obstructs vehicular or pedestrian traffic on a public way; or

(f) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or

(g) Initiates or circulates a report, knowing it to be false, concerning an alleged or impending fire, explosion, crime, catastrophe or other emergency; or

(h) Creates a hazardous or physically offensive condition by any act which he is not licensed or privileged to do.

(2) Disorderly conduct is a Class B misdemeanor.

COMMENTARY

A. Summary

Section 220 is designed to replace much of the existing law presently classified as "vagrancy" and "disturbing the peace." Some of that coverage is allocated to sections on loitering and harassment. Matters relating to prostitution have been incorporated into Article 28. Vagrancy as a substantive offense has been deleted. Existing provisions that, in effect, create "status" offenses are hopelessly archaic and most likely unconstitutional. This section is directed at conduct causing what the common law termed a breach of the peace. Before specified conduct may be viewed as "disorderly," the actor must intend to cause, or recklessly create a risk of, public inconvenience, annoyance or alarm. A strict liability offense is thereby avoided. The term "public place" is defined in § 3 of the proposed Code.

Paragraph (a) is directed at conduct within the traditional common law concept of breach of the peace. Paragraph (b) prohibits making "unreasonable" noise. The application of this provision depends upon the circumstances under which the challenged activity is performed. Noise eminently reasonable under certain circumstances may be highly unreasonable under other circumstances, *e.g.*, daytime v. nighttime; residential area v. industrial area. Paragraph (c) is directed at the use of abusive or obscene language or gestures in public places. If used with the intent to harass a *particular* person, it would constitute the crime of harassment.

Paragraph (d) prohibits interference with lawful meetings or assemblages. Paragraph (e) covers the intentional obstruction of vehicular or pedestrian traffic. It is not intended to prohibit persons gathering to hear a speech or otherwise communicate. Paragraph (f) proscribes the failure to disperse in response to a lawful order from the police.

The conduct prohibited by paragraph (g) is an aggravated form of disturbing the peace. A common and most aggravated example is the airline bomb scare. Section 212 penalizes false fire and police reports. Section 220 is designed to protect the public against general inconvenience and insecurity, rather than against deliberate interference with governmental administration.

Paragraph (h) is a general provision designed to reach activity that constitutes a public nuisance but that is not specifically proscribed under the other subsections. The provision is necessitated by the impossibility of itemizing every kind of act properly punishable as disorderly conduct. One example found in existing law is the use of stink bombs in public places.

B. Derivation

The section is derived from New York Revised Penal Law § 240.20 and Michigan Revised Criminal Code § 5525. Paragraph (g) is taken from Michigan Revised Criminal Code § 5550.

C. Relationship to Existing Law

ORS 166.060 would be repealed and replaced by § 220 and other sections of the Code that define specific criminal conduct.

There are few reported cases dealing with disorderly conduct. ORS 161.310, commonly referred to as the "Nuisance Act," has a long and varied judicial history. Since *State v. Bergman*, 6 Or 341 (1877), involving a slaughterhouse, this statute has been used to prosecute for acts which grossly disturb the public peace or outrage the public decency and are injurious to public morals. See *State v. Ayers*, 49 Or 61, 88 P 653 (1907), horse gaming pools; *Multnomah County Fair Ass'n v. Langley*, 140 Or 172, 13 P2d 354 (1932), horse racing lottery; *State v. Elliott*, 204 Or 460, 277 P2d 754 (1955), abortion mill; *Wilson v. Parent*, 228 Or 354, 365 P2d 72 (1961), vile and obscene language and gestures; *State v. Dewey*, 206 Or 496, 292 P2d 799 (1956), abortion mill.

The constitutionality of ORS 161.310 was questioned in *State v. Franzone*, 243 Or 597, 415 P2d 16 (1966), wherein the court stated: "We regard the question of the constitutionality of ORS 161.310 as still an open one, particularly in view of recent decisions of the Supreme Court of the United States." At 601. Since the lower court decision was reversed on other grounds, the Supreme Court did not reach the constitutional issue.

Section 221. Public intoxication. (1) A person commits the crime of public intoxication if he appears in any public place under the influence of alcohol, narcotics or dangerous drugs to the degree that he may endanger himself or other persons or property, or annoys persons in his vicinity.

(2) Public intoxication is a Class C misdemeanor.

COMMENTARY

A. Summary

Section 221 does not make public intoxication a strict liability offense. An intoxicated person may be charged only if he appears in public in a condition that endangers himself or other persons or property, or in a manner annoying to those around him. Coverage under the public intoxication section has been broadened to include narcotic drugs and dangerous drugs. The state statute does not, of course, prevent the application of municipal public intoxication ordinances. *Woods v. Prineville*, 19 Or 108 (1890).

B. Derivation

The section is taken from New York Revised Penal Law § 240.40.

C. Relationship to Existing Law

The subject of public intoxication as a criminal offense, particularly as it relates to chronic alcoholism, has been an issue of increasing concern in recent years. A number of legal authorities have attempted to bring into sharp focus the failures and inadequacies of past and present legislation dealing with drunkenness as a crime. See *The Challenge of Crime in a Free Society*, President's Commission on Law Enforcement 235 (1967); Block-Geis, *Man, Crime & Society*, 346 (2d ed 1964); Barnes-Teeters, *New Horizons in Criminology*, 89 (3d ed 1959); 19 *SC L Rev* 316 (1969); 18 *Buffalo L Rev* 337 (1969); *Powell v. Texas*, 392 US 514 (1968).

A chronic alcoholic may not be convicted of public intoxication. *Easter v. District of Columbia*, 361 F2d 50 (DC Cir 1966). *Driver v. Hinnant*, 356 F2d 761 (4th Cir 1966). There are no reported Oregon cases dealing with public intoxication.

A majority of Commission members believes that the problem of public drunkenness should be handled on a professional socio-medical basis rather than by the agency of the criminal law. Civil detoxification centers, medical-psychiatric counseling and sustained rehabilitative measures represent an enlightened response to the chronic alcoholic Unfortunately, facilities to implement a worthwhile socio-medical approach to the problem of public drunkenness are not presently available in Oregon. Until the advent of a state-wide program, the Commission believes that the criminal law remains the only available alternative. Section 221 would repeal ORS 166.160.

Section 222. Loitering. (1) A person commits the crime of loitering if he:

(a) Loiters in or near a school building or grounds, not having any reason or relationship involving custody of or responsibility for

a student, and not having written permission from anyone authorized to grant the same; or

(b) Loiters or prowls in a public place without apparent reason and under circumstances which warrant justifiable alarm for the safety of persons or property in the vicinity, and, upon inquiry by a peace officer, refuses to identify himself and give a reasonably credible account of his presence and purposes.

(2) Loitering is a Class C misdemeanor.

COMMENTARY

A. Summary

The most critical aspect of vagrancy legislation is its effect of creating a "status" of criminality based upon no specific misbehavior. Loitering statutes have traditionally been designed to enable the police to arrest and detain persons suspected of having committed or being about to commit a crime. The Model Penal Code discusses and analyzes alternative responses that may be devised to deal with the "suspicious loiterer":

> "The suspicious situation may be treated as laying the basis for police inquiries to which the actor must respond . . . ."

Difficult problems are noted in connection with this approach:

> "[It does not exclude the possibility that a person may be convicted without proof of antisocial behavior] since failure to identify or to give credible account of one's behavior leads to criminal liability, without necessity on the part of the prosecution to prove any criminal purpose . . . a plausible lie about one's purposes or identity will exclude liability, while an implausible truth does not.
>
> ". . . the police might expect merely to make inquiry of suspicious persons, most of whom would of course answer questions voluntarily. Where the answer does not dissipate suspicion, the officer would make such observations as would facilitate identification of the suspect in case an offense is committed in the neighborhood." (Tent. Draft No. 13 at 64-65 (1961)).

The American Law Institute finds this alternative most consistent with its ideas of the proper role of the police and with general principles of penal law, but recognizes that it would involve a total abandonment of the traditional vagrancy concept, a departure that would encounter serious resistance.

Model Penal Code § 250.6 is designed to provide the least objectionable statute for those jurisdictions not prepared to depart entirely from the vagrancy concept. This approach is reflected in § 222 (1)(b). Paragraph (a) is designed to deter conduct in or near school buildings or grounds that disrupts the orderly process of school administration. It prohibits "loitering" in or near school property in the absence of a relationship involving a student and written permission from a school administrator. Persons visiting a school on legitimate business, or attending an authorized school function, are not "loitering." No attempt has been made to define with precision what constitutes being "near" a school building or grounds; each factual question presented must necessarily turn on whether the act of loitering is in sufficient proximity to the school or school grounds to threaten the proper administration of school activities.

B. Derivation

Paragraph (a) is taken from New York Revised Penal Law § 240.35 (5). Paragraph (b) is derived from Model Penal Code § 250.6 and New York Revised Penal Law § 240.35 (6).

C. Relationship to Existing Law

The Oregon vagrancy statute, ORS 166.060, covers the following:

(a) Every person without visible means of support.
(b) Every beggar who solicits alms.
(c) Every idle or dissolute person who wanders late at night.
(d) Every common prostitute.
(e) Any person who loiters about school buildings.
(f) Any person who conducts himself violently, riotously or disorderly.

Paragraph (f) is incorporated into the disorderly conduct section. Paragraph (d) is covered in Article 28. The Model Penal Code rejects covering (b), begging:

> "Municipalities may properly regulate the use of sidewalks to safeguard against annoying and importunate mendicants and merchants; but such legislation does not belong in the penal code." (Tent. Draft No. 13, at 65, (1961)).

ORS 166.060 (1)(a) and (c), in light of the modern decisions, are probably unconstitutional. This leaves

only subsection (1) (e) to consider in drafting a loitering statute. Paragraph (a) of § 222 continues the coverage provided in subsection (1)(e) of ORS 166.060. Paragraph (b) attempts to incorporate the essential elements of Model Penal Code § 250.6. This is a new and controversial offense.

In *City of Portland v. Goodwin*, 187 Or 409, 210 P2d 577 (1949), the Supreme Court held constitutional the following City of Portland ordinance:

> "Between the hours of 1:00 and 5:00 o'clock A.M., Pacific Standard time, it shall be unlawful for any person to roam or be upon any street, alley or public place without having and disclosing a lawful purpose."

In *City of Portland v. James*, 251 Or 8, 444 P2d 554 (1968), the same ordinance was held to be violative of due process. Speaking for the court, Mr. Justice O'Connell states:

> "It seems apparent to us that the ordinance is a part and parcel of the general scheme underlying the various vagrancy laws, the design of which is to give a police officer the right to arrest persons whose appearance or actions arouse the officer's suspicion that the suspect has been or is likely to be involved in some transgression of law not then specifically identifiable by the officer. In short, the ordinance is designed to permit 'arrests on suspicion'.
>
> "Designed as it is the ordinance is void for vagueness . . . . It purports to make criminal the mere presence of a person on the streets when a police officer has the suspicion that the suspect does not have a lawful purpose in being there . . . This criterion for arrest is too vague to provide a standard adequate for the protection of constitutional rights.
>
> "It is not our intention to say that the police may not stop and question persons who arouse a reasonable suspicion that they are connected with criminal activity. *Nor do we express any opinion as to the validity of an ordinance cast in language similar to that used in the Model Penal Code permitting, under proper safeguards, the arrest of persons who loiter or prowl under circumstances creating a justifiable alarm for the safety of persons or property.*
>
> "The principal evil of such vague legislation is that it invites arbitrary and discriminatory enforcement . . . . An arrest is valid only if it is based upon probable cause. To sustain this ordinance in question would be to allow a crime to be defined so as to render the requirement of probable cause to effect a valid arrest an illusory protection . . . . The interest of freedom of movement on the streets and the attendant interests of privacy and human dignity deserve the most careful constitutional protection . . . ." At 11-13. (Emphasis supplied).

Recent state court decisions involving loitering statutes support the view that if the statute clearly defines the circumstances under which loitering creates "justifiable public danger or alarm," its constitutional validity will be upheld. For cases involving "suspicious loitering" or loitering in or about a school, see, *Anderson v. Shaver*, 290 F Supp 920 (Dist Ct NM 1968); *State v. Wiggins*, 158 SE2d 37 (NC 1967); *In re Huddleson*, 229 CA2d 618, 40 Cal Rptr 581 (1964); *People v. Johnson*, 161 NE 2d 9 (Ct of App NY 1959).

The "reasonably credible account" requirement in paragraph (b) of subsection (1) is discussed in two recent cases: *State v. Zito*, 103 NJ Super 552, 248 A2d 254 (1968); 54 NJ 206, 254 A2d 769 (1969), analyzes the "good account" provisions of the New Jersey disorderly conduct statute:

> "Plainly, the failure to give a satisfactory explanation to a police officer may be a failure to give a good account of oneself, but such a fact alone will not be sufficient to support a conviction.
>
> "As stated in *State v. Salerno*, 27 NJ 289, 142 A2d 636 (1958):
>
> > " 'Usually provisions for a good account are associated with conduct or circumstances in themselves offensive or suggestive of an intent to commit a crime . . . .' 142 A2d at 639.
>
> "We are satisfied that a failure to give a good account may not itself be punished or be made an essential element of a crime . . . . A failure to give a good account may not serve as affirmative proof of presence for an unlawful purpose. The central purpose of our statute being to reach presence at a place for an unlawful purpose rather than to punish silence, we think it fair to say the Legislature intended by the good account provision to assure the suspect a chance to explain away the circumstances which appear inculpatory.
>
> "To summarize, we hold (1) that the statutory offense consists solely of presence at a place for an unlawful purpose, (2) that the failure, refusal, or inability to give the officer a good account is not part of the offense, (3) that the statute requires, as a condition for prosecution, that the officer offer the suspect a chance to explain away circumstances which indicate presence for an unlawful purpose, unless the court finds that the circumstances prevented the officer or made it plainly unnecessary . . . .
>
> "We stress, that an arrest cannot be made because a person refused or failed to give a good account. An arrest can be made only if in the total circumstances there is probable cause to believe that the individual was present at the place for an unlawful purpose, i.e., to commit a crime . . . ." *State v. Salerno*, supra at 774, 775, 776.

In *People v. Schanbarger*, 24 NY2d 288, 300 NYS2d 100, 248 NE2d 16 (1969), defendant was accosted at 3:00 a.m. by a peace officer while walking on a public highway in an area where there had been a number of recent burglaries. He refused to answer the officer's questions and was arrested for loitering under New York Revised Penal Law § 240.35 (6). The New York court reversed the conviction, saying:

> "It is unnecessary to deal with the constitutional argument. Clauses in subsection (6) are conjunctive, rather than disjunctive, and in order to sustain conviction, each of the conjunctive elements must be proved beyond a reasonable doubt. The information in this case nowhere states that the circumstances were such that the trooper was justified in suspecting that the defendant might be engaged or was about to engage in crime. The defendant was convicted for his failure to answer the trooper's questions . . . . His failure to answer cannot constitute a criminal act under subsection (6) of section 240.35." At 17.

In applying the same standards to paragraph (b) of subsection (1) of § 222, the Commission believes that a person cannot be arrested merely because upon inquiry by a peace officer he refused to identify himself and give a reasonably credible account of his presence and purpose. An arrest can be made only if under the total circumstances his conduct warrants justifiable alarm for the safety of persons or property in the vicinity.

Section 223. Harassment. (1) A person commits the crime of harassment if, with intent to harass, annoy or alarm another person, he:

(a) Subjects another to offensive physical contact; or

(b) Publicly insults another by abusive or obscene words or gestures in a manner likely to provoke a violent or disorderly response; or

(c) Communicates with a person, anonymously or otherwise, by telephone, mail or other form of written communication, in a manner likely to cause annoyance or alarm; or

(d) Engages in a course of conduct that alarms or seriously annoys another person and which serves no legitimate purpose.

(2) Harrassment is a Class B misdemeanor.

COMMENTARY

A. Summary

Section 220, supra, is limited to disturbances of general or public impact. Section 223 is intended to reach "disorderly conduct" creating alarm or annoyance for an *individual* rather than the general public.

Paragraph (a) is designed to prohibit conduct presently constituting "simple assault." The assault sections in Article 11 require a physical injury. Petty batteries not producing injury will not constitute criminal assault under Article 11. If petty battery is committed with the intent to "harass, annoy or alarm" it will be subject to prosecution as harassment.

Paragraph (b) is similar to paragraph (c) of the disorderly conduct statute designed to protect the general public from exposure to abusive or obscene language and gestures. Paragraph (b) makes the same type of conduct punishable where directed at a specific individual.

Paragraph (c) subjects the actor to criminal liability if he uses the telephone or a written medium of communication in a manner likely to cause annoyance or alarm to another person, and acts intending to achieve that result.

Paragraph (d) is a dragnet provision comparable to paragraph (h) of the disorderly conduct statute and is intended to reach myriad forms of harassment that cannot be specifically enumerated.

B. Derivation

Paragraph (a) is derived from New York Revised Penal Law § 240.25 (1). Paragraph (b) is a modified version of Model Penal Code § 250.4 (2). Paragraph (c) is derived from New York Revised Penal Law § 240.30 (1). Paragraph (d) is taken from New York Revised Penal Law § 240.25 (5).

C. Relationship to Existing Law

The proposed section on harassment is new to Oregon law. Some of the coverage included in the section is in ORS 166.030, 161.310 and 165.550 all of which would be repealed.

Section 224. Abuse of venerated objects. (1) A person commits the crime of abuse of venerated objects if he intentionally abuses a public monument or structure, a place of worship or burial, or the national or state flag.

(2) As used in sections 224 and 225 of this Act, "abuse" means to deface, damage, defile or otherwise physically mistreat in a manner likely to outrage public sensibilities.

(3) Abuse of venerated objects is a Class C misdemeanor.

COMMENTARY

A. Summary

Article 16, dealing with criminal mischief, penalizes intentional interference with or damage to the property of another. Section 224 recognizes the existence of a special species of public property that may be desecrated without appreciable damage. The usual object and result of such conduct is an affront to public sensibilities. Examples are painting a swastika on a church, overturning cemetery headstones and burning a flag at a public demonstration. The section is designed to discourage that kind of conduct. Its purpose is to protect the public sensibility from conduct that technically may not amount to "criminal mischief."

B. Derivation

The section is taken, with substantial change, from Michigan Revised Criminal Code § 5555. The definition of "abuse" is from Model Penal Code § 250.9.

C. Relationship to Existing Law

Six statutes now deal with damage to or interference with particular types of property: ORS 162.710, 162.720, 162.730, 164.450, 164.580, 164.590. They would be repealed by § 224 or by the sections of the proposed Code covering criminal mischief.

Section 225. Abuse of corpse. (1) A person commits the crime of abuse of corpse if, except as otherwise authorized by law, he intentionally:

(a) Abuses a corpse; or

(b) Disinters, removes or carries away a corpse.

(2) Abuse of corpse is a Class C misdemeanor.

COMMENTARY

A. Summary

Section 225 deals with misconduct with a corpse that shocks the sensibilities of surviving kin and the public at large. The term "defile" in the definition of "abuse" in § 224 (2) would cover sexual misconduct with a corpse (necrophilism). The term "except as otherwise authorized by law" is intended to remove from criminal liability certain lawful activities involving corpses, *e.g.*, scientific research, cremation, autopsies.

B. Derivation

The section is derived from Michigan Revised Criminal Code § 5560, with the exception of paragraph (b), which is a restatement of ORS 164.570.

C. Relationship to Existing Law

ORS 164.570, disinterment or removal of body, would be repealed.

Section 226. Cruelty to animals. (1) A person commits the crime of cruelty to animals if, except as otherwise authorized by law, he intentionally or recklessly:

(a) Subjects any animal under human custody or control to cruel mistreatment; or

(b) Subjects any animal under his custody or control to cruel neglect; or

(c) Kills without legal privilege any animal under the custody or control of another.

(2) Cruelty to animals is a Class B misdemeanor.

COMMENTARY

A. Summary

Section 226 consolidates a proliferation of existing statutes dealing with cruelty to animals. The section states, in effect, that a person cannot:

(1) Cruelly mistreat any animal; or
(2) Cruelly neglect his own animal; or
(3) Kill any animal belonging to another.

The term "custody or control" excludes wild animals in their natural state. The security of these animals is regulated by the state game laws. No attempt has been made to define "animal." The usual application of the term in cruelty to animal legislation includes domestic and pet animals, *e.g.*, horses, cows, dogs, cats, etc.

Bestiality is defined to mean "a sexual connection between a human being and a brute of the opposite sex." (Black's Law Dict (4 ed 1957)). At common law, and under ORS 164.040, bestiality is treated as a form of sodomy. Sodomy, as defined in Article 13, supra, no longer includes sexual activity between a human being and an animal. Section 226 is meant to cover such conduct.

The term "except as otherwise authorized by law" is intended to exempt professionally accepted practices involving the use of animals, experiments by veterinarians or scientific research. It would also exempt the legalized destruction of certain animals by meat packers and humane societies.

B. Derivation

Section 226 is derived from Michigan Revised Criminal Code § 5565.

C. Relationship to Existing Law

A number of existing statutes would be repealed by the proposed section; others deal with specific problems involving animals and should be retained:

ORS 141.070, issuance of search warrant on complaint of cruelty to animals, not affected by § 226; 164.710, killing, wounding or poisoning animals, repealed; 164.720, attempting to poison domestic animals, repealed; 167.740, cruelty to animals, repealed; 167.745, abandonment of domestic animals, repealed; 165.420, abandonment of animals by bailees, repealed.

ORS 164.750 to 164.780, enacted by the 1969 Legislature, prohibits certain acts in relation to "young animals," particularly dyeing or raffling of chicks, ducklings, goslings or rabbits. These statutes have not been specifically retained in the proposed draft, although cruel mistreatment or neglect of these animals would be covered by § 226.

Three reported Oregon cases involve cruelty to animal prosecutions: *State v. Goodall*, 82 Or 329, 160 P 595 (1916), (cow); *State v. Goodall*, 90 Or 485, 175 P 857 (1919), (horse); *State v. Klein*, 98 Or 116, 193 P 208 (1920), (cow).

ARTICLE 27. OFFENSES AGAINST PRIVACY OF COMMUNICATIONS

Section 227. Offenses against privacy of communications; definitions. As used in sections 227 to 248 of this Act, unless the context requires otherwise:

(1) "Conversation" means the transmission between two or more persons of a private oral communication which is not a telephonic, telegraphic, radio or television communication.

(2) "Eavesdropping device" means any instrument, device or equipment designed for, adapted to or used in wiretapping or mechanical overhearing or recording of a conversation.

COMMENTARY

A. Summary

"Conversation" is defined in terms of a private oral communication transmitted without the aid of mechanical or electronic equipment. "Eavesdropping device" includes any type of equipment which may be used in wiretapping or "bugging."

B. Derivation

Subsection (1) restates ORS 165.535 (1). Subsection (2) is derived from New York Revised Penal Law § 250.10.

C. Relationship to Existing Law

ORS 165.535 defines four terms used in ORS 165.540 to state the crime of interception of communications. Only "conversation" has been retained as essential to the revised draft.

Section 228. Eavesdropping. (1) A person commits the crime of eavesdropping if, without legal authority granted under sections 235 to 248 of this Act, he intentionally:

(a) Overhears or records a conversation by means of an eavesdropping device, without the consent of all the persons engaged in the conversation, except that it shall not be unlawful for a peace officer acting in his official capacity, or a person acting under his direct supervision or command, to overhear or record a conversation by means of an eavesdropping device, where such person is a party to the communication or one of the parties to the communication has given prior consent to such eavesdropping; or

(b) Intercepts or records a telephonic or telegraphic communication by means of an eavesdropping device, without the consent of at least one of the persons engaged in the communication; or

(c) Installs an eavesdropping device in a place or premises knowing, or having good reason to know, that it is to be used for criminal eavesdropping.

(2) Eavesdropping is a Class C felony.

COMMENTARY

A. Summary

Section 228 prohibits three forms of activity directed towards the interception of private communications:

(1) "Bugging" conversation by means of a mechanical device, without the consent of all the parties to the conversation.

(2) "Wiretapping" telephonic and telegraphic communications by means of a mechanical device, without the consent of at least one of the parties to the communication.

(3) Installing a wiretapping or "bugging" device with actual or implied knowledge that it is to be used for illegal eavesdropping.

The reference to "legal authority" incorporates the requirements of §§ 235 to 248 which replace ORS 141.720. Persons acting in conformity to those sections are immune from criminal liability for conduct pursuant to a court ordered ex parte eavesdropping warrant. Peace officers engaged in official duties, and persons acting under their command, are exempt from the provisions of paragraph (a) if the "bugged" agent is a party to the communication or if one of the parties has given prior consent to the interception or recordation.

B. Derivation

Paragraph (a) of subsection (1) is taken from New York Revised Penal Law § 250.00 (2). Paragraph (b) is taken from New York Revised Penal Law § 250.00 (1). Paragraph (c) is based generally on Michigan Revised Criminal Code § 5615.

C. Relationship to Existing Law

A long line of U. S. Supreme Court cases, extending from 1914 to 1969, have dealt with interception of private communications as it relates to "unreasonable searches and seizures" under the Fourth

Amendment. See, *e.g.*, *Weeks v. U. S.*, 232 US 383 (1914); *Olmstead v. U. S.*, 277 US 438 (1928); *Nardone v. U. S.*, 302 US 379 (1937), 308 US 338 (1939); *Goldman v. U. S.*, 316 US 129 (1942); *Wolf v. Colorado*, 338 US 25 (1948); *On Lee v. U. S.*, 343 US 747 (1952); *Mapp v. Ohio*, 367 US 643 (1961); *Silverman v. U. S.*, 365 US 505 (1961); *Wong Sun v. U. S.*, 371 US 471 (1963); *Lopez v. U. S.*, 373 US 427 (1963); *Berger v. New York*, 388 US 41 (1967); *Katz v. U. S.*, 389 US 347 (1967); *U. S. v. White*, 405 F2d 838 (7th Cir 1969), *cert granted*, 89 S Ct 1305.

The issue of a defendant's standing to object to the admission of evidence tainted by unlawful electronic surveillance was decided in *Alderman v. U. S.*, 89 S Ct 961 (1969). The Court held that (1) the government may use evidence it obtains by unlawful electronic surveillance against any defendant who does not have "standing" to complain; (2) a defendant has standing to complain only if he was a party to the overheard conversation or if it took place on "his premises"; (3) all illegally obtained surveillance records as to which a defendant has standing must be submitted to the defendant or his counsel.

Wiretapping or "cutting in" without use of a mechanical device was discussed in *DeLore v. Smith*, 67 Or 304, 132 P 521 (1913):

> "Since a time practically concurrent with the use of the telephone as a medium of communication, the courts have held that a conversation had over the telephone was admissible when the witness could testify he recognized the voice of the party speaking. While the practice of eavesdropping or 'cutting in' on a telephone is most despicable, yet we cannot say as a rule of evidentiary law that the practice of this impropriety disqualifies a person who has qualified himself by testifying he recognized the voice of the speaker . . . ." At 308.

In *Elkins v. U. S.*, 364 US 206, 80A S Ct 1437 (1960), defendant was indicted for intercepting and divulging telecommunications in violation of 47 USC 501, 605 and 18 USC 371. He was convicted in the U. S. District Court in Oregon. In two earlier decisions the Oregon state courts had held that the evidence used in the federal prosecution had been illegally obtained and was therefore inadmissible in state court.

The United States Supreme Court held that evidence obtained by state officers during search which, if conducted by federal officers, would have violated defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial.

For further discussion, see: 67 *Mich L Rev* 455 (1968); 23 *Rutgers L Rev* 319 (1969); 14 *Wayne L Rev* 749 (1968); 46 *Or L Rev* 353 (1967); ABA Standards Relating to Electronic Surveillance (Tent. Draft 1968).

ORS 141.720, 141.730, 165.540, 165.545 would be repealed. ORS 41.910 and 141.990 would be amended to delete obsolete references.

Section 229. Possession of an eavesdropping device. (1) A person commits the crime of possession of an eavesdropping device if he possesses an eavesdropping device with the intent that it be unlawfully used by himself or another for eavesdropping.

(2) Possession of an eavesdropping device is a Class A misdemeanor.

COMMENTARY

Section 229 combines: (1) possession of an eavesdropping device with (2) intent that it be used for unlawful eavesdropping. "Unlawful" eavesdropping means electronic surveillance that fails to conform to the warrant requirements of §§ 235 to 248 of this Act. The section is new to Oregon law.

Section 230. Forfeiture of eavesdropping devices. An eavesdropping device installed or used in violation of this Act shall be forfeited to the state, and shall by court order be turned over to the Superintendent of State Police for whatever disposition he may order.

COMMENTARY

Section 230 is designed to increase the deterrent effect of the penal provisions of this article. The court may enter an order of forfeiture upon conviction, with disposition of the eavesdropping device to be made by the State Police.

Section 231. Divulging an eavesdropping warrant. (1) A person commits the crime of divulging an eavesdropping warrant if, having information concerning the existence or content of an eavesdropping warrant issued under sections 235 to 248 of this Act, or concerning any facts or circumstances attending an application for such a warrant, he discloses that information to another person without specific legal authority.

(2) Divulging an eavesdropping warrant is a Class A misdemeanor.

COMMENTARY

Section 231 restates ORS 141.740, which, by virtue of ORS 141.990 (2), is punishable as a felony. The procedure for obtaining court approved eavesdropping warrants is set out in the sections noted. The section is derived from New York Revised Penal Law § 250.20.

Section 232. Divulging illegally obtained information. (1) A person commits the crime of divulging illegally obtained information if he intentionally uses or divulges information he knows to have been initially obtained through a violation of section 228 of this Act.

(2) Divulging illegally obtained information is a Class A misdemeanor.

COMMENTARY

A person who employs an eavesdropper or assists in unlawful eavesdropping is a party to the substantive offense. Section 232 prohibits making use of eavesdropping information illegally obtained by another. Its primary utility will be to discourage the dissemination of such information.

The section is a restatement of ORS 165.540(1)(e) which prohibits the use or divulgence of any illegally intercepted conversation, telecommunication or radio communication.

Section 233. Defenses. It is a defense to a prosecution under sections 228 to 234 of this Act that:

(1) The person charged was a public servant, or a person acting under his direction, performing official duties in compliance with sections 235 to 248 of this Act; or

(2) The person charged was an employe of a communications common carrier who, while acting in the ordinary course of his employment, overheard the communication when transmitted through the facilities of his employer, except that this defense shall

not apply to a prosecution under paragraph (c) of subsection (1) of section 234 of this Act; or

(3) The communication intercepted or recorded consisted of a radio or television broadcast transmitted for the use of the general public, or was an emergency communication made in the normal course of operations by, or to, a federal, state or local public agency dealing in emergency services.

COMMENTARY

Section 233 provides three defenses to criminal prosecution under this article. Subsection (1) exempts a public servant performing official duties under a judicially approved eavesdropping warrant. Subsection (2) exempts monitoring activities of telephone, telegraph and radio company employes. The defense does not apply if the employe is charged under § 234 with divulging such information without the consent of the sender or receiver, unless disclosure is protected by the provisions of subsection (2). Subsection (3) exempts communications transmitted for consumption by the general public and those made in connection with emergency radio calls. The nature of these communications prevent them from being "private."

The defenses restate existing law found in subsections (2) and (4) of ORS 165.540. Subsection (3) of that statute exempts subscribers and members of their family who perform prohibited acts in their homes. This exception has not been retained. Subsection (2) of ORS 165.540 states "nor shall such prohibitions apply to public officials in charge of and at jails, police premises, sheriff's offices, penal or correctional institutions, except as to communications or conversations between an attorney and his client." This provision has not been retained insofar as it permits officials to conduct electronic surveillance in violation of § 228, *e.g.*, without the consent of one of the parties to the communication or, in the absence of such consent, without a judicially approved eavesdropping warrant.

Section 234. Tampering with private communications. (1) A person commits the crime of tampering with private communications if, knowing that he does not have the consent of the sender or receiver, he:

(a) Intentionally opens or reads a sealed private communcation; or

(b) Obtains in any manner from an employe or officer of a telephone or telegraph company information regarding the contents or nature of a telephonic or telegraphic communication; or

(c) While an employe or officer of a telephone or telegraph company, knowingly divulges to another person the contents or nature of a telephonic or telegraphic communication.

(2) It shall not be unlawful under paragraph (c) of subsection (1) for an employe or officer of a telephone or telegraph company, having knowledge that the facilities of a telephone or telegraph corporation are being used to conduct any criminal business, traffic or transaction, to furnish to his immediate superior or to an appropriate law enforcement officer or agency all pertinent information within his possession relating to such matter.

(3) Tampering with private communications is a Class B misdemeanor.

COMMENTARY

A. Summary

Section 234 restates existing Oregon law as represented by a number of interrelated provisions. Paragraph (a) of subsection (1) prohibits the unauthorized opening or reading of sealed private communications. Paragraph (b) of subsection (1) prohibits obtaining information regarding confidential communications from a communications common carrier employe. Paragraph (c) of subsection (1) prohibits an employe from divulging such information.

Subsection (2) allows a communications common carrier officer or employe to furnish his immediate superior or a law enforcement official information obtained during lawful monitoring activities if it clearly relates to a criminal transaction.

B. Derivation

Section 234 is derived from New York Revised Penal Law §§ 250.25 and 250.35.

C. Relationship to Existing Law

ORS 165.505 to 165.520 would be repealed. ORS 758.060 would be amended to delete overlapping provisions. Oregon has four civil liability statutes directed at illegal interception of communications: ORS 30.780 establishes civil liability for damages caused by illegal interception of communications; ORS 758.070, use by (telephone, telegraph and electric) company's agent of information contained in message, person violating section is liable in treble damages; ORS 165.505, which would be repealed, authorizes treble damages for opening or procuring telegraphic messages addressed to another; ORS 165.510, which would be repealed, establishes civil liability for learning contents of telegraphic message sent to another.

The Commission has not included a civil penalty provision in the draft, believing that civil remedies have no place in a criminal code. ORS 30.780 and 758.070 would be amended and retained. 18 USC 2520 provides that any person whose wire or oral communications are intercepted, disclosed or used in violation of federal law shall be entitled to civil damages, both actual and punitive.

The Commission does not intend that a party injured through a violation of this article be deprived of civil redress. Traditional tort remedies will still be available, including the imposition of punitive damages in appropriate cases.

Section 235. Eavesdropping warrants; definitions. As used in sections 235 to 248 of this Act:

(1) "Contents," when used with respect to a communication, includes any information concerning the identity of the parties to the communication, and the existence, substance, purport or meaning of that communication.

(2) "Designated offense" means any of the following crimes:

(a) A conspiracy to commit any crime enumerated in this subsection or an attempt to commit any felony enumerated in this subsection, which attempt would itself constitute a felony;

(b) Any felony and the misdemeanor crimes of promoting gambling in the second degree, possession of gambling records in the second degree, possession of a gambling device, tampering with a witness, tampering with physical evidence and harassment.

(3) "Eavesdropping" means wiretapping or mechanical overhearing or recording of a conversation by means of an eavesdropping device.

(4) "Eavesdropping warrant" means an order of a judge authorizing or approving eavesdropping.

(5) "Exigent circumstances" means conditions requiring the preservation of secrecy, whereby there is a reasonable likelihood that a continuing investigation would be thwarted by alerting any of the persons subject to surveillance to the fact of surveillance.

(6) "Intercepted communication" means:

(a) A telephonic or telegraphic communication which was intentionally overheard or recorded by a person other than the sender or receiver thereof, without the consent of the sender or receiver, by means of an eavesdropping device; or

(b) A conversation which was intentionally overheard or recorded, without the consent of all the persons engaged in the conversation, by means of an eavesdropping device; except that a conversation overheard or recorded by a peace officer acting in his official capacity, or a person acting under his direct supervision or command, by means of an eavesdropping device, where the person so acting is a party to the conversation, or one of the parties to the conversation has given prior consent, is not an "intercepted communication."

(7) "Judge" means a circuit court judge.

(8) "Law enforcement officer" means a public servant empowered by law to conduct an investigation of or to make an arrest for a designated offense, or a lawyer authorized by law to prosecute or participate in the prosecution for a designated offense.

COMMENTARY

A. Summary

The eight terms defined in § 235 are essential elements of the eavesdropping warrant procedure set forth in later sections.

"Contents" as defined includes information concerning the substance and meaning of an intercepted communication as well as the identity of parties involved.

A "designated offense" is one subject to the investigative technique of electronic surveillance. The list includes all felonies and certain misdemeanors considered characteristic of organized crime.

The definition of "exigent circumstances" provides a factual standard for judicial determination whether the notice requirements of § 242 may be postponed for a reasonable period of time.

An "intercepted communication" means a private communication that cannot lawfully be intercepted by electronic surveillance in the absence of a valid eavesdropping warrant.

A "law enforcement" officer is a public servant authorized to make arrests, to investigate and to prosecute for designated offenses.

B. Derivation

The section is derived from New York Code of Criminal Procedure § 814.

C. Relationship to Existing Law

The definitions are new. ORS 141.720, which would be repealed by this article, permits a circuit or district court judge to issue an eavesdropping warrant. The definition of "judge" in subsection (7) limits this authority to a circuit court judge.

Section 236. Eavesdropping warrants; in general. (1) Under circumstances prescribed in this Act, a judge may issue an eavesdropping warrant upon ex parte application of a district attorney authorized by law to prosecute or participate in the prosecution for the particular designated offense which is the subject of the application.

(2) No eavesdropping warrant may authorize the interception of any communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than 30 days.

COMMENTARY

A. Summary

Section 236 is a general statement embodying the nucleus of the system of standards of supervision designed to guarantee that the use by law enforcement officers of electronic surveillance techniques not be a "blanket grant of permission to eavesdrop . . . without adequate judicial supervision." *Berger v. New York*, 388 US 41 (1967). It is designed to involve a judicial and prosecuting officer in the decision to use the techniques by the law enforcement "officers engaged in the often competitive enterprise of ferreting out crime." It is only then that the standards recognize that "the right of privacy must reasonably yield to the right of search . . . ." *Johnson v. U.S.*, 333 US 10, 14 (1948).

It is clear that in determining the "unreasonableness" of a scheme of court order electronic surveillance, "antecedent justification [before a magistrate] . . . is . . . central." *Katz v. U.S.*, 389 US 347, 359 (1967). Participation by the district attorney in the decision to seek an eavesdropping warrant will not only centralize the warrant decision process, but will also personalize the formulation of warrant decision policy and place it in the hands of the chief law enforcement officer of each county.

The standards in § 236 reflect certain policy decision limitations in regard to the issuance of eavesdropping warrants:

(1) The issuing magistrate must be a circuit court judge with general criminal jurisdiction on the state level.

(2) The applicant must be a district attorney authorized to prosecute the designated offense under investigation. The Commission believes that this authority should be nondelegable except in those rare instances of actual absence or disability.

(3) Eavesdropping warrants may be issued only in connection with a named designated offense.

(4) The period authorized for electronic surveillance may be no longer than necessary to obtain the evidence sought, and in no event longer than 30 days.

B. Derivation

The section is derived from New York Code of Criminal Procedure § 815.

C. Relationship to Existing Law

ORS 141.720 contains a general statement of the law similar to that enunciated in subsection (1). The 30 day maximum period provision in § 236 would replace the 60 day grant of authority found in present law.

Section 237. Eavesdropping warrants; when issuable. An eavesdropping warrant may issue only:

(1) Upon an application made in accordance with sections 236 to 239 of this Act; and

(2) Upon probable cause to believe that a particularly described person is committing, has committed or is about to commit a particular designated offense; and

(3) Upon probable cause to believe that particular communications concerning the offense will be obtained through eavesdropping; and

(4) Upon a showing that normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous to employ; and

(5) Upon probable cause to believe that the facilities from which, or the place where, the communications are to be intercepted, are being used, or are about to be used, in connection with the commission of the offense, or are owned by, leased to, listed in the name of, or primarily used by the described person.

COMMENTARY

Section 237 specifies with particularity the allegations necessary to support issuance of an eavesdropping warrant. The term "probable cause" is used as the yardstick in measuring the facts and circumstances sufficient to justify issuance of a warrant by the magistrate. The five requirements are stated conjunctively.

"Probable cause" exists where the facts and cir-

cumstances within a person's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been committed. *State v. Hoover*, 219 Or 288, 298, 347 P2d 69 (1959); *Berger v. New York*, 388 US 41 (1967).

Section 237 is derived from New York Code of Criminal Procedure § 816.

RELATIONSHIP TO FEDERAL LAW:

The Omnibus Crime Control and Safe Streets Act of 1968, Title III, Public Law No. 90–351, 18 USC 2518 (3), authorizes electronic surveillance for 30 days, with the possibility of an unlimited number of 30 day extensions. The federal act defines in detail the circumstances under which eavesdropping may be authorized by the individual states and differs in many respects from existing state law.

Sections 235 to 248 conform state standards for court authorized eavesdropping warrants to the specified federal standards. The purpose of the sections is to promote effective law enforcement within the state by reducing the potential for confusion among law enforcement officials and the likelihood of litigation arising out of unnecessary differences between the state and federal law. At the same time, the article attempts to meet the constitutional requirements established by the U. S. Supreme Court.

Special acknowledgment is made to American Bar Association Standards Relating to Electronic Surveillance (Tent. Draft 1968), on which much of the commentary in the remaining sections of this article is based.

Section 238. Eavesdropping warrants; application. (1) An ex parte application for an eavesdropping warrant shall be made to a judge in writing and shall be subscribed and sworn to by the district attorney. If the district attorney is actually absent or disabled, "district attorney" shall mean that person designated to act for him and perform his official function in and during his actual absence or disability.

(2) The application shall contain:

(a) The identity of the district attorney and a statement of his authority to make the application; and

(b) A full and complete statement of the facts and circumstances relied upon by the district attorney to justify his belief that an eavesdropping warrant should be issued, including a statement of facts establishing probable cause to believe that a particular designated offense has been, is being or is about to be committed, a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, a particular description of the type of the communication sought to be intercepted, and the identity of the person, if known, committing the designated offense and whose communications are to be intercepted; and

(c) A statement that the communications are not otherwise legally privileged; and

(d) A full and complete statement of facts establishing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence sought; and

(e) A statement of the period of time for which the eavesdropping is required to be maintained. If the nature of the investigation is such that the authorization for eavesdropping should not automatically end when the described type of communication has

been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter; and

(f) A full and complete statement of the facts concerning all previous applications, known to the district attorney, for an eavesdropping warrant involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each application.

(3) Allegations of fact in the application may be based either upon the personal knowledge of the district attorney or upon information and belief. If the district attorney personally knows the facts alleged, it must be so stated. If the facts stated in the application are derived in whole or part from the statements of persons other than the district attorney, the sources of the facts must be either disclosed or described, and the application must contain facts establishing the existence and reliability of the informants or the reliability of the information supplied by them. The application must also state, so far as possible, the basis of the informant's knowledge or belief. Affidavits of persons other than the district attorney may be submitted in conjunction with the application if they tend to support any fact or conclusion alleged therein. Accompanying affidavits may be based on either personal knowledge of the affiant, or information and belief with the source thereof and the reason therefor specified.

COMMENTARY

A. Summary

The system of state controlled electronic surveillance demanded by federal law depends in large measure on the "informed and deliberate determination of magistrates . . . ." *Aguilar v. Texas*, 278 US 108, 110 (1964). This means, in short, that the magistrate must be given enough information to "judge for himself the persuasiveness of the facts relied on by the complaining officer . . . ." *Giordenello v. U. S.*, 357 US 480, (1958). Section 238 details the information that must be contained in the warrant applications.

Subsection (1) requires that the application be in writing and subscribed and sworn to by the district attorney. This is a statutory requirement in present federal warrant practice. *Fed R Crim P* 41; cf. *Giordenello v. U. S.*, 381 US 214 (1965). The requirement guarantees that the review of the magistrate's decision on a motion to suppress at trial or on appeal can proceed on the basis of an adequate record.

Subsection (2)(a) requires that the application identify the prosecuting officer who authorized the application. This requirement makes visible the prosecutor's decision and fixes his responsibility. See *King v. U. S.*, 282 F2d 398 (4th Cir 1960).

Subsection (2)(b) requires that the magistrate be given the identity, if known, of the intended subject, a specification of the designated offense under investigation, the type of communication to be intercepted, and the telephone or area involved. The "Fourth Amendment commands that a warrant issue not only upon probable cause supported by oath or affirmation, but also particularly describing the place to be searched and the person or things to be seized." *Berger v. New York*, 388 US 41, 55 (1967), reaffirmed in *Katz v. U. S.*, 389 US 347 (1967).

Subsection (2)(c) reflects the recognition that special efforts must be made in any system of authorized use of electronic surveillance techniques to protect the integrity of privileged communications.

Subsection (2)(d) requires a showing that other investigative procedures, that is, those procedures which are normally conducted with notice, have been tried and failed or appear unlikely to succeed if tried or to be too dangerous.

Subsection (2)(e) is intended to reflect the constitutional principles dealing with time announced in *Berger*, supra, and reaffirmed in *Katz*, supra. Electronic surveillance "must be confined in time precisely as the search for tangibles is confined in space." *Berger*, supra, at 100 (Harlan, J. in dissent). There must be, in short, the most exacting relation-

ship between the "duration" of the surveillance and the "character of the offense." Ibid. No "greater invasion of privacy [must be permitted] than [is] necessary under the circumstances." At 57.

Where the showing of probable cause, for example, indicates that the need is for a limited intrusion to place under surveillance a single meeting, the period of authorization should not be in excess of that necessary to cover the meeting. On the other hand, where the showing of probable cause indicates that the need is for coverage of a course of conduct, which will take place over an extended period of time, the period of authorization may appropriately be longer. The standard, in short, requires that each application and warrant be tailored to the concrete situation within the context of set limits.

Subsection (2)(f) requires the applicant to set out information of which he is aware concerning other applications involving the same individual, telephones, or places, so that the magistrate may consider the application before him in its proper context.

Subsection (3) requires that the source and reliability of facts supporting the application be stated. When allegations are based on information from an informant, it is essential not only that the application corroborate the informant's reliability, but that it also disclose facts to support the informant's allegations that evidence of a designated offense may be revealed by electronic surveillance. See *Ore Crim L Handbook*, § 20.56 (1969).

The Commission does not intend by adoption of subsection (3) to depart from existing case law holding that under carefully prescribed circumstances the identity of confidential informants may be protected. If allegations in the application are based on hearsay the magistrate must be informed of "some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed . . . was 'credible' or his information 'reliable.'" *Aguilar v. Texas*, 378 US 108, 84 S Ct 1509, 12 L Ed2d 729 (1964). See also *State v. Flores*, 251 Or 628, 447 P2d 387 (1968).

B. Derivation

Section 238 is derived from New York Code of Criminal Procedure § 817.

C. Relationship to Existing Law

ORS 141.720 fails to detail with sufficient particularity the information and allegations required to support issuance of an eavesdropping warrant and would be repealed.

Section 239. Eavesdropping warrants; determination of application. (1) For the purpose of determining whether grounds exist for the issuance of the warrant, the judge may require the district attorney to furnish additional testimony or documentary evidence in support of the application.

(2) If the judge determines on the basis of the facts submitted by the district attorney that grounds exist under section 237 of this Act and that the application conforms to section 238 of this Act, he may grant the application and issue an eavesdropping warrant in accordance with section 240.

COMMENTARY

A. Summary

Section 239 permits the judge to supplement the information contained in the application with additional oral interrogation or documentary evidence. The substance of any such examination should be preserved in writing for possible use in a subsequent challenge to the warrant. Additional testimony or documentary evidence cannot, however, be used as a substitute for compliance with the requirements of § 238.

B. Derivation

The section is derived from New York Code of Criminal Procedure § 818.

C. Relationship to Existing Law

ORS 141.720 (5) provides that "the court shall examine upon oath or affirmation the applicant and any witness the applicant desires to produce or the court requires to be produced."

Section 240. Eavesdropping warrants; form and content. An eavesdropping warrant shall contain:

(1) The name of the applicant, date of issuance, and the subscription and title of the issuing judge;

(2) The identity of the person, if known, whose communications are to be intercepted;

(3) The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(4) A particular description of the type of communications sought to be intercepted, and a statement of the particular designated offense to which it relates;

(5) The identity of the law enforcement agency authorized to intercept the communications;

(6) The period of time during which the interception is authorized, including a statement as to whether the interception shall automatically end when the described communication has been first obtained;

(7) A provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in a way that will minimize the interception of communications not otherwise subject to eavesdropping under this Act, and shall terminate upon attainment of the authorized objective, or in any event in 30 days; and

(8) An express authorization to make secret entry to install an eavesdropping device, if entry is necessary to execute the warrant, upon premises where the communication sought to be intercepted is to be made or received, or upon premises owned by, leased to or primarily used by the described person under investigation.

COMMENTARY

A. Summary

Section 240 requires the warrant itself to reflect the same level of specificity required of the application. The magistrate must be informed of sufficient facts to permit him to make his decision. The warrant must be definite enough to permit the executing officer to follow its direction.

A blanket warrant for a lengthy period of time gives an officer a "passkey" to search beyond what is necessary and fails "to minimize the danger of an unlawful search and seizure." *Berger v. New York*, 388 US 41, 57 (1967). Consequently, each warrant should require termination once the sought after conversations are "seized."

Existing search warrant practice requires the prompt execution of warrants. Section 240 mandates that surveillance authorized by the warrant be undertaken as soon as practicable. What is to be "avoided" is a failure to undertake "prompt execution." *Berger*, supra, at 59.

Subsection (8) permits authorization in the warrant for a law enforcement officer to make secret entry upon premises to install an eavesdropping device. Entry must be necessary to execute the warrant, *i.e.*, no other reasonable alternative means to execute the warrant must exist. Secret entry is limited to premises where the communication is to originate or be received, or premises owned by, leased to, listed in the name of, or primarily used by the person under investigation. The term "primarily used" has been employed in preference to the federal code language, "commonly used." The term "commonly used" would permit secret entry for installation of eavesdropping devices into the homes, offices and communication facilities of a suspect's

friends, relatives and business partners. The latitude of this "permissible trespass" seems to ignore *Berger's* implied disapproval of eavesdropping on people "without regard to their connection with the crime under investigation."

B. Derivation

Section 240 is derived from New York Code of Criminal Procedure § 819.

C. Relationship to Existing Law

ORS 141.720 provides:

"(4) The application and any order issued under this section shall identify fully the particular telephone or telegraph line, or other telecommunication or radio communication carrier or channel from which the information is to be obtained and the purpose thereof."

"(6) Orders issued under this section shall not be effective for a period longer than 60 days."

Section 241. Eavesdropping warrants; manner and time of execution. (1) A law enforcement officer who is a member of the law enforcement agency authorized in the warrant to intercept the communications shall execute an eavesdropping warrant according to its terms.

(2) The law enforcement agency intercepting the communications shall cease eavesdropping immediately upon termination of the authorization in the warrant. The agency shall remove or permanently inactivate any installed eavesdropping device as soon as practicable. Entry by the law enforcement agency upon premises authorized by subsection (8) of section 240 for the removal or permanent inactivation of the eavesdropping device is considered to be authorized by the warrant.

(3) The law enforcement agency shall, if possible, record on tape, wire or other comparable device the contents of a communication intercepted by any means authorized by this Act. The recording of the contents of the communication shall be done in a way that will protect the recording from editing or other alteration.

COMMENTARY

A. Summary

Section 241 requires immediate cessation of electronic surveillance upon termination of the authority granted by the warrant, accompanied by removal or permanent inactivation of the eavesdropping device as soon as practicable. Since secret entry upon premises to install the device may be authorized by the warrant, subsequent entry to remove or inactivate the device is also implied.

Subsection (3) is intended to reflect current law on the authenticity of electronically recorded evidence. Almost universally it is now held that, where a proper foundation is laid, sound recordings are admissible. A proper foundation is laid where it is shown that the recording device works, the operator was qualified to work it, and an accurate recording of the voices of identified parties was made, carefully preserved and not altered. *Monroe v. U. S.*, 234 F2d 49 (DC Cir), *cert denied*, 352 US 873 (1956).

B. Derivation

The section is taken from New York Code of Criminal Procedure § 820.

C. Relationship to Existing Law

The provisions contained in § 241 are new.

Section 242. Eavesdropping warrants; progress reports and notice. (1) An eavesdropping warrant may require that intermittent reports be made to the issuing judge, at such intervals as he may order, showing what progress has been made toward achievement

of the authorized objective and the need for continued eavesdropping.

(2) Immediately upon the expiration of the period of an eavesdropping warrant, the recordings made under subsection (3) of section 241 of this Act shall be made available to the issuing judge and sealed under his directions.

(3) Except as otherwise provided in subsection (6) of this section, within a reasonable time, but no later than 90 days after termination of an eavesdropping warrant, written notice shall be personally served upon the person named in the warrant and upon any other party to the intercepted communication that the judge determines should be notified in the interest of justice.

(4) The written notice specified in subsection (3) of this section shall include:

(a) Notice of the fact and date of the issuance of the eavesdropping warrant;

(b) The period of time covered by the authorized eavesdropping; and

(c) Notice of whether communications were or were not intercepted during the authorized period.

(5) The judge, upon the filing of a motion by a person served with notice of authorized eavesdropping, may in his discretion make available to that person or his counsel for inspection portions of the intercepted communications, applications and warrants as the judge determines to be in the interest of justice.

(6) On a showing of exigent circumstances to the issuing judge, the service of notice required by subsection (3) of this section may be postponed by order of the judge for a reasonable period of time. Renewals of an order of postponement may be obtained on a new showing of exigent circumstances.

COMMENTARY

A. Summary

Section 242 reflects the judgment that the inventory procedures now applicable to conventional searches should be adapted to the use of electronic surveillance techniques. The Supreme Court in *Berger v. New York*, 388 US 41, 60 (1967), commented unfavorably on the absence of such a provision in the then existing New York statute.

The standard requires that notice be served upon the person named in the warrant and upon any other party to the intercepted communication believed by the judge to be entitled to notice.

Subsection (5) authorizes a judge to respond to a motion filed by a party served with notice of electronic surveillance by making available to him or his counsel portions of the intercepted communication and copies of the application and warrant. This authority is discretionary, controlled by the judge's impartial determination of what best serves the interests of justice.

Only where a showing of good cause can be made should service of notice be postponed, but then only postponed, not dispensed with. "Exigent circumstances" justifying postponement of notice is defined in subsection (5) of § 235. For example, in the situation of a continuing investigation where surveillance is discontinued at one location, but taken up at another, notice in reference to the first location may reasonably be postponed until the investigation authorized by the warrant is completed. Every subject of electronic surveillance having standing to object will, therefore, have notice and opportunity.

B. Derivation

Section 242 is derived from New York Code of Criminal Procedure § 822.

C. Relationship to Existing Law

Oregon law does not now provide for notice and return of an eavesdropping order.

Section 243. Eavesdropping warrants; custody of warrants, applications and recordings. (1) Applications made and warrants issued under sections 235 to 240 of this Act shall be sealed by the judge. An eavesdropping warrant, together with a copy of papers upon which the application is based, shall be delivered to and retained by the district attorney as authority for the eavesdropping authorized by the warrant. A copy of the eavesdropping warrant, together with all the original papers upon which the application was based, shall be retained by the issuing judge, and, in the event of a denial of an application for an eavesdropping warrant, a copy of the papers upon which the application was based shall be retained by the judge denying the application. Eavesdropping applications and warrants shall be disclosed only upon a showing of good cause before a judge and shall not be destroyed except on order of the issuing or denying judge, or his successor, and in any event shall be kept for 10 years.

(2) Custody of recordings made under subsection (3) of section 241 of this Act shall be wherever the judge orders. They shall not be destroyed except upon an order of the judge who issued the warrant, or his successor, and in any event shall be kept for 10 years. Duplicate recordings may be made for use or disclosure under the provisions of subsections (1) and (2) of section 244 of this Act.

COMMENTARY

A. Summary

Section 243 requires the records of electronic surveillance to be sealed and retained by the court. Sealing by the magistrate is an aid in guaranteeing that no editing or alterations are made in the records. See, *Lopez v. U. S.*, 373 US 427 (1963). The section requires that the records themselves be maintained under judicial supervision for at least 10 years. Subsection (2) permits duplicate recordings for use by law enforcement officers engaged in the performance of official duties. The destruction of applications, warrants and recordings may be done only by order of the judge who authorized the warrant or, in the event of his death or retirement, by his successor to office.

B. Derivation

The section is derived from New York Code of Criminal Procedure § 823.

C. Relationship to Existing Law

ORS 141.740, which would be repealed, provides that an application for an order to intercept communications and any supporting documents and testimony connected therewith shall remain confidential in the custody of the court, and shall not be released or in any manner disclosed except on written order of the court.

Section 244. Eavesdropping warrants; disclosure and use of information; order of amendment. (1) A law enforcement officer who has by any means authorized by this Act obtained knowledge of the contents of an intercepted communication, or evidence derived

therefrom, may disclose such contents to another law enforcement officer to the extent that the disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) A law enforcement officer who has by any means authorized by this Act obtained knowledge of the contents of an intercepted communication, or evidence derived therefrom, may use such information to the extent that its use is appropriate to the proper performance of his official duties.

(3) Any person who has by any means authorized by this Act received information concerning a communication, or evidence derived therefrom, intercepted in accordance with the provisions of this Act, may disclose the contents of that communication or such derivative evidence while giving testimony under oath in any criminal proceeding in any court or in any grand jury proceeding; provided, however, that the presence of the seal provided for by subsection (2) of section 242 of this Act, or a satisfactory explanation of its absence, shall be a prerequisite for the use or disclosure of the contents of any communication or derivative evidence.

(4) When a law enforcement officer, while engaged in intercepting communications in a manner authorized by this Act, intercepts a communication which was not otherwise sought and which constitutes evidence of a designated crime that has been, is being or is about to be committed, the contents of the communication, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Contents of an intercepted communication and any evidence derived therefrom may be used under subsection (3) of this section when a judge amends the eavesdropping warrant to include such contents. The application for an amendment shall be made by the district attorney as soon as practicable. If the judge finds that the contents were otherwise intercepted in accordance with the provisions of this Act, he may grant the application.

COMMENTARY

A. Summary

Subsections (1) and (2) of § 244 reflect the judgment that disclosure or use of intercepted communications or evidence derived therefrom should be restricted to the proper performance of official duties. "Official duties" should include disclosures made in the course of criminal investigations, even though it might be necessary to disclose information to possible witnesses in an attempt to persuade them to cooperate. It would also include information sharing systems between law enforcement agencies. Primarily, however, disclosure or use should be limited to disclosure or use within the agency itself or in connection with a criminal trial. The presence of a judicial seal, or a satisfactory explanation for its absence, is made a prerequisite for admission into evidence of intercepted communications or derivative evidence.

Existing law is ambiguous on the propriety of a law enforcement officer making use of evidence of one crime incidentally uncovered during a search directed towards a different crime. Subsection (4) reflects the judgment that disclosure should be permitted under certain circumstances. The standard applicable to use under subsection (4) requires the prosecuting officer to return to the magistrate to seek an amendment to the warrant including the contents of the communication before evidence of an unrelated offense may be employed. In seeking an amendment, the standard contemplates a showing by the district attorney that the original warrant was lawful, that it was sought in good faith for the desig-

nated offense, and that the evidence was incidentally intercepted during the course of an otherwise lawfully executed eavesdropping warrant, that is, that the scope of the search was, in fact, related to the original objective. Subsection (4) requires further that the order of amendment be sought as soon as practicable.

B. Derivation

The section is derived from New York Code of Criminal Procedure § 825.

C. Relationship to Existing Law

ORS 141.740 provides that no person having custody of any records maintained in connection with an eavesdropping order shall disclose or release any information contained therein except upon written order of the court. *State v. Elk*, 249 Or 614, 623, 439 P2d 1011 (1968), holds that "if the police, in the course of a lawful search on one crime, discover the fruits of another crime, even though such other crime be a more serious one, the newly discovered evidence may be seizable."

Section 245. Eavesdropping evidence; definitions. As used in sections 245 to 248 of this Act:

(1) "Aggrieved defendant" means an aggrieved person who has been named as a defendant in an indictment or information filed in a court having trial jurisdiction of such indictment or information.

(2) "Aggrieved person" means:

(a) A person who was the sender or receiver of a communication described in paragraph (a) of subsection (6) of section 235 of this Act; or

(b) A party to a conversation discussion described in paragraph (b) of subsection (6) of section 235 of this Act; or

(c) A person against whom the overhearing or recording described in subsection (6) of section 235 of this Act was directed.

COMMENTARY

A. Summary

The definitions in § 245 reflect the judgment that the right to suppress evidence should be limited to those whose privacy has been invaded. See generally, 50 ALR2d 577 (1956). The "standing" rule is not intended to be a shield for unlawful law enforcement activity. The definitions reflect the present liberal federal rule. *Jones v. U. S.*, 362 US 257 (1960). Any party whose privacy was invaded or against whom the search itself was directed should have standing to suppress unlawfully seized evidence.

B. Derivation

Section 245 is derived from New York Code of Criminal Procedure § 813-j.

C. Relationship to Existing Law

The section is analogous to ORS 141.150 which provides that "the person from whose possession the property was taken" may controvert the grounds of issuing a search warrant.

Section 246. Eavesdropping evidence; notice before use. (1) The contents of an intercepted communication, or evidence derived therefrom, shall not be received in evidence or otherwise disclosed upon trial of a defendant unless the state, not less than 30 days before commencement of the trial, has furnished the defendant with a copy of the eavesdropping warrant and accompanying application under which the interception was authorized or approved, and a written transcript of the contents of the intercepted communication intended to be used by the state at the trial or from which evidence was derived that is intended to be used at the trial.

(2) The 30 day period may be waived by the trial court if it finds that it was not possible to furnish the defendant with the papers 30 days before trial and that the defendant will not be prejudiced by the delay in receiving the papers and transcript.

COMMENTARY

A. Summary

Section 246 requires that notice be given to the opposing parties 30 days prior to the trial, hearing or proceeding wherein electronically seized evidence or evidence derived therefrom is to be used against them. Copies of the eavesdropping application and warrant, and a written transcript of the intercepted communications must accompany the notice. The aggrieved defendant will then be in a position to request, if he desires, a pretrial hearing on a motion to suppress provided for in §§ 247 and 248. A failure to comply with the notice requirement may result in suppression of the evidence.

B. Derivation

Section 246 is derived from New York Code of Criminal Procedure § 813-k.

C. Relationship to Existing Law

The section is new. ORS 141.140, relating to search warrants, is similar to the proposal.

Section 247. Eavesdropping evidence; suppression motion; in general. (1) An aggrieved defendant may move to suppress the contents of any intercepted communication, or evidence derived therefrom, which the state intends to offer in evidence upon such defendant's trial, on the ground that:

(a) The intercepted communication was unlawfully overheard or recorded; or

(b) The eavesdropping application or warrant under which it was intercepted is insufficient on its face; or

(c) The eavesdropping was not conducted in conformity with the eavesdropping warrant.

(2) The motion to suppress prescribed in subsection (1) of this section shall be made in a court having trial jurisdiction of the indictment or information pending against the aggrieved defendant. The court shall hear evidence upon any issue of fact necessary to a determination of the motion. The court may, in its discretion, make available to the aggrieved defendant or his counsel for inspection portions of the intercepted communication, or evidence derived therefrom, as the court determines to be in the interest of justice.

(3) If no motion is made in accordance with the provisions of this Act, the defendant shall be considered to have waived any objection during trial to the admission of evidence, based upon the ground that the evidence is subject to suppression as prescribed in subsection (1) of this section.

COMMENTARY

A. Summary

Paralleling the pretrial notice requirements in § 246, § 247 requires that the motion to suppress be made prior to the trial, hearing or proceeding. It is intended to achieve the same result. A culpable failure to raise the suppression issue before trial would warrant a refusal to consider the motion on its merits. It is also intended to protect the state's right of appeal.

Subsection (1) of § 248 allows the court to enter-

tain a motion to suppress during trial upon a showing that the defendant lacked the opportunity to make the motion prior to trial or had no knowledge of the grounds upon which the motion could be advanced.

Three grounds may be advanced by an aggrieved defendant in a motion to suppress evidence obtained through electronic surveillance:

(1) The intercepted communication was unlawfully obtained, *e.g.*, in the absence of an eavesdropping warrant; the communication was legally privileged.

(2) The eavesdropping application or warrant is invalid on its face.

(3) The electronic surveillance was not conducted in conformity with the authority granted by the warrant, *e.g.*, it was conducted on premises not authorized by the warrant; the period of surveillance exceeded that authorized by the warrant.

If the motion to suppress is granted, the intercepted communication and all derivative evidence obtained therefrom may not thereafter be used in any proceeding involving the aggrieved defendant. This rule accords with the guidelines laid down in *Alderman v. U. S.*, 89 S Ct 961 (1969), which held "the established principle is that suppression of the product of a 4th Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence."

B. Derivation

Sections 247 and 248 are derived from New York Code of Criminal Procedure §§ 812-l and 813-m.

C. Relationship to Existing Law

In *State v. Hoover*, 219 Or 288, 296, 347 P2d 69 (1959), defendant was convicted for being an ex-convict in possession of a concealable firearm. The firearm was found during a search by the police in an automobile operated by the defendant. By way of dicta, the court commented:

> "The revolver was concealed by the device of having Mrs. Hoover sit on it. Thus, we might easily dispose of the case by ruling that the search, if in fact unlawful, was a search of Mrs. Hoover's person and not of the automobile. Were this the case it would be her rights that were violated and the defendant would have no standing to make a complaint [citing cases]."

This statement by the Oregon court suggests concurrence with the standing rule enunciated by the U. S. Supreme Court in *Alderman*, supra.

Section 248. Eavesdropping evidence; suppression motion; time of making and determination. (1) The suppression motion prescribed in subsection (1) of section 247 of this Act shall be made before commencement of the trial, except that the court may entertain a motion made for the first time during trial upon a showing that the aggrieved defendant did not have an opportunity to make the motion before trial, or that he was not aware of the grounds of the motion.

(2) When the motion is made before trial, the trial shall not be commenced until the motion has been determined. When the motion is made during trial, the court shall, in the absence of the jury, if there be one, hear evidence in the same manner as if the motion had been made before trial, and shall decide all issues of fact and law.

(3) If the motion to suppress is granted, the contents of the intercepted communication, or evidence derived therefrom, shall not be received in evidence in any trial, hearing or proceeding involving the movant.

COMMENTARY

See commentary to § 247 supra.

OFFENSES AGAINST PUBLIC HEALTH AND DECENCY

ARTICLE 28. PROSTITUTION AND RELATED OFFENSES

Section 249. Prostitution and related offenses; definitions. As used in this Act, unless the context requires otherwise:

(1) "Place of prostitution" means any place where prostitution is practiced.

(2) "Prostitute" means a male or female person who engages in sexual conduct for a fee.

(3) "Prostitution enterprise" means an arrangement whereby two or more prostitutes are organized to conduct prostitution activities.

(4) "Sexual conduct" means sexual intercourse or deviate sexual intercourse.

COMMENTARY

A. Summary

Four terms are defined to clarify the sections on prohibited prostitutional activity. While "prostitution" is not separately defined, it clearly means the type of activity engaged in by a "prostitute" defined as "sexual conduct" for a fee.

"Sexual intercourse" and "deviate sexual intercourse," terms used in defining "sexual conduct," are defined in § 104.

B. Derivation

No particular models were relied upon in formulating the definitions in § 249.

C. Relationship to Existing Law

Two significant departures from existing law would be fashioned by the use of the terms "prostitute" and "sexual conduct." The proposed law would encompass both male and female prostitutes, and the sexual activity prohibited will include deviate sexual intercourse.

Section 250. Prostitution. (1) A person commits the crime of prostitution if he engages in or offers or agrees to engage in sexual conduct in return for a fee.

(2) Prostitution is a Class A misdemeanor.

COMMENTARY

A. Summary

Section 250 covers all types of commercial sexual activitity, whether heterosexual or homosexual. Since commercial prostitution makes available varied forms of sexual gratification, it would be unrealistic to confine coverage to "sexual intercourse" alone.

Traditionally, the term "prostitute" included only the female. Changing sexual mores in our society has wrought an alteration in this traditional view. In applying the proposed sections to persons of the same sex, and to the male prostitute, a more realistic appraisal of the problem is achieved.

The commercial character of the conduct prohibited is expressed in the term "for a fee." The Model Penal Code speaks in terms of sexual activity "as a business." The California and Illinois codes use the term "for money." The Michigan and New York codes use the term "for a fee." It was felt that "as a business" lacked clarity when applied to an isolated act of prostitution. The term "for money" may be unduly restrictive in view of other forms of valuable consideration that may bind the transaction.

B. Derivation

The section is derived from New York Revised Penal Law § 230.00 and Michigan Revised Criminal Code § 6201.

C. Relationship to Existing Law

"Every common prostitute" is guilty of vagrancy under ORS 166.060. This statute would be repealed. In *State v. Gustin*, 244 Or 531, 419 P2d 429 (1966), defendant was convicted of vagrancy by prostitution and appealed. The issue raised was whether a single act of solicitation establishes the fact that a person is a common prostitute. Citing with approval *Davis v. Sladden*, 17 Or 259, 21 P 140 (1889), approved in *Barnett v. Phelps*, 97 Or 242, 191 P 502, 11 *ALR* 663 (1920), the court held that since the stipulation disclosed but a single offer of illicit intercourse, the evidence had failed to sustain the charge. The court construed the word "common," used to describe the word "prostitute" in the statute, as emphasizing the fact that the statute was directed against women who are given to the practice of offering themselves for promiscuous intercourse with men.

In *State v. Perry*, 249 Or 76, 436 P2d 252 (1968), defendant appealed a conviction of being a common prostitute. Defendant contended that ORS 166.060 (1)(d) was unconstitutionally vague, providing no standard by which the status of a "common prostitute" may be determined.

The court pointed out that the statute does not proscribe and make punishable a specific act of prostitution; it defines the crime in terms of the defendant's status or condition. The court held that vagrancy may be established by proof of a single act. To the extent language in *State v. Gustin* could be interpreted to mean that evidence showing more than one act is necessary to establish a crime under ORS 166.060 (1)(d), it was rejected. The court closed its decision with a critical analysis of the statute as applied to the crime of prostitution:

"The complexities created by the enactment of ORS 166.060 (1)(d) as a crime of personal condition as distinguished from a crime of action present serious questions of their constitutionality as well as difficult problems of procedure and evidence and should prompt the legislature to heed the advice of Professor Sherry in *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 Calif L Rev 537, 567 (1960):

> " 'In these circumstances the time is surely at hand to modernize the vagrancy concept or, better yet, to abandon it altogether for statutes which will harmonize with notions of a decent, fair and just administration of criminal justice and which will at the same time make it possible for police departments to discharge their responsibilities in a straightforward manner without the evasions and hypocrisies which so many of our procedural rules force upon them. This may be done by drafting legislation having to do with conduct rather than status, legislation which will describe the acts to be proscribed with precision and which will be free of the hazy penumbra of medieval ideas of social control characteristic of existing law.' " At 83.

The Commission is not convinced that the advocates of tolerated prostitution have formulated socially acceptable alternatives to prohibitory legislation. The proposed draft, therefore, is designed to maintain the existing pattern of the law in the United States. For further discussion see Barnes & Teeters, *New Horizons in Criminology* 92-96 (3d ed 1959); Block, *Crime in America* 273 (1961); 25 *Law and Contemporary Problems* 223 (1960); Watson, *Psychology for Lawyers* 155 (1960).

Section 251. Promoting prostitution. (1) A person commits the crime of promoting prostitution if, with intent to promote prostitution, he knowingly:

(a) Owns, controls, manages, supervises or otherwise maintains a place of prostitution or a prostitution enterprise; or

(b) Induces or causes a person to engage in prostitution or to remain in a place of prostitution; or

(c) Receives or agrees to receive money or other property, other than as a prostitute being compensated for personally rendered prostitution services, pursuant to an agreement or understanding that the money or other property is derived from a prostitution activity; or

(d) Engages in any conduct that institutes, aids or facilitates an act or enterprise of prostitution.

(2) Promoting prostitution is a Class C felony.

COMMENTARY

A. Summary

Section 251 creates a single comprehensive offense covering conduct characteristic of prostitution carried on as a commercial enterprise. It is designed to reach the typical "panderer," "pimp" and "madam." The *mens rea* requirement applicable to the section is an "intent to promote prostitution."

Paragraph (a) covers both the fixed situs and "call girl" type of prostitution activity. It extends to anyone actively participating in such an operation. Paragraph (b) is aimed at the "panderer." Paragraph (c) is directed at the person who knowingly derives a profit from prostitutional activity. It is more restricted in scope than the usual "living off the earnings of a prostitute" statute.

Traditional "pimping" statutes penalize "living or deriving support or maintenance in whole or in part from the earnings or proceeds of [a female person's prostitution]." This type of legislation is criticized by the Model Penal Code:

> "It is obvious that such laws were evolved to help prosecutors convict men believed to be engaged in promoting prostitution, often of their wives, if there were sufficient evidence the man might be convicted of soliciting for the woman. But where evidence of soliciting or other actual complicity in prostitution is lacking, conviction can be had on proof merely that she supports him 'in whole or in part.'
>
> "Such legislation is insupportable in principle and goes well beyond any pragmatic justification which might be urged for it. In no other instance is criminal liability based on the bare fact that one is supported by another person who gains his livelihood illegally" (Tent. Draft No. 9, 180 (1959)).

Paragraph (c) therefore requires a knowing receipt of money or other property upon an agreement or understanding that such benefit is derived from prostitution, *and* an intent to promote prostitution.

Paragraph (d) is designed to reach conduct that, in effect, aids and abets an act or enterprise of prostitution. This includes procuring prostitutes for patrons and procuring patrons for prostitutes. It would also reach transportation of persons for purposes of prostitution.

The Mann Act (18 USC 2421, 2422, 2423 (1951)) provides a felony penalty for anyone who transports a female across state lines for "prostitution, or debauchery or for any other immoral purpose." There is also substantial state legislation punishing the transportation of females into the state for purposes of prostitution. (See Md Ann Code Gen Laws 528 (1952), "through or across" the state).

A different issue is presented by intrastate or local transportation, where the transporter knows or suspects that the purpose of the trip involves prostitution, *e.g.*, a cab driver delivering a fare to a house of prostitution. A relatively disinterested person should not have to curtail normal business practices on the basis of knowledge of another person's illicit pursuits. An exemption from criminal liability should apply where the transporter does not directly or indirectly promote or directly profit from prostitution activity. Paragraph (d) therefore requires an intent to promote prostitution, excluding from coverage legitimate activity incidental or collateral to acts of prostitution.

Section 251 is *not* intended, particularly in regard to paragraphs (b) and (d), to reach the patron of a prostitute who, in paying a fee and engaging in sexual conduct, may "cause a person to engage in prostitution," or "engages in . . . conduct that institutes, aids or facilitates an act . . . of prostitution." However, *soliciting* a person to commit prostitution would be a Class B misdemeanor. (See § 57 supra).

B. Derivation

The section is taken from Model Penal Code § 251.2.

C. Relationship to Existing Law

Ten statutes in ORS ch 167 deal with prostitution: 167.105, keeping a bawdyhouse (one year, $500 fine); 167.110, common fame as evidence of bawdyhouse, rights of lessor; 167.115, placing wife in house of prostitution (10 years); 167.120, living with, receiving earnings of, or soliciting for a prostitute (15 years); 167.125, procuring female to engage in prostitution (five years, $5,000 fine); 167.130, transporting female for prostitution purposes (five years, $10,000 fine); 167.135, procuring or transporting female under 18 for prostitution purposes (10 years, $10,000 fine); 167.140, sufficiency of female's testimony in prosecution for encouraging prostitution; 167.225, taking away female under 16 years of age without consent of parents for purpose of marriage, concubinage or prostitution (two years, $500 fine); 167.240 prohibits inducing a minor to visit a house of prostitution (one year, $250 fine).

The disparity in penalty provisions is not supported by any persuasive rationale. The 15 year penalty for living with or soliciting for a prostitute seems unusually severe when measured against the other prohibited conduct carrying lesser penalties.

ORS 465.110 through 465.990 provide for the abatement of houses of prostitution as a nuisance. Violation of an injunction is punishable as contempt.

ORS 434.070 includes prostitutes and other lewd persons as members of the class which may be re-

quired to submit to examination by the State Health Officer. It also prohibits issuance of a certificate to a prostitute indicating freedom from venereal disease.

The Commission recommends repeal of the following statutes: ORS 167.105, 167.120, 167.125, 167.130 and 167.240. The proposed section makes no substantive change in existing law. It combines in one section various aspects of commercialized prostitution that are presently covered in separate statutes with widely divergent penalties. The Commission believes that a more realistic penalty structure will produce more effective prosecution in the area of commercialized prostitution.

Section 252. Compelling prostitution. (1) A person commits the crime of compelling prostitution if he knowingly:

(a) Uses force or intimidation to compel another to engage in prostitution; or

(b) Induces or causes a person under 18 years of age to engage in prostitution; or

(c) Induces or causes his spouse, child or stepchild to engage in prostitution.

(2) Compelling prostitution is a Class B felony.

COMMENTARY

A. Summary

Section 252 particularizes three forms of promoting prostitution considered aggravating factors serving to increase the seriousness of the offense. It covers coercive conduct characterized by force or duress, conduct that exploits the immature and that which victimizes a dependent person.

Paragraph (a) of subsection (1) reflects the view that a prostitute's voluntary participation is a factor to be considered in measuring the culpability of the "promoter." The social and psychological pressures that draw a person into a life of prostitution are complex and varied. While penal legislation may never provide a fully effective deterrent to voluntary prostitution, the law should continue to apply forceful deterrents against the use of coercion.

Paragraph (b) of subsection (1) affirms certain public policies: (1) the immature deserve maximum protection in the area of sexually motivated offenses; (2) as maturity increases, there is a concomitant increase in resistance to personal engagement in prostitution; (3) the harmful effects of a life of prostitution are cumulative and progressive; involvement at an early age makes reform and rehabilitation more difficult.

The induction of a spouse into prostitution has traditionally been severely penalized. Paragraph (c) extends coverage to include children and stepchildren, since it is apparent that the public policy rationale is equally applicable to these persons. If the child is forced into prostitution, or is less than 18 years old, the provisions of paragraphs (a) and (b) would also apply.

Section 252 is not intended to apply to the patron of a prostitute, but is directed at the third party promoter. If a patron uses force or intimidation to compel a prostitute to engage in sexual conduct, the elements of rape are present. The term "induces or causes," used in paragraphs (b) and (c), is not intended to cover a patron who pays a fee to a prostitute in return for sexual favors. However, as noted in commentary under § 251, *soliciting* a person to commit prostitution would be a crime.

B. Derivation

The section is patterned after the proposed California Revised Penal Code § 1805. (Tent. Draft No. 2, June 1968).

C. Relationship to Existing Law

Existing law is discussed in the commentary to § 251. The conduct covered in § 252 is presently prohibited by four Oregon statutes: ORS 167.125, coercing female to engage in prostitution, (five year maximum); ORS 167.115, placing wife in house of prostitution, (ten year maximum); ORS 167.135, procuring female under 18 for prostitution, (ten year maximum); ORS 167.225, taking away female under 16 years of age without consent of parents for purpose of prostitution, (two year maximum).

The Commission recommends that these four statutes be repealed by adoption of § 252. (See also Articles 12 and 13). Under Article 28, these offenses would not be limited to females, *i.e.*, it would be a crime to coerce a male into prostitution, or to cause a minor male to engage in prostitution. The term "spouse" is used in paragraph (c) to make it clear that both husband and wife are considered to be within the prohibition.

Section 253. Promoting and compelling prostitution; corroboration. A person shall not be convicted under section 251 or 252 of this Act solely on the uncorroborated testimony of the person whose prostitution he is alleged to have promoted or compelled.

COMMENTARY

A. Summary

Section 253 continues and expands the corroboration requirement presently applicable to certain felony prostitution statutes. The corroboration requirement is not usually applied in other areas of sexual misconduct. The ordinary complainant in a sex case has been victimized by an isolated criminal act; corroborating evidence is often sparse or nonexistent. To make out the crime of promoting or compelling prostitution, an additional affirmative act must be shown—the act or attempted act of prostitution itself. It is not unreasonable to require the state to prove by independent evidence that an act or attempted act of prostitution did, in fact, occur.

B. Derivation

Section 253 is derived from New York Revised Penal Law § 230.35.

C. Relationship to Existing Law

ORS 167.140 provides that upon a trial for inveigling, enticing or taking away an unmarried female for the purpose of prostitution, the defendant cannot be convicted upon the testimony of the female injured unless she is corroborated by other evidence tending to connect the defendant with the commission of the crime. *State v. McCowan*, 203 Or 551, 280 P2d 976 (1955), held that this section did not apply to ORS 167.120, living with, receiving earnings of, or soliciting for a prostitute.

ORS 136.550 requires that the testimony of an accomplice be corroborated by other evidence tending to connect the defendant with the commission of the crime. *State v. Barnett*, 249 Or 226, 437 P2d 821 (1968), held that only those who could be punished for the crime for which accused is tried are accomplices. A prostitute is not, therefore, an accomplice to the crime of promoting or compelling prostitution. (See commentary to § 15 supra).

State v. Caldwell, 241 Or 355, 405 P2d 847 (1965), held that evidence adequate to support a conviction is not essential to constitute corroboration; it is sufficient to meet the requirements of the statute if it fairly and legitimately tends to connect the defendant with the commission of the crime.

Adoption of § 253 would repeal ORS 167.140. ORS 136.550 would be unaffected by its adoption.

Section 254. Evidence. (1) On the issue of whether a place is a place of prostitution as defined in section 249 of this Act, its general repute and repute of persons who reside in or frequent the place shall be competent evidence.

(2) Notwithstanding ORS 139.320, in any prosecution under sections 251 and 252 of this Act, spouses are competent and compellable witnesses for or against either party.

COMMENTARY

A. Summary

Section 254 allows reputation evidence and makes a spouse a competent and compellable witness.

B. Derivation

The section is derived from Model Penal Code § 251.2.

C. Relationship to Existing Law

Special evidentiary rules governing admission of reputation of alleged houses of prostitution, as well as the competency of spousal testimony, is common legislation in the field of prostitution. (*E.g.*, Ohio Rev Code Ann 2905.25 (1953); Ga Code Ann 26-6206 (1953); Wis Stat 944.35 (1957)).

Abrogation of the common law rule excluding spousal testimony has special utility in prosecuting pimps and panderers who not infrequently are married to the prostitute. See *Wyatt v. United States*, 263 F2d 304 (5th Cir 1959), sustaining admissibility of the wife's testimony, without the aid of a statute, on the grounds that even under common law a wife could testify against her husband as to offenses of

which she was the victim. There was no evidence in the case that Wyatt's prostitute wife was anything but a willing collaborator with him.

The species and quantum of proof necessary to sustain a conviction under this statute has twice been discussed by the Oregon Court:

State v. Thomas, 56 Or 170, 171, 108 P 135 (1910): "Though the character of the house [of ill-fame] and the right to its possession depended upon evidence of common fame, such general reputation, if believed beyond a reasonable doubt, was sufficient to establish the averments of the indictment."

State v. Gold, 133 Or 635, 637, 290 P 1093 (1930): "Evidence of possession of premises by defendant charged with maintaining house of prostitution held sufficient to take case to jury. Acts of defendant charged, in exercising authority over premises and directing and discharging employees, implied that she was in possession."

ORS 139.320 provides: "In all criminal actions in which the husband is the party accused, the wife is a competent witness and when the wife is the party accused, the husband is a competent witness; but neither husband nor wife in such cases shall be compelled or allowed to testify in such cases unless by consent of both of them; provided, that in all cases of personal violence upon either by the other or of personal violence or other unlawful act committed against any minor child of either or both of the parties, the injured party, husband or wife, shall be allowed to testify against the other; provided, further, that in all criminal actions for polygamy or adultery, the husband or wife of the accused is a competent witness and shall be allowed to testify against the other without the consent of the other as to the fact of marriage."

ORS 167.115, relating to placing a wife in a house of prostitution, states: "In all prosecutions under this section a wife is a competent witness against her husband." Another instance of removal of this privilege is found in ORS 167.625, special rules of evidence for nonsupport actions: "No provisions of law prohibiting the disclosure of confidential communications between husband and wife apply. A wife is a competent and compellable witness."

In *State v. LeFils*, 209 Or 666, 307 P2d 1048 (1957), the Supreme Court construed ORS 139.320 as it relates to compelling a nonconsenting wife to testify over her husband's objections:

> "The effect of this statute is 'to remove the subject matter from the field of incompetency of witnesses as at common law and to transfer it to the field of privilege', (State v. Dennis, 177 Or 73, 97, 159 P2d 838, 161 P2d 670 (1945)) . . . except in the instances mentioned in the provisos to this statute, either party may be a witness when the other is the accused, if both have actively consented . . . Had the legislature intended that the witness-spouse should be compellable in the proviso, the word 'competent' or the word 'compelled' would have been used . . ."

The corroboration requirement in § 253 imposes an additional burden of proof upon the state. Prostitution offenses, unlike most crimes against property or the person, often involve unwilling and uncooperative witnesses. Fear, self-interest, misguided loyalty and misplaced confidence often serve to thwart successful prosecution of prostitutional activity. The Commission believes that a rule of evidence excluding spousal testimony unless both parties consent fails to properly serve social justice in the area of prostitution. Subsection (2) therefore makes spousal testimony *both* competent and compellable.

Adoption of subsection (2) will overrule *State v. LeFils* insofar as that case is applicable to prostitution prosecutions. ORS 167.110, which is restated by subsection (1) of § 254, would be repealed.

ARTICLE 29. OBSCENITY AND RELATED OFFENSES

Section 255. Definitions. As used in sections 255 to 262 of this Act, unless the context requires otherwise:

(1) "Advertising purposes" means purposes of propagandizing in connection with the commercial sale of a product or type of product, the commercial offering of a service, or the commercial exhibition of an entertainment.

(2) "Displays publicly" means the exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a public thoroughfare, depot or vehicle.

(3) "Furnishes" means to sell, give, rent, loan or otherwise provide.

(4) "Minor" means an unmarried person under 18 years of age.

(5) "Nudity" means uncovered, or less than opaquely covered, post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered human male genitals in a discernibly turgid state. For purposes of this definition, a female breast is considered uncovered if the nipple only or the nipple and the areola only are covered.

(6) "Obscene performance" means a play, motion picture, dance, show or other presentation, whether pictured, animated or live, performed before an audience and which in whole or in part depicts or reveals nudity, sexual conduct, sexual excitement or sado-masochistic abuse, or which includes obscenities or explicit verbal descriptions or narrative accounts of sexual conduct.

(7) "Obscenities" means those slang words currently generally rejected for regular use in mixed society, that are used to refer to genitals, female breasts, sexual conduct or excretory functions or products, either that have no other meaning or that in context are clearly used for their bodily, sexual or excretory meaning.

(8) "Public thoroughfare, depot or vehicle" means any street, highway, park, depot or transportation platform, or other place, whether indoors or out, or any vehicle for public transportation, owned or operated by government, either directly or through a public corporation or authority, or owned or operated by any agency of public transportation that is designed for the use, enjoyment or transportation of the general public.

(9) "Sado-masochistic abuse" means flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(10) "Sexual conduct" means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

(11) "Sexual excitement" means the condition of human male or female genitals or the breasts of the female when in a state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

COMMENTARY

This section establishes definitions for key terms that are used in the article. Each definition is discussed in connection with the specific subsequent section in which it is used.

The glossary is derived from definitions appearing in a proposed statute by Richard H. Kuh, noted New York prosecutor, in his book *Foolish Figleaves? Pornography in-and-out of court* (MacMillan, 1967). Subsections (4), (7), (9) and (10) are very similar to definitions of those terms set forth in Oregon Senate Bill 92 (1969). Subsection (3) is new.

The author points out:

"In defining nudity, sexual conduct, and other

items taboo for sale to the immature, there is no hedging, no use of weasel words. No haze of subjectivity is imposed by suggestions that the nudes or the sex must be lust-provoking or prurience-inciting." At 257.

This approach to the pornography problem, one straightforward and simply-stated, has a refreshing objectivity about it which permits much clearer statements of the specific offenses that are prohibited by this article.

Section 256. Furnishing obscene materials to minors. (1) A person commits the crime of furnishing obscene materials to minors if, knowing or having good reason to know the character of the material furnished, he furnishes to a minor:

(a) Any picture, photograph, drawing, sculpture, motion picture, film or other visual representation or image of a person or portion of the human body that depicts nudity, sado-masochistic abuse, sexual conduct or sexual excitement; or

(b) Any book, magazine, paperback, pamphlet or other written or printed matter, however reproduced, or any sound recording which contains matter of the nature described in paragraph (a), or obscenities, or explicit verbal descriptions or narrative accounts of sexual conduct, sexual excitement or sado-masochistic abuse.

(2) Furnishing obscene materials to minors is a Class A misdemeanor. Notwithstanding sections 77 and 79 of this Act, a person convicted under this section may be sentenced to pay a fine, fixed by the court, not exceeding $10,000.

COMMENTARY

See commentary under § 259 infra.

Section 257. Sending obscene materials to minors. (1) A person commits the crime of sending obscene materials to minors if, within this state, he knowingly arranges for or dispatches for delivery to a minor, whether the delivery is to be made within or outside this state, by mail, delivery service or any other means, any of the materials enumerated in section 256 of this Act.

(2) Unless the defendant knows or has good reason to know that the person to whom the materials are sent is a minor, it is a defense to a prosecution under this section that the defendant caused to be printed on the outer package, wrapper or cover of the materials to be delivered, in words or substance, "This package (wrapper) (publication) contains material that, by Oregon law, cannot be furnished to a minor."

(3) Sending obscene materials to minors is a Class A misdemeanor. Notwithstanding sections 77 and 79 of this Act, a person convicted under this section may be sentenced to pay a fine, fixed by the court, not exceeding $10,000.

COMMENTARY

See commentary under § 259 infra.

Section 258. Exhibiting an obscene performance to a minor. (1) A person commits the crime of exhibiting an obscene performance to a minor if the minor is unaccompanied by his parent or lawful guardian, and for a monetary consideration or other valuable commodity or service, the person knowingly or recklessly:

(a) Exhibits an obscene performance to the minor; or

(b) Sells an admission ticket or other means to gain entrance to an obscene performance to the minor; or

(c) Permits the admission of the minor to premises whereon there is exhibited an obscene performance.

(2) No employe is liable to prosecution under this section or under any city or home-rule county ordinance for exhibiting or possessing with intent to exhibit any obscene motion picture provided the employe is acting within the scope of his regular employment at a showing open to the public.

(3) As used in this section, "employe" means any person regularly employed by the owner or operator of a motion picture theater if he has no financial interest other than salary or wages in the ownership or operation of the motion picture theater, no financial interest in or control over the selection of the motion pictures shown in the theater, and is working within the motion picture theater where he is regularly employed, but does not include a manager of the motion picture theater.

(4) Exhibiting an obscene performance to a minor is a Class A misdemeanor. Notwithstanding sections 77 and 79 of this Act, a person convicted under this section may be sentenced to pay a fine, fixed by the court, not exceeding $10,000.

COMMENTARY

See commentary under § 259 infra.

Section 259. Displaying obscene materials to minors. (1) A person commits the crime of displaying obscene materials to minors if, being the owner, operator or manager of a business or acting in a managerial capacity, he knowingly or recklessly permits a minor who is not accompanied by his parent or lawful guardian to enter or remain on the premises, if in that part of the premises where the minor is so permitted to be, there is visibly displayed:

(a) Any picture, photograph, drawing, sculpture or other visual representation or image of a person or portion of the human body that depicts nudity, sexual conduct, sexual excitement or sado-masochistic abuse; or

(b) Any book, magazine, paperback, pamphlet or other written or printed matter, however reproduced, that reveals a person or portion of the human body that depicts nudity, sexual conduct, sexual excitement or sado-masochistic abuse.

(2) Displaying obscene materials to minors is a Class A misdemeanor. Notwithstanding sections 77 and 79 of this Act, a person convicted under this section may be sentenced to pay a fine, fixed by the court, not exceeding $10,000.

COMMENTARY TO SECTIONS 256 TO 259

A. Summary

Sections 256 to 259 comprise the heart of the obscenity article which is aimed at prohibiting the dissemination of obscene materials to the young. These sections incorporate several of the critical terms defined in section 255, *i.e.*, "minor," "nudity," "obscenities," "obscene performance," "sado-masochistic abuse," "furnishes," "sexual conduct" and "sexual excitement." By carefully defining these terms we can attempt to achieve a clarity that has not heretofore existed in the obscenity statutes.

> "Were the draft to be adopted, simplicity would exist and forecasting would become easy. Personal reactions, the bane of censorship, would finally become irrelevant. Were there a sale, were the purchaser a minor (as defined by the statute), were the merchandise to portray nudity (or one of the other carefully described categories that would be taboo for the young), neither police, nor jurors, nor judges would need to question whether the subject matter was prurient or non-prurient, patently offensive or inoffensive, socially redeemed or irredeemable. The absurdity, the annoyance, the expense and the delay entailed in case-by-case appellate review seeking to trace undiscoverable lines ostensibly separating the artistic from the obscene would be avoided." Kuh, supra at 257.

Kuh's proposal deals with children as customers only with the key verb being "sells," which is defined as "giving or loaning for monetary consideration or other valuable commodity or service." The targets of his proposals "are those prime moral lepers, the profiteers who, pushing muck to adolescents, live off pre-and post pubertal curiosity." Kuh, supra at 258.

The Commission draft uses the broader term, "furnishes" (defined as meaning to sell, give, rent, loan or otherwise provide), and endeavors to get at objectionable materials regardless of the means used to bring them to the attention of minors. Section 256 bans directly furnishing such materials to persons under 18. Sales or deliveries by mail are banned by § 257, while exhibitions and displays are prohibited by §§ 258 and 259.

The proposal's term, "minor," is limited to unmarried persons who are under 18 years of age, *i.e.*, have not reached their 18th birthday. Obviously there is a certain amount of arbitrariness in fixing an age limit in such laws, and reasonable men may differ on this question; however, settling on this particular age corresponds to the age recommendations made with respect to sexual offenses (Art. 13). The draft focuses on two points: the dissemination of certain types of materials to minors, and public displays of certain materials. No attempt is made to control or limit any other adult activity in this area.

The types of items that cannot be sold, displayed, exhibited, delivered or otherwise furnished to a minor, if "nudity" is involved, are not limited to pictures showing genitalia. "Nudity" is defined as existing not only when pubic areas are revealed, but also when the figure is so thinly veiled or scantily covered as to show exposed female breasts. The draft bars, too, sales of items containing representations by words or pictures of sado-masochistic abuse, of sexual excitement and of sexual conduct, whether hetero- or homosexual, or that engaged in solitarily. Furthermore, "obscenities," defined as "slang words currently generally rejected for regular use in mixed society" and used to refer to sexual parts or excretory functions, is also prohibited. Whether a particular word is "obscene" will depend on its current acceptance by society and will be a question for the trier of fact.

All references to sexual conduct would not be enjoined by the proposal, only "explicit verbal descriptions or narrative accounts of sexual conduct, sexual excitement or sado-masochistic abuse."

The *mens rea* requirement is "knowing or having good reason to know the character of the material furnished." *Scienter* has been judicially required in obscenity statutes since the decision in *Smith v. California*, 361 US 147 (1959), wherein the Supreme Court held that enforcement of a statute imposing strict liability on a bookseller who sells obscene material without any notice of the character or contents of the publication is an unconstitutional restriction on the freedom of speech and press. The effect of the case is to impose on the state the burden of establishing beyond a reasonable doubt that the purveyor of the material possesses some degree of *scienter* sufficient to protect the First Amendment guaranties. Although the Court found it essential that some element of *scienter* be established, it was careful to say that it was not passing on what sort of mental element was required in such a prosecution to protect the First Amendment guaranties:

> "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a

bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be." At 154.

To date the Court has never explicitly ruled on the minimal constitutional requirements of *scienter* in such a prosecution; however, it has recognized state definitions of that element as adequate. For example, in *Mishkin v. New York*, 383 US 502, (1966), the Court found New York's judicial definition of this element to be sufficient. Noting the New York Court of Appeals' decision, the Court said:

> "In *People v. Finkelstein*, 9 NY2d 342, 344-345, 174 NE2d 470, 471 (1961), the New York Court of Appeals authoritatively interpreted § 1141 to require the 'vital element of *scienter*,' and it defined the required mental element in these terms:
>
> "'A reading of the statute [§ 1141] as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised . . . .'
>
> "The Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity. The New York definition of the *scienter* required by § 1141 amply serves those ends, and therefore fully meets the demands of the Constitution." *Mishkin v. New York*, supra at 510-511.

The culpability requirement set forth in the draft should meet the standards required by the *Smith-Mishkin* decisions.

B. Derivation

Sections 256, 257, and 258 are based on the same source as § 255, a proposed statute by Richard H. Kuh in his book, *Foolish Figleaves? Pornography in-and-out of court* (MacMillan, 1967). Also see New York Revised Penal Law, §§ 235.20 to 235.22. The exemption for employes under subsections (2) and (3) of § 258 is similar to ORS 167.151. Section 259 is limited to owners, operators, managers or others acting in a managerial capacity in a business.

C. Relationship to Existing Law

The interpretation the United States Supreme Court has given the First Amendment's guaranties of freedom of speech and press in the past decade has molded a new definition of "obscenity." The guideline by which these guaranties are to be measured was struck in *Roth v. United States*, 354 US 476, 484 (1957): "All ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties . . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." On this historical interpretation of the Constitution the Court, at 485, ruled: ". . . obscenity is not within the area of constitutionally protected speech or press."

Subsequently, in *Jacobellis v. Ohio*, 378 US 184 (1964), the Court reasoned that since only obscenity is excluded from the constitutional protection of the First Amendment's guaranties, the question of whether or not a particular work is obscene necessarily implicates a question of constitutional law, which requires an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected. Logically, such a determination rests upon a definition of "obscenity" and its application to the facts of a particular case. However, mere possession of obscene material cannot be punished absent an intent to disseminate it unlawfully. *Stanley v. Georgia*, 394 US 557 (1969).

The Oregon Supreme Court, in *State v. Jackson*, 224 Or 337, 356 P2d 495 (1960), traces in detail the history of judicial definitions of "obscenity" up to the *Roth* decision, stating:

> "In the past, obscenity has most often been defined by the courts in terms of its 'tendency' to arouse sexual thoughts or to corrupt the morals of its readers . . . . The test most widely used in this country in a former day was that which Lord Cockburn announced in *Regina v. Hicklin*, LR 2 QB 360 (1868):
>
> "'. . . I think the test of obscenity is this: whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.'
>
> "The test was a failure since a book might be condemned for the chance effect of isolated passages upon the most susceptible, and thus applied would, in the words of Judge Learned Hand, 'reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few.' *United States v. Kennerly*, 209 F 119 (DCSDNY 1913) . . . following the decision in *United States v. One Book Entitled Ulysses*, 72 F2d 705 (2d cir 1934) . . . the court adopted a somewhat vague test based on the 'dominant effect' of the book considered as a whole . . . The *Hicklin* rule may fairly be said to have been laid to rest by the decision of the United States Supreme Court in *Butler v. Michigan*, 352 US 380, 77 S Ct 524, 1 L Ed2d 412 (1957). A Michigan statute under which Butler was convicted made it a misdemeanor to sell any book 'containing obscene, immoral, lewd or lascivious language . . .

tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth.' The court held that the statute violated due process, in that: 'The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children.' If any doubt remained about the *Hicklin* rule, it was laid to rest a few months later when *Roth v. United States*, supra, expressly held it to be unconstitutional." *State v. Jackson*, supra at 356-358.

As noted in the opinion, *Roth* rejected the *Hicklin* formulation as a proper guide for judging material as obscene. In place of the early standard, *Roth* substituted this test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

Memoirs v. Massachusetts, 383 US 413 (1966), summarized the three elements of the *Roth* test as follows:

"We defined obscenity in *Roth* . . . . Under this definition . . . three elements must coalesce; it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value . . . . Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness." At 418-419.

These three federal criteria, either expressly by statute, or by judicial construction, have been considered necessary to protect any restriction a state may wish to impose on obscene or indecent material. The *Roth* court realized that although these terms, "obscene" and "indecent," were not precise, the lack of precision itself was not offensive to the requirement of due process if they were applied according to the standards for judging obscenity that the Court therein prescribed.

Oregon has two statutes dealing directly with the dissemination of obscene material: ORS 167.151, disseminating obscene matter; and ORS 167.152, tie-in sales of indecent or obscene publications. The draft would repeal both of these statutes. The most recent examination of the central obscenity statute, ORS 167.151, by the Oregon Supreme Court can be found in *State v. Childs*, 252 Or 91, 447 P2d 304 (1968). The *Childs* court recognized that before material may be classified as obscene it must meet each and every one of three requirements, listing the three federal criteria laid out in *Memoirs v. Massachusetts*, supra. See also, *State v. Watson*, 243 Or 454, 414 P2d 337 (1966). The *Childs* opinion observes:

"It is obvious that the legislature has experienced some difficulty in keeping up with the rapidly changing United States constitutional concept of what constitutes obscenity. The present statute was enacted in 1961 and amended in 1963. A prior statute was simultaneously repealed. Legislative history and the statutory language used indicates that the 1961 enactment was for the purpose of making Oregon's statute comply with *Roth* and the 1963 amendment was to bring it up to date because of the decision in *Manual Enterprises v. Day*, 370 US 478, 82 S Ct 1432 8 L ed2d 639 (1962)." *State v. Childs*, supra at 101.

The New York Law—The "Variable Obscenity" Concept:

The dissemination of indecent material to minors is covered by New York Revised Penal Law §§ 235.20 to 235.22. The statute upon which these sections are based was recently under examination by the United States Supreme Court in *Ginsberg v. New York*, 390 US 629 (1968).

Ginsberg was charged with selling a 16 year old boy two "girlie" magazines. The trial court found (1) that the magazines contained pictures which depicted female "nudity" in a manner defined by § 235.20 (2) as a "showing of . . . female . . . buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple . . ."; and (2) that the pictures were "harmful to minors" in that they had, within the meaning of § 235.20 (6) "that quality of . . . representation . . . of nudity . . . [which] . . . (a) predominantly appeals to the prurient, shameful or morbid interest of minors, and (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (c) is utterly without redeeming social importance for minors." The Court affirmed the conviction, saying:

". . . The concept of variable obscenity is developed in Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn L Rev 5 (1960). At 85 the authors state:

" 'Variable obscenity . . . furnishes a useful tool for dealing with the problem of denying adolescents access to material aimed at a primary audience of sexually mature adults. For a variable obscenity focuses attention upon the make-up of primary and peripheral audiences in varying circumstances, and provides a reasonably satisfactory means for delineating the obscene in each circumstance.' " *Ginsberg v. New York*, supra at 635, n 4.

Impliedly approving this concept, the Court recognized that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . .' *Prince v. Massachusetts*, 321 US 158, 170." *Ginsberg v. New York*, supra at 638. The Court justified this view on the basis of two state interests. The Court enumerated these interests as follows:

> "First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' . . . The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. Indeed, [section 235.20 (6)] expressly recognizes the parental role in assessing sex-related material harmful to minors according 'to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.' Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.
>
> "The State also has an independent interest in the well-being of its youth. The New York Court of Appeals squarely bottomed its decision on that interest in *Bookcase, Inc. v. Broderick*, supra . . . Judge Fuld . . . also emphasized its significance in the earlier case of *People v. Kahan* . . . In his concurring opinion . . . he said:
>
> > " 'While the supervision of the children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.'
>
> "In *Prince v. Massachusetts*, supra, at 165, this Court, too, recognized that the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses . . .' " *Ginsberg v. New York*, supra at 639-640.

The Court concluded by holding that it could not say that there was no rational relation between the objective of safeguarding minors from harm and the definition of obscene material on the basis of its appeal to minors under 17.

New York's definition of obscenity (§ 235.00(1)) is based on the Model Penal Code, and on the Supreme Court decision in *Roth* and *Memoirs*. However, it expands the type of activity to which the prurient interest is addressed. In addition to the Model Penal Code's inclusion of "nudity, sex or excretion," the New York drafters included "sadism" or "masochism."

Kuh criticizes the New York statute (§ 235.20), saying:

> "Here we *really* have it: all the words that hardly any two judges seemed to have been able to interpret alike, lifted from the welter of conflicting opinions and peppered liberally with the words 'for minors.'
>
> "Judges who have split bitterly in applying traditional obscenity statutes are certain to find themselves at odds under the new laws as to whether *Playboy*, with its nudes, its sex, and its sophistication and veneer, is or is not fit for the young. What about *Lady Chatterley's Lover* or *Memoirs of Hecate County?* And what about the widely advertised 'how-to-do-it' guidebooks to sexual happiness, written by doctors and by psychologist-marriage counselors? Different judges will be certain to decide differently—and to rail at each other in the process.
>
> "In legislatively enacting those phrases that have nurtured so much chaos, the lawmakers have assured constitutionality. What can be safer than adulating the highest Justices by molding a new statute in the very words hailed from their special Sinai? But constitutionality is hardly the prime goal of penal legislation. Utility—uniformity of understanding by police and by courts, by prosecutors, by publishers, and by booksellers, *along with hopefully persuasive arguments for constitutionality*—should be the aim.
>
> "Although perpetuating some obscurity, New York's new statutes (and others elsewhere emulating them) are not *all* bad. Applying them, courts are almost certain to find at least some items to be unsuitable for the young that some judges might deem permissible for their parents. The most tawdry of the striptease nudes, whether in glossy sets or in magazines, and sado-masochistic pamphlets— worthless smut on the borders of illegality when sold to adults—would clearly seem taboo for youngsters. To that extent the new statutes are a forward step. However they create another of the obscenity laws' paradoxes.
>
> "Not telling booksellers and others precisely what it is they may or may not do discourages the cautious from selling questionable materials: materials that may *not* in fact be within the laws' proscriptions. 'The bookseller's self-censorship,' Justice Brennan had noted, commenting on this

play-it-safe timidity in his *Smith* case (scienter) opinion, 'would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded: And so the new laws' *in terrorem* impact is likely to work a censorship on sales to the young broader than the laws intended, a censorship of a type *not reviewable* in the courts.

"How much better off all would be, the prosecuted, the prosecutors, the public, and the judges, were there to be a return in the obscenity area to the customary requirement of penal statutes: that they be precise; that, in so far as is humanly possible, they put everyone on notice of exactly what is, and what is not, prohibited?

"Such legislation *is* possible." Kuh, supra at 251-252. (Footnotes omitted.) The Commission's draft subscribes to these views.

Although the Oregon Supreme Court has indicated that a bookseller should not be immune from prosecution absent a prior determination of the book's obscenity and that this should not be the law (State v. Childs, supra at 506), the effect of Senate Bill 92 (1969), had it been enacted, would have been to provide a civil remedy by injunction against a distributor prior to his being charged criminally with selling harmful materials to minors. The Commission voted against this approach because of the belief that it would be too cumbersome and impractical to be effective, and because of doubts about the constitutionality of such a procedure under the "prior restraint" inhibitions of § 8, Article I, Oregon Constitution:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

The Oregon Supreme Court states the essence of a "prior restraint" in *State v. Jackson*, supra at 351.

> "The gravamen of prior restraint is not the mere fact that punishment is imposed prior to distribution of allegedly offensive material. It lies in the attempt to control distribution by means of what might be called a general injunction whereby criminal penalties are assessed for breach of the injunction rather than for the criminality of the subject matter."

Section 260. Defenses. In any prosecution under sections 256 to 259 of this Act, it is an affirmative defense for the defendant to prove:

(1) That the defendant was in a parental or guardianship relationship with the minor; or

(2) That the defendant was a bona fide school, museum or public library, or was acting in his capacity as an employe of such organization or of a retail outlet affiliated with and serving the educational purpose of such organization; or

(3) That the defendant was charged with the sale, showing or display of an item, those portions of which might otherwise be contraband forming merely an incidental part of an otherwise non-offending whole, and serving some legitimate purpose therein other than titillation.

COMMENTARY

A. Summary

Section 260 articulates three affirmative defenses (burden on the defendant to prove by a preponderance of the evidence). In each instance the facts that would establish the defense would be peculiarly within the knowledge of the defendant.

B. Derivation

Source of the section is the same as previous sections of the draft. See also, New York Revised Penal Law § 235.22.

C. Relationship to Existing Law

There are no comparable provisions in existing Oregon law.

Subsections (1) and (2) are largely self-explanatory. While prosecution of a parent or a school, museum or library would be extremely unlikely, the section provides a safety valve against any potential abuse of the provisions of the article. Subsection (3) is intended to allow the sale, distribution or display of magazines, books, films, etc., in which the offending items constitute only a minor part thereof and

serve some legitimate purpose. Most of the currently popular news magazines occasionally carry articles and pictures which would fall within the definitions set forth in the previous sections, but these items, when they do appear, ordinarily constitute a minor part of an otherwise "inoffensive whole." Such materials would not be prohibited. Likewise, some of today's films which include, for example, a brief and incidental nude scene, would not be prohibited.

Section 261. Publicly displaying nudity or sex for advertising purposes. (1) A person commits the crime of publicly displaying nudity or sex for advertising purposes if, for advertising purposes, he knowingly:

(a) Displays publicly or causes to be displayed publicly a picture, photograph, drawing, sculpture or other visual representation or image of a person or portion of the human body that depicts nudity, sado-masochistic abuse, sexual conduct or sexual excitement, or any page, poster or other written or printed matter bearing such representation or a verbal description or narrative account of such items or activities, or any obscenities; or

(b) Permits any display described in this section on premises owned, rented or operated by him.

(2) Publicly displaying nudity or sex for advertising purposes is a Class A misdemeanor.

COMMENTARY

A. Summary

This section attacks the problem of public displays of materials that may offend persons who are unwillingly subjected to them. The section incorporates most of the terms defined in § 255.

The thrust of the proposal is well stated by Kuh:

"The proposed ban is applied to that nudity and sex that is so displayed *commercially* for advertising purposes as to be visible by the passing public. By focusing this way on the apparent *purpose* of the presentation, questions of taste are avoided. The civic monument is given immunity, while items condemned will include pictures found on burlesque billboards, in nudie-movie teaser montages . . . .

"So much for the irritant that is public display. The proposed statute, as drafted, is designed to remove the most blatant aspects without invading the right of private in-the-store displays and of private sales . . . ." Kuh, supra, at 277-8.

He also discusses the potentially salutary effect that such legislation is likely to have:

"Anti-display statutes might even perform yeoman duty in removing irritants from public view and thus calming advocates of more and more censorship. By driving merchandise, not underground, but into *discreet* channels the temper-taunting red flags will disappear and pro-censorship pressures should be lessened. Were legislative enactment to suceed in driving objectionable items from public *view*, while permitting adults *privately* to buy, to read, to see, or to hear far more objectionable materials, the *meaningful* rights of all would be reconciled. The majority would be spared the discomfort of being forcibly confronted by the depersonalizing, the embarrasing, the crude; the minority would, as part of the same legislative framework, be freed to enjoy more of what it wished, quietly and without fanfare." At 275.

B. Derivation

The section is based on a proposed statute by Kuh, supra at 275-6. Also see Michigan Revised Criminal Code § 6320.

C. Relationship to Existing Law

Oregon has no comparable provisions in existing law, although the common law "indictable nuisance" statute, ORS 161.310, makes it a misdemeanor to "wilfully and wrongfully commit any act . . . which openly outrages the public decency and is injurious to public morals . . . ."

The basic premise of the section, that the state has the right to protect its citizens against an "assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid it," was recognized by the Supreme Court in the case of *Redrup v. New York*, 386 US 767, 769 (1967).

Section 262. Defenses. In any prosecution for violation of section 261 of this Act, it shall be an affirmative defense for the defendant to prove:

(1) That the public display, even though in connection with a commercial venture, was primarily for artistic purposes or as a public service; or

(2) That the public display was of nudity, exhibited by a bona fide art, antique or similar gallery or exhibition, and visible in a normal display setting.

COMMENTARY

This section would allow the defendant to prove that the public display was primarily for artistic purposes, was a public service or was that of a bona fide art gallery. Certainly legitimate artistic displays should not, and probably would not, be the subject of a criminal prosecution, but should it occur, this section would provide protection for the defendant.

ARTICLE 30. GAMBLING OFFENSES

Section 263. Definitions. As used in sections 263 to 272 of this Act, unless the context requires otherwise:

(1) "Bookmaking" means promoting gambling by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events.

(2) "Contest of chance" means any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.

(3) "Gambling" means that a person stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome. "Gambling" does not include bona fide business transactions valid under the law of contracts for the purchase or sale at a future date of securities or commodities, and agreements to compensate for loss caused by the happening of chance, including but not limited to contracts of indemnity or guaranty and life, health or accident insurance.

(4) "Gambling device" means any device, machine, paraphernalia or equipment that is used or usable in the playing phases of gambling, whether it consists of gambling between persons or gambling by a person involving the playing of a machine. Lottery tickets, policy slips and other items used in the playing phases of lottery and policy schemes are not gambling devices within this definition.

(5) "Lottery" or "policy" means an unlawful gambling scheme in which:

(a) The players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other medium, one or more of which chances are to be designated the winning ones; and

(b) The winning chances are to be determined by a drawing or by some other method; and

(c) The holders of the winning chances are to receive something of value.

(6) "Numbers scheme or enterprise" means a form of lottery in which the winning chances or plays are not determined upon the basis of a drawing or other act on the part of persons conducting or connected with the scheme, but upon the basis of the outcome of a future contingent event otherwise unrelated to the particular scheme.

(7) "Player" means a person who engages in any form of gambling solely as a contestant or bettor, without receiving or becoming entitled to receive any profit therefrom other than personal gambling winnings, and without otherwise rendering any material assistance to the establishment, conduct or operation of the particular gambling activity. A person who gambles at a social game of chance on equal terms with the other participants therein is a person who does not otherwise render material assistance to the establishment, conduct or operation thereof by performing, without fee or remuneration, acts directed toward the arrangement or facilitation of the game, such as inviting persons to play, permitting the use of premises therefor and supplying cards or other equipment used therein. A person who engages in bookmaking is not a player.

(8) "Profits from gambling" means that a person, other than as a player, accepts or receives money or other property pursuant to an agreement or understanding with another person whereby he participates or is to participate in the proceeds of gambling.

(9) "Promotes gambling" means that a person, acting other than as a player, engages in conduct that materially aids any form of gambling. Conduct of this nature includes, but is not limited to, conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases or toward any other phase of its operation. A person promotes gambling if, having control or right of control over premises being used with his knowledge for purposes of gambling, he permits the gambling to occur or continue or makes no effort to prevent its occurrence or continuation.

(10) "Slot machine" means a gambling device that as a result of the insertion of a coin or other object operates, either completely

automatically, or with the aid of some physical act by the player, in such a manner that, depending upon elements of chance, it may eject something of value or otherwise entitle the player to something of value. A device so constructed or readily adaptable or convertible to such use is no less a slot machine because it is not in working order or because some mechanical act of manipulation or repair is required to accomplish its adaptation, conversion or workability. Nor is it any less a slot machine because apart from its use or adaptability as such it may also sell or deliver something of value on a basis other than chance.

(11) "Something of value" means any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.

(12) "Unlawful" means not specifically authorized by law.

COMMENTARY

This section is based on New York Revised Penal Law § 225.00 and Michigan Revised Criminal Code § 6101. The significance of each definition is discussed in the commentaries to particular sections in the article.

Section 264. Promoting gambling in the second degree. (1) A person commits the crime of promoting gambling in the second degree if he knowingly promotes or profits from unlawful gambling.

(2) Promoting gambling in the second degree is a Class A misdemeanor.

COMMENTARY

See commentary under § 265 infra.

Section 265. Promoting gambling in the first degree. (1) A person commits the crime of promoting gambling in the first degree if he violates section 264 of this Act by engaging in bookmaking to the extent that he receives or accepts in any one day more than five bets totaling more than $500 or by receiving in connection with a lottery or numbers scheme or enterprise:

(a) Money or written records from a person other than a player whose chances or plays are represented by such money or records; or

(b) More than $500 in any one day of money played in the scheme or enterprise.

(2) Promoting gambling in the first degree is a Class C felony.

COMMENTARY TO SECTIONS 264 AND 265

A. Summary

Sections 264 and 265 of the draft prohibit two basic kinds of criminal gambling activity. One is "promoting" unlawful gambling activity. This is defined to include any activity that goes beyond being a "player" including setting up the game, acquisition of the necessary equipment, providing the place, bringing in the players and financing the operation.

The other activity is "profiting" from unlawful gambling activity, the receipt of money or other property, other than as a player, as proceeds from gambling activity based on a prior agreement or understanding to that effect. This is intended to reach the criminal whose activities do not fall within the definition of "promoting."

The underlying purpose of the sections is to get at the professional who exploits the popular urge to gamble. *The individual citizen who places a bet is not criminal.* This approach to the gambling statutes eliminates the need for a special immunity statute because the "player" would not violate the law. *Neither are friendly social games criminal under the draft* and a person does not promote gambling if he merely invites friends in for a game and provides cards or other paraphernalia. This results from the definition of "player" in § 263 (7) which exempts one who "gambles at a social game of chance on equal terms with other participants" so long as he does nothing more than to provide without fee or remuneration the use of premises or the necessary equipment.

The Michigan revisers neatly state the case for excluding the friendly social game:

> "Private consensual games are generally accepted as socially if not legally proper, and there is no point in preserving the fiction that they are undesirable." (Michigan Revised Criminal Code at 465).

The definition of "contest of chance" in § 263 (2) and "gambling" in § 263 (3) continue the generic approach incorporated in the definitions by using broad, comprehensive terms that are intended to include any sort of activity that brings in gain based on chance. None of the specific games are listed by name, although some are specifically mentioned in § 265.

The definition of "something of value" in § 263 (11) includes money, property, tokens and *free plays.* (See further discussions infra). The definition of "gambling" exempts stock transactions and insurance from the coverage of the article inasmuch as the activities are subject to close regulation under special statutes.

No gambling promotion is lawful under the proposed draft unless the Legislature specifically authorizes it and it does not constitute a lottery prohibited by § 4, Article XV, Oregon Constitution, *e.g.*, mutual wagering at race meets under ORS chapter 462. Consequently, the term "unlawful gambling" is used, with "unlawful" being defined in § 263 (12) as not specifically authorized by law.

"Bookmaking" is defined in § 263 (1) as taking bets as a business, rather than casually, upon the outcome of future contingent events. The definition of "lottery" in § 263 (5) corresponds to the familiar "prize, chance, consideration" test used by the Oregon Court in a number of cases.

The definition of "numbers scheme or enterprise" is an additional refinement of the basic lottery definition.

A small volume bookmaker only "promotes gambling" and therefore, only violates § 264, promoting gambling in the second degree, a Class A misdemeanor. But, if he takes more than five bets for more than $500 in any one day, or promotes a lottery, he commits the first degree crime under § 265, a Class C felony. Similarly, the sections distinguish between the numbers runner who keeps his bets small, and the professional "bagman."

B. Derivation

Sections 264 and 265 are from Michigan Revised Criminal Code §§ 6105 and 6106, and New York Revised Penal Law §§ 225.00 to 225.10.

C. Relationship to Existing Law

ORS chapter 167 contains 17 separate statutes dealing with lotteries or other forms of gambling. The crimes are misdemeanors, except for ORS 167.405, an indictable misdemeanor, and ORS 167.420, a felony: ORS 167.405, setting up or promoting lotteries; 167.410, selling lottery tickets; 167.415, advertising lottery tickets; 167.420, false or fictitious lottery; 167.425, proof necessary to overcome presumption of falsity; 167.430, forfeiture of prizes; 167.505, conducting or playing forbidden games; 167.510, permitting gambling on premises; 167.515, duty of officers to enforce gambling laws; 167.520, self-incrimination by witnesses; 167.525, witness failing to appear at trial; 167.530, recovery of gambling fines; 167.535, operating or using a slot machine; 167.540, seizure and destruction of slot machines; 167.545, possession of slot machine as evidence of operating it; 167.550, disposal of fines and jurisdiction of courts for offenses under 167.535; 167.555, possessing or operating games of chance, duty of officers. The proposed draft would repeal all of these statutes. Other statutes dealing with gambling:

ORS 30.740, "All persons losing money or anything of value at or on any game described in ORS 167.505 shall have a cause of action to recover from the dealer or player winning the same, or proprietor for whose benefit such game was played or dealt,

or such money or thing of value won, twice the amount of the money or double the value of the thing so lost." This statute would be appropriately amended.

ORS 465.090, "All notes, bills, bonds, mortgages or other securities or other conveyances, the consideration for which shall be money or other thing of value, won by playing at any games listed in ORS 167.505 shall be void and of no effect as between the parties to the same and all other persons, except holders in good faith, without notice of the illegality of such contract or conveyance." This statute would be amended. Related statutes that would not be affected are: ORS 91.410, 91.420, 141.180, 462.080, 462.140, 462.990, 465.010, 465.020, 465.030, 465.040, 465.050, 465.060, 465.070, 498.028, 260.310.

State v. Gitt Lee, 6 Or 425 (1877), in construing the statute (now ORS 167.505) the court stated:

> ". . . It is not necessary in an indictment for a violation of this statute to state the name of the game or the name of the device by which it is played. [But] the indictment should describe the device with which the game was played, not necessarily by its name, but by its adoption and use, and it should appear therefrom that a 'tangible device' was used, and that it was adapted, devised and used for the purpose of carrying on or playing a 'banking or other game for money, etc.', or if it was not devised originally for that purpose that it was so adapted and used . . . ."

Ah Poo v. Stevenson, 83 Or 340, 163 P 822 (1917) held:

> ". . . . A 'gambling implement' and a 'gambling device' are synonymous terms. A 'gambling device' is defined as an 'invention often used to determine the question as to who wins and who loses, that risk their money on a contest or chance of any kind; anything which is used as a means of playing for money or other thing of value, so that the result depends more largely on chance than skill; a gambling device.' "

National Thrift Assn. v. Crews, 116 Or 352, 241 P 72 (1925) set forth the elements of a lottery:

> ". . . . A lottery is any scheme whereby one, on paying money or other valuable thing to another becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine. The essential elements of a lottery are (1) consideration, (2) prize, and (3) chance." Accord, *State v. Schwemler*, 154 Or 533, 60 P2d 938 (1936); *McFadden v. Bain*, 162 Or 250, 91 P2d 292 (1938); *Cudd v. Aschenbrenner*, 233 Or 272, 377 P2d 150 (1963); *Ex parte Kameta*, 36 Or 251, 60 P 394 (1900).

State v. Coats, 158 Or 122, 72 P2d 1102 (1938), in affirming Oregon's adherence to the "dominant chance" doctrine as distinguished from the "pure chance" doctrine, held:

> ". . . . [T]hree things are necessary to constitute a lottery, viz., prize, chance and consideration . . . if any substantial degree of skill or judgment is involved, it is not a lottery. Of course, all forms of gambling involve prize, chance and consideration, but not all forms of gambling are lotteries. A lottery is a scheme or plan, as distinguished from a game where some substantial element of skill or judgment is involved. According to the weight of authority the operation of slot machines and similar gambling devices, whereby small amounts are hazarded on the chance of winning larger sums, constitutes lotteries."

McKee v. Foster, 219 Or 322, 347 P2d 585 (1959), held that "lottery" contemplates a prize tangible in nature and having a value in the market place, but does not include the "free-play" feature of a replay pinball machine. *The draft would overrule this case.*

Mult. Co. Fair Assn. v. Langley, 140 Or 172, 13 P2d 354 (1932), held that ". . . chance, as distinguished from skill, must be the predominant factor in a lottery." *Langley* goes on to say that the maintenance of a poolroom in which persons congregate to bet upon horse races is a "gaming house" punishable as a nuisance at common law, therefore prohibited by § 14–722, Oregon Code 1930. The case relies on *State v. Nease*, 46 Or 433 and *State v. Ayers*, 49 Or 61, both of which rejected the contention that the outcome of a horse race is dependent upon mere chance, but held that maintaining a place to which persons can resort for the purpose of wagering money upon the outcome of such races constitutes a common law nuisance, but not a lottery.

An interesting discussion of the background of the constitutional prohibition appears in the *Langley* case at 184:

> "At the time when the lottery provision of our constitution was proposed for adoption at the Constitutional Convention various amendments were proposed to it which sought to prohibit, in addition to lotteries, 'all games at billiards, ten pins and cards,' and 'all species of gambling.' These and other proposals were rejected while the one prohibiting lotteries was retained. (Citing Carey's History of the Oregon Constitution.) Lotteries at that time were institutions of great magnitude and the evil consequences were far-reaching. The Federal Supreme Court described their nature as of 'widespread pestilence.' " See, also *City of Portland v. Duntley*, 185 Or 365, 203 P2d 640 (1949).

The Oregon Attorney General has rendered a number of opinions regarding the gambling and lottery statutes, including:

31 *Op Atty Gen* 49 (1962): A "one-armed" bandit type slot machine described in ORS 167.535 (1) may be seized and destroyed pursuant to court order without having to prove that such machine was actually used for gambling purposes.

30 *Op Atty Gen* 342 (1961): Sale of merchandise by use of a punchboard is an illegal lottery.

30 *Op Atty Gen* 415 (1961): A scheme of awarding discounts in varying amounts based on an individually drawn card is a lottery.

32 *Op Atty Gen* 255 (1965): A scheme calling for guessing the number of pennies in a jar constitutes a lottery under ORS 167.405.

Section 266. Possession of gambling records in the second degree. (1) A person commits the crime of possession of gambling records in the second degree if with knowledge of the contents thereof, he possesses any writing, paper, instrument or article:

(a) Of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise; or

(b) Of a kind commonly used in the operation, promotion or playing of a lottery or numbers scheme or enterprise.

(2) Possession of gambling records in the second degree is a Class A misdemeanor.

COMMENTARY

See commentary under § 268 infra.

Section 267. Possession of gambling records in the first degree. (1) A person commits the crime of possession of gambling records in the first degree if with knowledge of the contents thereof, he possesses any writing, paper, instrument or article:

(a) Of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise, and constituting, reflecting or representing more than five bets totaling more than $500; or

(b) Of a kind commonly used in the operation, promotion or playing of a lottery or numbers scheme or enterprise, and constituting, reflecting or representing more than 500 plays or chances therein.

(2) Possession of gambling records in the first degree is a Class C felony.

COMMENTARY

See commentary under § 268 infra.

Section 268. Possession of gambling records; defense. In any prosecution under section 266 or 267 of this Act it is a defense if the writing, paper, instrument or article possessed by the defendant is neither used nor intended to be used in the operation or promotion of a bookmaking scheme or enterprise, or in the operation, promotion or playing of a lottery or numbers scheme or enterprise.

COMMENTARY TO SECTIONS 266 TO 268

A. Summary

Sections 266 and 267 penalize the possession of papers and records necessary to the operation of lotteries, bookmaking and numbers rackets.

Section 266 is the basic offense, and the item possessed must relate to a lottery or bookmaking activity in that it is commonly used for the purpose. The defendant must be shown to have knowledge of the contents of the item. Section 267 employs the same rationale as § 265 in penalizing more heavily the large volume professional gambler. Section 268 permits a defense if the items possessed were not intended to be used for criminal purposes.

B. Derivation

The sections are taken from Michigan Revised Criminal Code §§ 6115, 6116 and 6120.

C. Relationship to Existing Law

ORS 167.410 prohibits the sale or possession of lottery tickets and provides a misdemeanor penalty. No distinction is drawn between the small scale and large scale operator, although the authorized sentence ranges from three months to a year, or a fine not less than $50 nor more than $500.

Section 269. Possession of a gambling device. (1) A person commits the crime of possession of a gambling device if, with knowledge of the character thereof, he manufactures, sells, transports, places or possesses, or conducts or negotiates a transaction affecting or designed to affect ownership, custody or use of:

(a) A slot machine; or

(b) Any other gambling device, believing that the device is to be used in promoting unlawful gambling activity.

(2) Possession of a gambling device is a Class A misdemeanor.

COMMENTARY

A. Summary

This section penalizes trafficking in slot machines or other gambling devices defined in § 263 (4). The purpose of this section is to aid enforcement of the gambling laws by punishing the possession of gambling devices separate from the possession of betting memoranda. The items prohibited are "slot machines," defined in § 263 (10), and "gambling devices," defined in § 263 (4). The definition of gambling device specifically excludes lottery and policy materials to avoid overlap with §§ 266 and 267. Pinball machines that pay off, including those that are of the "free play" variety, are gambling devices because the definition of the term refers to "gambling" which is defined in § 263 (3) and hinges on the possibility of receiving "something of value" which, in turn, is defined in § 263 (11) to include free plays. Therefore, *McKee v. Foster*, supra, is abrogated. The crime is graded a Class A misdemeanor because the felony penalties under the article are applied to the professional operators of lotteries or numbers enterprises.

B. Derivation

The section is adapted from Michigan Revised Criminal Code § 6125.

C. Relationship to Existing Law

ORS 167.535, 167.545, 167.555 would be repealed.

Section 270. Gambling offenses; prima facie proof. In any prosecution under sections 263 to 269 of this Act in which it is necessary to prove the occurrence of a sporting event, the following shall be admissible in evidence and shall be prima facie evidence of the occurrence of the event:

(1) A published report of its occurrence in a daily newspaper, magazine or other periodically printed publication of general circulation; or

(2) Evidence that a description of some aspect of the event was written, printed or otherwise noted at the place in which a violation of any of the provisions of sections 263 to 269 of this Act is alleged to have been committed.

COMMENTARY

This section provides two alternative methods of proving the occurrence of a sporting event. The section is derived from Michigan Revised Criminal Code § 6130. Oregon now has no comparable statute.

Section 271. Forfeiture of prizes. (1) All sums of money and every other valuable thing drawn as a prize in any lottery or pretended lottery, by any person within this state, are forfeited to the use of the state, and may be sued for and recovered by a civil action.

(2) Nothing contained in ORS 465.010 to 465.070 shall interfere with the duty of officers to take possession of property as provided by subsection (1) of this section.

COMMENTARY

This section continues existing law. Subsection (2) refers to abatement proceedings authorized by ORS chapter 465.

Section 272. Seizure and destruction of gambling devices. (1) A gambling device is a public nuisance. Any peace officer shall summarily seize any such device that he finds and deliver it to the custody of the sheriff, who shall hold it subject to the order of the court having jurisdiction.

(2) Whenever it appears to the court that the gambling device has been possessed in violation of section 269 of this Act, the court shall adjudge forfeiture thereof and shall order the sheriff to destroy the device and to deliver any coins taken therefrom to the county treasurer, who shall deposit them to the general fund of the county.

(3) The seizure of the gambling device or operating part thereof constitutes sufficient notice to the owner or person in possession thereof. The sheriff shall make return to the court showing that he has complied with the order.

COMMENTARY

This section is a slightly modified version of ORS 167.540. *Stangier v. Goad*, 163 Or 314, 97 P2d 191 (1939), held that a sheriff could not be enjoined from seizing a slot machine since the judicial determination provided for in the statute constituted an adequate remedy at law.

ARTICLE 31. OFFENSES INVOLVING NARCOTICS AND DANGEROUS DRUGS

Section 273. Offenses involving narcotics and dangerous drugs; definitions. As used in sections 273 to 282 of this Act, unless the context requires otherwise:

(1) "Apothecary," "coca leaves," "dispense," "federal narcotic laws," "manufacturer," "marihuana," "narcotic drugs," "official written order," "opium" and "wholesaler" have the meaning provided for those terms in ORS 474.010.

(2) "Dangerous drugs" means dangerous drugs as defined in ORS 475.010.

(3) "Furnishes" means to sell, barter, exchange, give or dispose to another, or to offer or agree to do the same, and includes each such transaction made by any person, whether as principal, proprietor, agent, servant or employe.

(4) "Unlawfully" means in violation of any provision of ORS chapter 474 or 475.

COMMENTARY

A. Summary

Ten definitions found in ORS 474.010 are incorporated by reference in subsection (1) and made applicable to this article.

"Dangerous drugs" are defined in subsection (2) by reference to ORS 475.010. The definition in that statute would be amended by § 314, infra, to include the listing of specific drugs designated by the Drug Advisory Council. The particular drugs have been found to have a potential for abuse because of either their stimulant or depressant effect on the central nervous system or have been found to have a potential for abuse because of their hallucinogenic effect.

Subsection (2) will, because of the amendment to ORS 475.010, incorporate the dangerous drug list promulgated by the Drug Advisory Council under authority of ORS 689.620. The current list (See Board of Pharmacy Chapter 855, Division 8, § 80–005) contains those drugs designated in paragraphs (a) and (b).

Defining specific drugs as "dangerous" avoids the problem raised by periodic challenges to the legal validity of administrative procedures employed by the Drug Advisory Council in designating a drug as dangerous. While the problem may continue in regard to future designations, coverage for the listed drugs is firmly established.

Another potential problem is the effect of a ruling by the Drug Advisory Council *removing* a drug presently designated as dangerous from the dangerous drug list. The statutory definition of dangerous drugs would then require amendment by the Legislature to conform to the Drug Advisory Council's determination. The discretion of the district attorney should preclude prosecutions for criminal activity in a drug removed from the list between legislative sessions.

"Furnishes" is defined in subsection (3) to cover both gratuitous and nongratuitous transactions as well as offers or agreements to engage in the same. The language regarding the status of the person who "furnishes" is included to avoid a conflict with the definition of "sale" in ORS 474.010 (10).

"Unlawfully" is defined to mean in violation of ORS chapter 474 or 475 which establish the procedures and conditions whereby narcotic and dangerous drugs may be legally manufactured, transported, sold and possessed.

The definitions in § 273 represent a restatement of existing law. The major structural change is reflected by the inclusion of specifically named drugs in the definition of dangerous drugs. ORS 475.010 (1) presently defines "dangerous drug" as a drug designated by the Drug Advisory Council as a dangerous drug and included in published regulations of the State Board of Pharmacy under ORS 689.620.

In *State v. Sargent*, 87 Adv Sh 883, — Or —, 449 P2d 845 (1969), the court, in considering whether the Legislative Assembly could constitutionally delegate to the Drug Advisory Council the power to define an element of a crime, held that the delegation in ORS 475.010 (1) did not violate either the state or federal constitution.

Section 274. Criminal activity in drugs. (1) A person commits the crime of criminal activity in drugs if he knowingly and unlawfully manufactures, cultivates, transports, possesses, furnishes, prescribes, administers, dispenses or compounds a narcotic or dangerous drug.

(2) Criminal activity in drugs is a Class B felony, or the court may, under the criteria set forth in section 83 of this Act, enter judgment for a Class A misdemeanor and impose sentence accordingly.

COMMENTARY

A. Summary

Section 274 penalizes a broad range of illicit drug activity, including its manufacture, distribution, sale, possession and administration. The crime is classified as a Class B felony but may be treated in appropriate cases as a Class A misdemeanor, in the court's discretion.

The *mens rea* requirement is that the conduct be "knowing" and "unlawful." "Unlawfully" means that the drug transaction is in violation of those Oregon statutes outside the criminal code that govern *lawful* drug activity, *e.g.*, ORS chapters 474 and 475.

All verbs are used in their ordinary dictionary sense, except "furnishes" which is defined in § 273, and "possesses," which is defined in § 3 of this Act. Section 15 supra states:

> "Except as otherwise provided by the statute defining the crime, a person is not criminally liable for the conduct of another constituting a crime if:
>
> "(1) He is a victim of that crime; or
>
> "(2) The crime is so defined that his conduct is necessarily incidental thereto."

Subsection (2) of § 15 is intended to apply to § 274 insofar as a buyer of narcotic or dangerous drugs may be held to be an accomplice of the seller. The Commission intends to exclude the buyer from accomplice liability under the statute since his conduct is "necessarily incidental" to the unlawful sale. (See commentary § 15).

B. Derivation and Relationship to Existing Law

ORS 474.020, prohibiting unlawful dealing in narcotic drugs, would be repealed. ORS 474.990 (2), providing a penalty for violation of ORS 474.020 of a $5,000 fine or 10 years imprisonment, or both, except in the case of the drug, marihuana, which may be punished either by 10 years and a $5,000 fine, or one year and a $5,000 fine, would be repealed.

ORS 475.100 (1) states that "no person shall sell, give away, barter, distribute, buy, receive or possess a dangerous drug" except under certain conditions. This statute would be retained as a regulatory standard. ORS 475.990, providing a penalty for violation of ORS 475.100 of either a $5,000 fine and one year imprisonment, or a $5,000 fine and 10 years imprisonment, would be repealed.

Adoption of § 274 would impose uniform penalty criteria for criminal activity in both narcotic and dangerous drugs. This would be consistent with existing law, since alternative sentencing provisions are provided granting the court authority to impose misdemeanor penalties in appropriate cases.

Section 275. Tampering with drug records. (1) A person commits the crime of tampering with drug records if he knowingly:

(a) Alters, defaces or removes a narcotic or dangerous drug label affixed by a manufacturer, wholesaler or apothecary, except that it shall not be unlawful for an apothecary to remove or deface such a label for the purpose of filling prescriptions; or

(b) Affixes a false or forged label to a package or receptacle containing narcotic or dangerous drugs; or

(c) Makes or utters a false or forged prescription or false or forged official written order for narcotic or dangerous drugs; or

(d) Makes a false statement in any narcotic or dangerous drug prescription, order, report or record required by ORS chapter 474 or 475.

(2) Tampering with drug records in a Class C felony.

COMMENTARY

A. Summary

Section 275 covers a variety of fraudulent practices involving drug labels, prescriptions, orders and reports. The intent of the section is to support the integrity of the regulatory provisions governing lawful traffic in drugs. The section applies both to narcotic and dangerous drugs. The *mens rea* element is that the actor's conduct be "knowing." The culpability factor of "unlawfully" is not included, since ORS chapters 474 and 475 do not provide any *lawful* means of engaging in the prohibited conduct.

Paragraph (a) of subsection (1) prohibits the alteration of a narcotic or dangerous drug label. The apothecary is exempted if his purpose in defacing or removing the label involves filling prescriptions. Paragraph (b) of subsection (1) prohibits affixing a false or forged label to a receptacle containing narcotic or dangerous drugs. Paragraph (c) prohibits making or uttering false or forged prescriptions or written orders for narcotic or dangerous drugs. Paragraph (d) of subsection (1) penalizes making false statements in connection with a narcotic or dangerous drug prescription, order, report or record that is required to be issued or maintained in accordance with ORS chapters 474 or 475.

B. Derivation

Paragraph (a) of subsection (1) is derived from ORS 474.100. Paragraph (b) is derived from ORS 474.170 (6). Paragraph (c) is derived from ORS 474.170 (5). Paragraph (d) is derived from ORS 474.170 (3) and 475.100 (3).

C. Relationship to Existing Law

ORS 474.100 (1) and (2) prohibit the alteration, defacement or removal of a narcotic drug label. Paragraph (a) of subsection (1) of the proposed draft extends this prohibition by including dangerous drugs. The penalty provision is ORS 474.990 which provides a maximum punishment of 10 years imprisonment and a $5,000 fine. ORS 474.100 would be amended to delete the last sentence in subsections (1) and (2). (See § 311).

ORS 474.170 (3) prohibits the making of a false statement in any prescription, order, report or record required by ORS chapter 474. The penalty provision is ORS 474.990. ORS 475.100 (3) prohibits the making of a false statement in any prescription, order, report or record required by ORS chapter 475. The penalty provision is ORS 475.990 (3) which provides a punishment of one year imprisonment or a $500 fine. ORS 474.170 and 475.990 would be repealed and 475.100 amended to delete subsection (3). ORS 474.990 (1) should be retained to govern violations of the regulatory provisions of ORS chapter 474.

ORS 474.170 (5) prohibits the making or uttering of any false or forged prescription or written order. This coverage is also extended to include dangerous drugs. The penalty provision is ORS 474.990.

ORS 474.170 (6) prohibits affixing any false or forged label to a package or receptacle containing narcotic drugs. Section 275 extends this coverage to include dangerous drugs. The penalty provision is ORS 474.990. ORS 474.170 would be repealed.

Section 275 expands existing law to include dangerous drugs. This is consistent with the legislative intent expressed by the 1969 amendment to ORS 475.990 (2) which, in effect, imposes a uniform penalty provision for criminal activity in narcotic and dangerous drugs.

Section 276. Criminal use of drugs. (1) A person commits the crime of criminal use of drugs if he knowingly uses or is under the influence of a narcotic or dangerous drug, except when administered or dispensed by or under the direction of a person authorized by law to prescribe and administer narcotic drugs and dangerous drugs to human beings.

(2) In any prosecution for violation of subsection (1) of this section, it is not necessary to allege or prove what specific drug the defendant used, or was under the influence of, in order to

establish a prima facie case. Evidence that the specific drug is not within the definition of "narcotic drugs" in ORS 474.010 or the definition of "dangerous drugs" in ORS 475.010 is a defense.

(3) Criminal use of drugs is a Class A misdemeanor.

COMMENTARY

A. Summary

Section 276 prohibits the knowing use of a narcotic or dangerous drug when not administered or dispensed by a person authorized by law. The section penalizes *both* the use of the drug, and the condition of being under the influence of the drug. To penalize the actual use of the drug, the taking or administration must have occurred within the state. A person may be prosecuted for being under the influence of the drug within the state regardless of where taken or administered. The section does not penalize the mere status of being addicted to a narcotic or dangerous drug so long as it is not taken or administered in Oregon and the person is not in Oregon under its influence.

B. Derivation

The section restates ORS 475.625.

C. Relationship to Existing Law

ORS 475.625 prohibits the use of narcotic or dangerous drugs unless legally administered or dispensed. The penalty provision is ORS 475.635 which provides a misdemeanor punishment and authorizes a maximum five year probation period. These statutes would be repealed.

Section 277. Criminal drug promotion. (1) A person commits the crime of criminal drug promotion if he knowingly maintains or frequents a place:

(a) Resorted to by drug users for the purpose of unlawfully using narcotic or dangerous drugs; or

(b) Which is used for the unlawful keeping or sale of narcotic or dangerous drugs.

(2) Criminal drug promotion is a Class A misdemeanor.

COMMENTARY

A. Summary

Section 277 is intended to discourage the knowing maintenance or frequenting of places characterized by unlawful drug activity. The words "maintain" and "frequent" are to be given their ordinary dictionary meaning.

B. Derivation

The section is derived from ORS 474.130.

C. Relationship to Existing Law

ORS 474.130 (1) declares that any place which is resorted to by narcotic addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same shall be deemed a common nuisance. Subsection (2) prohibits keeping or maintaining such a common nuisance. Subsection (3) prohibits frequenting any place known to be such a common nuisance. The statute would be amended to delete subsections (2) and (3). ORS 474.990 (3) provides a misdemeanor penalty for violation of ORS 474.130. The statute would be amended to delete subsection (3). (See § 312). The proposed section broadens the scope of existing law by including within its prohibition dangerous drug activity.

Section 278. Obtaining a drug unlawfully. (1) A person commits the crime of obtaining a drug unlawfully if he obtains or procures the administration of a narcotic or dangerous drug by:

(a) The forgery or alteration of a prescription or any official written order; or

(b) The concealment of a material fact; or

(c) The use or giving of a false name or a false address; or

(d) Falsely representing himself to be a person authorized by law to obtain narcotic or dangerous drugs; or

(e) Any other form of fraud, deceit or misrepresentation.

(2) Obtaining a drug unlawfully is a Class C felony.

COMMENTARY

A. Summary

Section 278 penalizes obtaining a narcotic or dangerous drug, or its administration, by various forms of fraud and misrepresentation.

B. Derivation

The section is based on ORS 474.170 (1) and (4), but includes dangerous drug transactions.

C. Relationship to Existing Law

Subsection (2) of ORS 474.170 states that "information communicated to a physician in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, shall not be deemed a privileged communication." That provision has been deleted as unnecessary since the physician-client privilege under ORS 44.040 (1) (d) is limited to civil proceedings. See *State v. Betts*, 235 Or 127, 384 P2d 198 (1963).

Section 279. Criminal possession of drugs; prima facie evidence. (1) Proof of unlawful manufacture, cultivation, transportation or possession of a narcotic or dangerous drug is prima facie evidence of knowledge of its character.

(2) Proof of possession of a narcotic drug not in the container in which it was originally delivered, sold or dispensed is prima facie evidence that the possession is unlawful.

(3) Proof of possession of a dangerous drug not in the container in which it was originally delivered, sold or dispensed, when a prescription is required under the provisions of ORS chapter 474 or 475, is prima facie evidence that the possession is unlawful unless the possessor also has in his possession a label prepared by the pharmacist for the drug dispensed.

COMMENTARY

A. Summary

Subsection (1) states that proof of unlawful manufacture, cultivation, transportation or possession of drugs is prima facie evidence that the defendant has knowledge of the character of the drug. Subsection (2) makes it prima facie unlawful to possess a narcotic drug other than in the container in which it was originally sold or dispensed. This presumption could, of course, be rebutted by evidence tending to prove that the drug was lawfully obtained. Subsection (3) makes it prima facie unlawful to possess a dangerous drug other than in the container in which it was originally sold or dispensed unless the possessor also has in his possession a label prepared by the pharmacist who dispensed the drug. The defendant could also rebut this presumption by showing lawful possession.

B. Derivation

Subsection (1) is derived from Michigan Revised Criminal Code § 6015. Subsection (2) is derived from ORS 474.110. Subsection (3) is derived from ORS 475.100 (4).

C. Relationship to Existing Law

Subsection (1) is new statutory language. 11 *Op Atty Gen* 689 (1924) states that proof of possession of opium is prima facie evidence that such possession is unauthorized. The opinion recognizes the rule of evidence that proof of possession may be the basis for a rebuttable presumption that the possessor had knowledge of the unlawful character of contraband.

Subsection (2) restates the crime defined in ORS 474.110 in terms of prima facie evidence. ORS 474.110, to be repealed, states that a narcotic drug may law-

fully be possessed only in its original container. The penalty provision, ORS 474.990, makes a violation of that section punishable by 10 years imprisonment or a $5,000 fine.

The Commission believes that public policy will best be served by framing subsection (3) in terms of prima facie evidence. Many instances of this conduct are lacking in criminal intent. The possessor should be given the opportunity to produce evidence tending to prove such possession is, in fact, lawful. Subsection (3) restates ORS 475.100 (4). A person may legally possess a dangerous drug not in its original container if he also possesses a label prepared by the issuing pharmacist. If the drug is not in its original container and the possessor does not have the required label, it is prima facie evidence that such possession is unlawful. ORS 475.100 would be amended to delete subsection (4). (See § 315).

In re Estate of Thornberg, 186 Or 570, 577, 208 P2d 349 (1949), states that:

> "Prima facie evidence is such evidence as in judgment of law is sufficient to establish the fact, and, if not refuted, remains sufficient for the purpose."

The constitutional validity of statutory presumptions in criminal cases has been the subject of two recent United States Supreme Court decisions. Early decisions articulated a number of different standards by which the validity of statutory presumptions were to be measured.

In *Tot v. U.S.*, 319 US 463 (1943), the Court singled out one test as controlling, holding that the "controlling" test for determining the validity of a statutory presumption was "that there be a rational connection between the facts proved and the fact presumed." At 467. In *Leary v. U.S.*, 89 S Ct 1532 (1969), a constitutional attack was directed at 21 USC 176a, which authorized a presumption of knowledge of foreign importation based upon the proven fact of possession of untaxed marihuana. The Court, in applying the *Tot* test, found § 176a to be unconstitutional.

Similar statutory presumptions were challenged in *Turner v. U.S.*, — US —, 6 Cr L 3043 (1970). In *Turner*, the defendant was convicted of two counts involving heroin and cocaine. The Supreme Court affirmed on the two counts involving heroin and reversed on the two counts involving cocaine. The Court held that there was a "rational connection" between the proven fact, possession of heroin, and the presumed fact, knowledge that the heroin had been illegally imported. It held that the presumed fact of knowledge arising from possession of cocaine was not constitutionally permissible.

Leary and *Turner* do not completely answer the question of the constitutionality of the prima facie rules of evidence proposed by § 279. Each subsection must be measured against the mandate that "there must be a rational connection between the facts proved and the fact presumed." *Tot v. U.S.*, supra, at 467. For an exhaustive survey of the subject, see 34 *U Chi L Rev* 141 (1966).

Section 280. Burden of proof on exemption from drug laws. In any prosecution under sections 273 to 278 of this Act, or in a forfeiture proceeding under section 281 of this Act, any exception, excuse, proviso or exemption contained in ORS chapter 474 or 475 shall be an affirmative defense.

COMMENTARY

The term "in any prosecution" is intended to include complaint, information, indictment and trial. The section shifts to the defendant the burden of proving a claimed exemption from the drug law under which he is being prosecuted or the forfeiture of conveyance proceeding to which he is subject. This allocation of proof is considered both necessary and equitable since facts giving rise to an exemption are peculiarly within the knowledge of the defendant. Section 280 is a restatement of ORS 474.180 which would be repealed.

Section 281. Seizure and forfeiture of conveyance used in violation of this Act. (1) A district attorney or peace officer charged with the enforcement of sections 273 to 278 of this Act, having personal knowledge or reasonable information that narcotic or dangerous drugs are being unlawfully transported or possessed in any boat, vehicle or other conveyance, may search the same without warrant and without an affidavit being filed. If narcotic or danger-

ous drugs are found in or upon such conveyance, he may seize them, arrest any person in charge of the conveyance and as soon as possible take the arrested person and the seized drugs before any court in the county in which the seizure is made. He shall also, without delay, make and file a complaint for any crime justified by the evidence obtained.

(2) Any boat, vehicle or other conveyance used by or with the knowledge of the owner, operator or person in charge thereof for the unlawful transportation, possession or concealment of narcotic or dangerous drugs shall be forfeited to the state in the same manner and with like effect as provided in ORS 471.660 and 471.665.

COMMENTARY

A. Summary

Section 281 restates existing law as reflected by ORS 475.120 which would be repealed. ORS 471.660 and 471.665, cited in subsection (2), cover the seizure and disposal of conveyances transporting liquor.

The issue of a warrantless search under ORS 475.120 is discussed by William F. Frye in chapter 20, *Oregon Criminal Law Handbook* (1969), wherein he observes that:

"In *State v. Ramon*, 248 Or 96, 432 P2d 507 (1967), the court sustained the search of a car seized off the street on the authority of ORS 475.120. This section provides that any district attorney or peace officer having personal knowledge or reasonable information that narcotic drugs are contained in 'any boat, vehicle or other conveyance, shall search the same without warrant and without any affidavit being filed.' In *State v. Evans*, 143 Or 603, 610, 22 P2d 496 (1933) (Case note in § 20.7), the court found authority in a similar statute (ORS 496.660) for the search and seizure of game from a hunting camp.

"Neither *Ramon* nor *Evans* dealt with the constitutionality of the respective statutes involved, but prior to *Evans* an article was published questioning the constitutionality of ORS 496.660. See *Skipworth, The Law of Search and Seizure*, 3 Or L Rev 179, 182 (1924). The court referred to this statute in *State v. Krogness*, 238 Or 135, 148, 388 P2d 120 (1964), saying, 'We leave open the question whether such a statute would be upheld if it were to be construed as permitting a search upon mere suspicion.' See also ORS 471.660-.665 (forfeitures for certain violations of liquor code). The U.S. Supreme Court in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 US 693, 14 Led2d 170 (1965), held that the constitutional exclusionary rule also applies in forfeiture proceedings.

"In his dissent to *State v. McCoy*, 249 Or 160, 437 P2d 734 (1968), O'Connell, J., used the term 'searches after seizure authorized by statute' and cited *Cooper v. California*, 386 US 58, 17 Led2d 730 (1967), as the case which recognized this as one of the exceptions to a warrantless search. He predicted, however, the eventual demise of the rule expressed in that case.

"Caveat: The Fourth Amendment is couched in terms of unreasonable 'searches *and* seizures,' while Art. I, sec. 9 speaks of 'unreasonable search, *or* seizure.' " At § 20.5.

The *Ramon* case has since been reversed on grounds not involving the constitutionality of ORS 475.120. By way of dicta, the opinion recognizes the continuing validity of automobile searches after seizure authorized by statute, citing *Carroll v. U.S.*, 267 US 132 (1925). *State v. Ramon*, supra, 423 F2d 248 (9th Cir 1970).

A recent discussion of the "emergency rule" (warrantless search of automobiles) is found in *State v. Keith*, Or App, 90 Or Adv Sh 531, — Or —, 465 P2d 724 (1970). wherein the court quotes without objection *Chimel v. California*, 395 US 752 (1969):

" 'Our holding today is of course entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants 'where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' " At 541.

The transportation of narcotic and dangerous drugs presents special problems that justify a search after seizure authorized by statute. Research discloses no instance in which such a statute has been declared unconstitutional. In view of the legislative intent expressed by ORS 475.120, authority to conduct a warrantless search of conveyances for narcotics or dangerous drugs on the basis of "personal knowledge or reasonable information" has been retained. It should be noted that this authority has been broadened to include search for "dangerous drugs." The present statute refers only to narcotic drugs.

Section 282. Acquittal or conviction under federal law as precluding state prosecution. No person shall be prosecuted under sections 273 to 278 of this Act if he has been acquitted or convicted under the federal narcotic laws of the same act or omission which it is alleged constitutes a violation of sections 273 to 278 of this Act.

COMMENTARY

The section restates ORS 474.210 which would be repealed.

MISCELLANEOUS OFFENSES AND PROVISIONS

ARTICLE 32. MISCELLANEOUS OFFENSES

Section 283. Offensive littering. (1) A person commits the crime of offensive littering if he creates an objectionable stench or degrades the beauty or appearance of property or detracts from the natural cleanliness or safety of property by intentionally:

(a) Discarding or depositing any rubbish, trash, garbage, debris or other refuse upon the land of another without permission of the owner, or upon any public way; or

(b) Draining, or causing or permitting to be drained, sewage or the drainage from a cesspool, septic tank or other contaminated source, upon the land of another without permission of the owner, or upon any public way; or

(c) Permitting any rubbish, trash, garbage, debris or other refuse to be thrown from a vehicle which he is operating; except that this subsection shall not apply to a person operating a vehicle transporting passengers for hire subject to regulation by the Interstate Commerce Commission or the Public Utility Commissioner or a person operating a school bus subject to ORS 485.010 to 485.060.

(2) As used in this section, "public way" includes, but is not limited to, roads, streets, alleys, lanes, trails, beaches, parks and all recreational facilities operated by the state, a county or a local municipality for use by the general public.

(3) Offensive littering is a Class C misdemeanor.

COMMENTARY

Section 283 restates the substance of ORS 164.440. A requirement that an article thrown from a vehicle be "likely to injure an animal, vehicle or person" has been deleted. The *mens rea* requirement that the vehicle operator "intentionally permit" the conduct vitiates the concept of vicarious liability and holds the operator criminally liable for his own wrongful act.

Subsection (3) of ORS 164.440 allows a defendant punished by fine to satisfy the sentence by clearing litter from a public way at the rate of $25 per day. The Commission does not intend by deletion of this

provision to reject the "litter patrol" concept. The sentencing judge may as a matter of discretion allow a convicted defendant to discharge a fine or discharge a condition of probation by clearing litter from public ways.

A similar statute which would be unaffected by this draft is ORS 449.107 prohibiting the deposit of trash on land within 100 yards of water or in any waters of this state. ORS 449.990 (2) imposes a $500 fine or 30 days imprisonment for violation of that statute. The "litter patrol" option is found in ORS 449.107 (4)(a).

Section 284. Creating a hazard. (1) A person commits the crime of creating a hazard if:

(a) He intentionally discards in a place where it may attract children a container with a compartment of more than one and one-half cubic feet capacity and a door or lid which locks or fastens automatically when closed and which cannot easily be opened from the inside; or

(b) Being the owner or otherwise having possession of property upon which there is a well, cistern, cesspool, excavation or other hole of a depth of four feet or more and a top width of 12 inches or more, he intentionally fails or refuses to cover or fence it with a suitable protective construction.

(2) Creating a hazard is a Class B misdemeanor.

COMMENTARY

Paragraph (a) of subsection (1) is comparable to ORS 166.560. The present statute is framed in terms of an "ice box, refrigerator or similar container." The proposed section covers any type of container large enough for a child to enter and which by its door construction creates a serious safety hazard.

Paragraph (b) is new. It requires that open excavations four feet or more in depth be protected by a suitable cover or fence. The section is intended to deter the intentional maintenance of certain "attractive nuisances."

Section 284 is derived in part from Michigan Revised Criminal Code § 7505 and New York Revised Penal Law § 270.10.

Section 285. Misrepresentation of age by a minor. (1) A person commits the crime of misrepresentation of age by a minor if being less than 21 years of age he knowingly represents himself to be of an age other than his true age with the intent of securing a right, benefit or privilege which by law is denied to persons less than 21 years of age.

(2) Misrepresentation of age by a minor is a Class C misdemeanor.

COMMENTARY

In view of other provisions in the proposed Code punishing persons who permit minors to engage in certain activities, *e.g.*, § 177, endangering the welfare of a minor, the Commission believes that it should be criminal for a minor to "knowingly" misrepresent his age in order to secure a benefit denied him by reason of his minority.

Section 285 requires that the minor act "knowingly" with the intent of securing a right, benefit or privilege denied by law to persons less than 21 years of age.

The section is derived from ORS 165.605. The Commission recommends repeal of ORS 165.605, while retaining certain other similar provisions in ORS regulatory chapters. (ORS 462.195 (3), 462.990 (1), pari-mutuel gambling; ORS 471.135, 471.143, 471.430, 471.990, 472.310 (10), 472.990, alcoholic beverages).

Section 286. Concealing birth of an infant. (1) A person commits the crime of concealing the birth of an infant if he conceals the corpse of a newborn child with intent to conceal the fact of its birth or to prevent a determination of whether it was born dead or alive.

(2) Concealing the birth of an infant is a Class A misdemeanor.

COMMENTARY

ORS 163.660 makes it a misdemeanor for an unmarried woman to conceal the death of any issue of her body so that it cannot be determined whether the child was born alive or dead, or was murdered. There are no appellate cases construing the statute. Presumably the statute was designed as a substitute for murder or manslaughter in instances in which the fact of childbirth is known, but decomposition of the fetus makes it impossible to establish beyond a reasonable doubt that the fetus had independent existence.

For the purposes of criminal homicide, the definition of "human being" (§ 87) is "a person who has been born and was alive at the time of the criminal act." There should therefore continue to be a residual crime where a birth is concealed and the concealment makes it impossible to determine if the child was born alive.

Section 286 removes two inconsistencies in the present law. ORS 163.660 limits the offense to any "unmarried woman." This limitation may be unjustifiably narrow, since married women who conceive and deliver may in certain circumstances be as strongly motivated to conceal the birth as single women. Morover, a limitation of coverage to the mother is unwise, since someone else may conceal the birth.

The culpability requirement is that the birth be concealed with the intent of either concealing the fact of birth or of preventing a determination that the infant was born dead or alive.

Section 287. Criminal defamation. (1) A person commits the crime of criminal defamation if with intent to defame another person he knowingly:

(a) Publishes or causes to be published false and scandalous durable matter concerning such other person; or

(b) Publishes or causes to be published false and scandalous matter concerning such other person by means of a radio or television broadcast.

(2) It shall be a defense to any prosecution under this section that:

(a) The matter published was true and was published with good motives and for justifiable ends; or

(b) The publication is protected by an absolute or qualified privilege.

(3) Criminal defamation is a Class A misdemeanor.

COMMENTARY

A. Summary

Libel is defined as "the malicious publication of durable defamation." The dissemination of defamatory remarks by radio or television, in the absence of a written script, has been held to be libel, although criminal liability should not attach to slander in the absence of clear statutory language. See Perkins, *Criminal Law* 411 (2d ed. 1969).

Section 287 requires an intent to defame another person, accompanied by the knowing publication of false and scandalous matter concerning such person. While malice has always been held to be an element of criminal libel, this concept is rejected in favor of a requirement of ordinary criminal intent.

The term "durable matter" in paragraph (a) of subsection (1) includes writings, photographs, paint-

ings, symbols or their equivalent. As distinguished by Perkins, "libel is the malicious publication of durable defamation; slander is the malicious publication of transitory defamation." Supra at 415. Paragraph (b) of subsection (1) prohibits a specialized form of transitory defamation.

Paragraph (a) of subsection (2) provides a defense involving three conjunctive elements: (1) truth of the publication, (2) publication with good motives, and (3) publication for justifiable ends. This defense recognizes the social interest in having the truth disclosed under certain circumstances.

Paragraph (b) of subsection (2) codifies the defenses of absolute and qualified privilege.

B. Derivation

The section is derived from ORS 163.410 and 163.420.

C. Relationship to Existing Law

Existing statutes would be affected as follows: ORS 132.670, requirements for criminal libel indictment, not affected; 163.410, libel and slander; penalty for publishing or broadcasting defamatory matter, repealed; 163.420, truth as defense in libel actions; presumption of malice, repealed; 163.430, defamation of insurers or fraternal benefit societies, repealed; 163.440, defamation of banks and trust companies, repealed; 163.450, defamation of savings and loan associations, repealed; 163.460, publishing of picture importing that person is convict or criminal, repealed; 260.370 and 260.380, political criminal libel, not affected.

State v. Putnam, 53 Or 266, 269, 100 P2d 2 (1909), held that "[I]n all criminal prosecutions for libel the truth may be given in evidence and is a complete defense if it further appears that the publication was under such circumstances as to justify the conclusion that it was made with good motives and for justifiable ends."

State v. Pierce, 140 Or 1, 12 P2d 320 (1932), held that in order for a publication to be criminal, it must be both false and scandalous. Since falsity is an element of the crime by statute, it is incumbent upon the state to prove it.

State v. Kerekes, 225 Or 342, 357 P2d 413, 358 P2d 523 (1961), held that in criminal libel cases, unless overcome by the evidence, truth is to be presumed and is a complete defense. In discussing privilege, the court held that the defense of qualified privilege is available in criminal libel prosecutions and that where privilege is an issue, malice is not presumed from a published falsehood, but must be proven. A plea of "not guilty" requires the state to prove all elements of the crime, including the abuse, if any, of the privilege. See also *State v. Hosmer*, 72 Or 57, 142 P 814 (1914); *State v. Mason*, 26 Or 273, 38 P 130 (1894); Or Const., § 9, Article IV.

The defense of qualified privilege in the "public interest" area has been increasingly liberalized in recent years. See *Garrison v. Louisiana*, 379 US 64, 85 S Ct 209 (1964); *Associated Press v. Walker* and *Curtis Publishing Co. v. Butts* (joint opinion), 388 US 130 (1968); *Time, Inc. v. Hill*, 385 US 374 (1968).

Section 288. Misconduct with emergency telephone calls. (1) A person commits the crime of misconduct with emergency telephone calls if:

(a) He intentionally refuses to relinquish immediately a party line or public pay telephone after being informed that it is needed for an emergency call; or

(b) He requests another to relinquish a party line or public pay telephone to place an emergency call with knowledge that no such emergency exists.

(2) As used in this section:

(a) "Party line" means a subscriber's line telephone circuit, consisting of two or more main telephone stations connected therewith, each station with a distinctive ring or telephone number.

(b) "Emergency call" means a telephone call to a police or fire department, or for medical aid or ambulance service, necessitated by a situation in which human life or property is in jeopardy and prompt summoning of aid is essential.

(3) Every telephone directory published after the effective date of this Act which is distributed to members of the general public in

this state shall contain in a prominent place a notice of the offense punishable by this section.

(4) Misconduct with emergency telephone calls is a Class B misdemeanor.

COMMENTARY

This section is based on Michigan Revised Criminal Code § 7515, New York Revised Penal Law § 270.15 and ORS 166.710 which would be repealed.

ARTICLE 33. MISCELLANEOUS PROVISIONS

Section 289. Detention and interrogation of persons suspected of theft committed in a store; reasonable cause. (1) Notwithstanding ORS 133.310, 133.350, 133.550 and subsection (2) of 133.560, a peace officer, merchant or merchant's employe who has reasonable cause for believing that a person has committed theft of property of a store or other mercantile establishment may detain and interrogate the person in regard thereto in a reasonable manner and for a reasonable time.

(2) If a peace officer, merchant or merchant's employe, with reasonable cause for believing that a person has committed theft of property of a store or other mercantile establishment, detains and interrogates the person in regard thereto, and the person thereafter brings against the peace officer, merchant or merchant's employe any civil or criminal action based upon the detention and interrogation, such reasonable cause shall be a defense to the action, if the detention and interrogation were done in a reasonable manner and for a reasonable time.

COMMENTARY

This section is a modified version of ORS 164.392 which pertains to reasonable detention and interrogation of shoplifting suspects. Under the proposed comprehensive definition of theft, the separate crime of shoplifting would be repealed; however, the Commission believes that the substance of ORS 164.392 should be retained. The new section would allow detention and interrogation of persons suspected of committing either first or second degree theft, as those crimes are defined in §§ 124 and 125 supra. The Commission recommends that the section be added to and made a part of ORS 133.210 to 133.380 (arrests).

Section 290. Evidence admissible to prove forgery. (1) In any prosecution for forgery of a bank bill or note or for criminal possession of a forged bank bill or note, the testimony of any person acquainted with the signature of the officer or agent authorized to sign the bills or notes of the bank of which such bill or note is alleged to be a forgery, or who has knowledge of the difference in appear-

ance of the true and forged bills or notes thereof, may be admitted to prove that it is a forgery.

(2) In any prosecution for forgery or for criminal possession of any note, certificate, bond, bill of credit, or other security or evidence of debt issued on behalf of the United States or any state or territory, the certificate duly sworn to of the Secretary of the Treasury, or of the Treasurer of the United States, or of the secretary or treasurer of any state or treasury on whose behalf the note, certificate, bond, bill of credit or other security or evidence of debt purports to have been issued, shall be admitted as evidence to prove that it is a forgery.

COMMENTARY

This section restates ORS 165.140 which would be repealed by the proposed Code. Editorial changes have been made to conform to the new language appearing in §§ 151-155 of the draft. The Commission recommends that § 290 be added to and made a part of ORS 136.510 to 136.560 (evidence in criminal trials).

Section 291. Jurisdiction of circuit courts over offenses against children under 16. Notwithstanding any city charter, ordinance or statute conferring jurisdiction in criminal cases on municipal courts or statutes conferring jurisdiction in criminal or quasi-criminal cases on justice courts and district courts, in all cases of offenses against children under 16 years of age, the circuit courts of this state shall have exclusive original trial jurisdiction except in those cases where the defendant is subject to the exclusive original jurisdiction of the juvenile court or domestic relations court.

COMMENTARY

This section reenacts ORS 167.055 which would be repealed. The Commission recommends that § 291 be added to and made a part of ORS 3.011 to 3.570 (circuit courts).

SPECIAL NOTE ON §§ 292 to 305. The proposed Code would repeal all sections in ORS chapters 161 to 168. In many cases comparable provisions of repealed statutes are part of the draft articles. In other instances the Commission recommends the outright repeal of certain statutes because they are obsolete, unnecessary or redundant. (See commentary to previous sections). A third category consists of statutes that would be repealed merely to remove them from the basic substantive criminal code. The Commission recommends that this type of statute be reenacted by the Legislature and compiled in appropriate chapters of ORS outside the Code proper. (See commentary, Article 32). Sections 292 to 305, which follow, are for the purpose of picking up this third category of statutes. In the interest of printing economy only the captions of these sections and explanatory commentary appear below. The sections will, of course, be set forth completely in the printed bill. Sections 289-291, supra, also fall into the same category but are set out fully because they are directly related to substantive sections of the draft.

Section 292. Employment of minors in place of public entertainment.—

Section 293. Employment of minors in place of public entertainment; exceptions.—

COMMENTARY TO SECTIONS 292 AND 293

These sections will restate the provisions of ORS 167.235 and 167.237 which would be repealed. The Commission recommends that the sections be added to and made a part of ORS chapter 653, employment of minors. (See related sections and commentary in Article 20).

Section 294. Records required by law to be in English.—

COMMENTARY

This section would reenact, with minor editorial changes, ORS 162.610. The Commission recommends that this section be added to and made a part of chapter 192, public records and reports.

Section 295. Transportation of coniferous trees without bill of sale prohibited.—

Section 296. Investigations to prevent violations of section 295.—

Section 297. Arrest; trial; summons.—

Section 298. Seizure of trees transported in violation of section 295.—

COMMENTARY TO SECTIONS 295 TO 298

These sections would restate, with minor language changes, the provisions of ORS 164.362 to 164.368. The Commission recommends that the sections be added to and made a part of chapter 527, forest conservation.

Section 299. Tampering with brands on hides of cattle; wrongfully selling or destroying hides.—

COMMENTARY

This section would restate the provisions of ORS 165.410. The Commission recommends that it be added to and made a part of chapter 604, brands and marks.

Section 300. Misrepresentation of pedigree; mutilation of certificate or proof of pedigree.—

COMMENTARY

This section would restate ORS 165.415. The Commission recommends that it be added to and made a part of ORS chapter 605, breeding of animals.

Section 301. Sponsoring or participating in prize fight.—

COMMENTARY

This section would restate, with minor changes, ORS 167.715. The Commission recommends that it be made a part of chapter 463, boxing and wrestling.

Section 302. Definitions for sections 302 to 305.—

Section 303. Proclamation of emergency period by Governor.—

Section 304. Exclusion from public property; penalty.—

Section 305. Review of exclusion order.—

COMMENTARY TO SECTIONS 302 TO 305

These sections would reenact, with editorial changes, ORS 164.485 to 164.505. The Commission recommends that these sections be added to and made a part of ORS 145.010 to 145.060, prevention of crime by public officers.

Section 306. ORS 131 is amended to read:

131.390. **Where hindering prosecution is committed in county other than that of principal crime.** In the case of [an accessory after the fact in the commission of a crime] *a person charged with the crime of hindering prosecution,* the action must be commenced and tried in the county where the crime of [the accessory] *hindering prosecution* was committed, notwithstanding the principal crime was committed in another county.

COMMENTARY

The amendment to ORS 131.390 is merely editorial to substitute the new term "hindering prosecution" for "accessory after the fact." (See § 207 supra.)

Section 307. ORS 137.010 is amended to read:

137.010. **Duty of court to pass sentence in accordance with this section.** *(1)* The statutes that [declare certain crimes punishable as therein mentioned] *define offenses* impose a duty upon the court [authorized] *having jurisdiction* to pass sentence [, to determine and impose the punishment prescribed and, whenever such punishment is left undetermined between certain limits or kinds, to determine the punishment to be inflicted] *in accordance with this section unless otherwise specifically provided by law.*

(2) When a person is convicted of an offense, if the court is of the opinion that it is in the best interests of the public as well as of the defendant, the court may suspend the imposition or execution of sentence for any period of not more than five years.

(3) If the court suspends the imposition or execution of sentence,

the court may also place the defendant on probation for a definite or indefinite period of not less than one nor more than five years.

(4) The power of the judge of any court to suspend execution of sentence or to grant probation to any person convicted of a crime shall continue until the person is delivered to the custody of the Corrections Division.

(5) When a person is convicted of an offense and the court does not suspend the imposition or execution of sentence or when a suspended sentence or probation is revoked, the court shall impose the following sentence:

(a) A term of imprisonment; or

(b) A fine; or

(c) Both imprisonment and a fine; or

(d) Discharge of the defendant.

(6) This section does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office or impose any other civil penalty. An order exercising that authority may be included as part of the judgment of conviction.

COMMENTARY

Section 307 deletes language in ORS 137.010 that is inconsistent with the proposed grading and sentencing scheme and adds new provisions relating to the various options that are available as authorized dispositions that the court can employ for persons convicted of offenses. (See Articles 7, 8, 9).

Subsection (1) requires the court to pass sentence in accordance with the provisions of this section. The statute defining the offense would not prescribe a specific penalty for the particular single offense (except for some offenses that will continue to lie outside the criminal code) but would be graded into one of the designated categories of offenses, each of which would carry its own range of penalties.

Subsections (2), (3) and (4) authorize the court to suspend the imposition or execution of sentence and to grant probation.

Subsection (5) itemizes the different sentencing options that will be available to the judge. All of these exist under present law, except for (d) which would allow the court to discharge the defendant. The criteria for use of this sentencing tool is set forth in § 84 supra.

Subsection (6) makes it clear that civil, administrative and quasi-criminal sanctions provided elsewhere in ORS continue fully in effect. If the statute creating the penalty or sanction authorizes an adjudication ancillary to the criminal prosecution, an order exercising that authority may be included by the court as part of the judgment of conviction in the criminal case.

Subsections (2), (3) and (4) are based on ORS 137.510 which would be repealed. Subsections (5) and (6) are based on Model Penal Code § 6.02 and Michigan Revised Criminal Code § 1210.

The draft does not provide for "conditional discharge" which appears in the New York and Michigan codes because it is, in effect, a suspended sentence without probation, which presently is authorized under existing law. The distinction between a "conditional discharge" as opposed to a "suspended sentence" appears to be mainly one of semantics although the former can be said to be a type of sentence in itself.

Section 308. ORS 137.075 is amended to read:

137.075. **Report to court and to convicted person.** (1) Within 60 days after completing the diagnostic examination, the Administrator of the Corrections Division shall file with the court a written

report of findings and conclusions relative to the examination. [The immunities granted under ORS 137.115 are applicable to the examination and report under this section and ORS 137.072, 137.124, 137.320, 423.020 and 423.090.]

(2) A certified copy of the report shall be sent by registered mail by the clerk of the court to the convicted person, his counsel and the district attorney.

(3) No statement made by a defendant in the course of an examination under this section or ORS 137.072, 137.124, 137.320, 423.020 and 423.090 shall be used against him in any civil proceeding or in any other criminal proceeding.

(4) No person shall be examined in any civil or any other criminal proceeding as to any statement made by the defendant in the course of the examination without the consent of the defendant.

(5) No statement contained in any report made under this section shall be the subject of any civil suit or action.

COMMENTARY

This section amends ORS 137.075 which deals with diagnostic examinations of criminal defendants. The statute presently incorporates by reference certain immunities that are set forth in ORS 137.115, one of the sex offender sentencing statutes, which would be repealed by § 85. The amendments proposed by § 308 would retain the immunity provisions now found in ORS 137.115 by making them a part of 137.075 itself.

Section 309. ORS 137.120 is amended to read:

137.120. **Indeterminate sentence.** (1) Each minimum period of imprisonment in the penitentiary which prior to June 14, 1939, was provided by law for the punishment of felonies, and each such minimum period of imprisonment for felonies, hereby is abolished.

(2) Whenever any person is convicted of a felony, the court shall, unless it imposes other than a sentence to serve a term *of imprisonment* in the [penitentiary] *custody of the Corrections Division,* sentence such person to imprisonment [in the penitentiary] for an indeterminate period of time, but stating and fixing in the judgment and sentence a maximum [penitentiary] term for the crime, which shall not exceed the maximum term of imprisonment provided by law therefor; and judgment shall be given accordingly. Such a sentence shall be known as an indeterminate sentence.

(3) This section does not affect the indictment, prosecution, trial, verdict, judgment or punishment of any felony committed before June 14, 1939, and all laws now and before that date in effect relating to such a felony are continued in full force and effect as to such a felony.

COMMENTARY

This section merely amends ORS 137.120 to make the language consistent with ORS 137.124 (see § 310 infra). The concept of a judge-fixed maximum sentence is not disturbed.

Section 310. ORS 137.124 is amended to read:

137.124. **Commitment of defendant to Corrections Division; place of confinement; transfer of inmates.** (1) If the court imposes a sentence of imprisonment upon conviction of a felony, it shall not designate the penal or correctional institution in which the defendant is to be confined but shall commit the defendant to the legal and physical custody of the Corrections Division.

[(2) Upon commitment to the Corrections Division all convicted male persons under the age of 26 who have not been convicted of the crime of murder or rape where actual force is involved or treason, or who have not served a previous term of imprisonment in an adult penal institution, shall be assigned initially to the Oregon State Correctional Institution. All other convicted male felons shall be assigned initially to the Oregon State Penitentiary.]

[(3)] *(2)* After assuming custody of the convicted male person [and notwithstanding the initial assignment pursuant to subsection (2) of this section,] the Corrections Division may transfer inmates from one penal or correctional institution to another such institution for the purposes of diagnosis and study, rehabilitation and treatment, as best seems to fit the needs of the inmate and for the protection and welfare of the community and the inmate.

(3) If the court imposes a sentence of imprisonment upon conviction of a misdemeanor, it shall commit the defendant to the custody of the executive head of the penal or correctional institution for the imprisonment of misdemeanants designated in the judgment.

COMMENTARY

ORS 137.124 is amended to accomplish three things:

(1) To remove any restrictions that now limit the discretion of the Corrections Division in making the initial assignment of inmates to either the penitentiary or the Oregon State Correctional Institution.

(2) To provide the courts with legislative direction regarding imprisonment of misdemeanants which, under the proposed new Code, will not be set out in the statute defining each particular crime.

(3) To provide flexibility in the statute by not limiting confinement of misdemeanants to a county jail but to allow for the use of a "correctional institution" (other than one for felons) if such facilities become available in the future.

Section 311. ORS 474.100 is amended to read:

474.100. **Labels affixed to containers of drugs.** (1) Whenever a manufacturer sells or dispenses a narcotic drug, and whenever a wholesaler sells or dispenses a narcotic drug in a package prepared by him, he shall affix securely to each package in which that drug is contained a label showing in legible English the name and address of the vendor and the quantity, kind and form of narcotic drug contained therein. [No person, except an apothecary for the purpose of filling a prescription under this chapter, shall alter, deface or remove any label so affixed.]

(2) Whenever an apothecary sells or dispenses any narcotic drug

on a prescription issued by a physician, dentist or veterinarian, he shall affix to the container in which such drug is sold or dispensed, a label showing his name, address and registry number, or the name, address and registry number of the apothecary for whom he is lawfully acting; the name and address of the patient or, if the patient is an animal, the name and address of the owner of the animal and the species of the animal; the name, address and registry number of the physician, dentist or veterinarian by whom the prescription was written; and such directions as may be stated on the prescription. [No person shall alter, deface or remove any label so affixed so long as any of the original contents remain.]

COMMENTARY

This section deletes language that will be unnecessary if § 275, tampering with drug records, is adopted.

Section 312. ORS 474.130 is amended to read:

474.130. **Place resorted to by drug addicts declared to be nuisance.** [(1)] Any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same, shall be deemed a common nuisance and shall be abated in the manner provided in ORS 471.630 to 471.655.

[(2) No person shall keep or maintain such a common nuisance.]

[(3) No person shall frequent any place if he knows it to be a place of the type described in subsection (1) of this section.]

COMMENTARY

Section 312 amends ORS 474.130 to delete provisions that are covered under § 277 of the proposed Code.

Section 313. ORS 474.990 is amended to read:

474.990. **Penalties.** [(1)] Except as otherwise specifically provided, [any person violating any provision of this chapter, upon conviction, shall be punished by a fine not exceeding $5,000, or by imprisonment in the state penitentiary for not exceeding 10 years, or both.] *violation of any of the provisions of this chapter is a Class C felony.*

[(2) Any person violating subsection (1) of ORS 474.020 by manufacturing, possessing, having under his control, selling, prescribing, administering, dispensing or compounding the narcotic drug marihuana shall be punished, upon conviction, by a fine of not more than $5,000, or by imprisonment in the county jail for a period not exceeding one year, or both, or by imprisonment in the

penitentiary for not exceeding 10 years, or by a fine of not more than $5,000, or both.]

[(3) Violation of subsection (2) or (3) of ORS 474.130 is a misdemeanor.]

COMMENTARY

This section deletes penalty provisions that will be unnecessary if § 274, criminal activity in drugs, is adopted. It also adopts the proposed new felony classification of Article 7.

Section 314.. ORS 475.010 is amended to read:

475.010. **Definitions for ORS 475.010 to 475.735.** As used in [ORS 475.010 to 475.705] *this chapter,* unless the context requires otherwise:

(1) "Dangerous drug" means: [a drug designated by the Drug Advisory Council as a dangerous drug and included in published regulations of the State Board of Pharmacy under ORS 689.620.]

(a) Amobarbital, secobarbital, pentobarbital, phenobarbital, acid diethylbarbituric, amphetamine, dextroamphetamine, mephentermine, methamphetamine, phenmetrazine, methylphenidate hydrochloride, glutethimide, methyprylon, meprobamate, chlordiazepoxide HCL, diazepam, oxazepam, chloral hydrate, paraldehyde, ethchlorvynol and ethinamate, any salts, derivatives or compounds of the foregoing substances, any preparations or compound containing any of the foregoing substances or their salts, derivatives or compounds or any registered trademarked or copyrighted preparation or compound registered in the United States Patent Office containing any of the foregoing substances; and

(b) All products containing the substances lysergic acid diethylamide, psilocybin, dimethyltryptamine, methyltryptamine, peyote and mescaline; and

(c) Any other drug designated by the Drug Advisory Council as a dangerous drug and included in published regulations of the State Board of Pharmacy under ORS 689.620.

(2) "Licensed medical practitioner," "pharmacist," "pharmacy" and "prescription" have the meaning provided for those terms in ORS 689.010.

(3) "Narcotic drugs" and "veterinarian" have the meaning provided for those terms in ORS 474.010.

COMMENTARY

Section 314 amends ORS 475.010 to adopt the list of dangerous drugs promulgated by the Drug Advisory Council (See § 273 supra).

Section 315. ORS 475.100 is amended to read:

475.100. **Sale or possession of dangerous drugs without prescription prohibited; preservation and inspection of prescriptions.** (1) Except as provided in ORS 475.110, no person shall sell, give away, barter, distribute, buy, receive or possess a dangerous drug except:

(a) Upon a written prescription of a practitioner licensed by law to administer such drug; or

(b) Upon an oral prescription of a practitioner licensed to administer such drug which is reduced promptly to writing and filed by the pharmacist; or

(c) By refilling the written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist; or

(d) Without prescription if such drug is combined with one or more additional ingredients that prevent ingestion of an amount of such drug sufficient to cause a stimulating or hypnotic effect upon the central nervous system and if for this reason the combination may be sold without prescription under federal law.

(2) Every prescription or order required by subsection (1) of this section shall be at all times open to inspection by duly authorized officers of the law and shall be preserved for at least three years from the date of filing thereof.

[(3) No person shall wilfully make any false statement in any prescription, order, report or record required by this section; or, by fraud, deceit, misrepresentation or subterfuge, obtain or attempt to obtain any drug or the administration of any drug included under subsection (1) of this section.]

[(4) When a person possesses a drug not in the container in which it was dispensed to him and a prescription for the drug is required under subsection (1) of this section, such possession is prima facie unlawful under that subsection if he does not also have in his possession a label prepared by the pharmacist for the drug dispensed.]

COMMENTARY

Section 315 amends ORS 475.100 to delete language that will be replaced by § 278, obtaining a drug unlawfully.

Section 316. ORS 758.060 is amended to read:

758.060. **Wrongful alteration of telegraphic message.** (1) No officer, agent, operator, clerk or employe of any telegraphic company, or any other person, shall wilfully [:]

[(a) Divulge to any other person than the party from whom it was received, or to whom it is addressed, or his agent or attorney, any message received, sent or intended to be sent over any telegraph

line, or the contents, substance, purport, effect or meaning of such message, or any part thereof; or]

[(b)] Alter any such message by adding thereto or omitting therefrom any words or figures, so as to materially change the sense, purport or meaning of such message, to the injury of the person sending or desiring to send the message, or to whom it was directed.

(2) [However,] when numerals or words of number occur in any message, the operator or clerk sending or receiving may express the same in words or figures, or in both words and figures, and such fact shall not be deemed an alteration of the message, nor in any manner affect its genuiness, force, or validity.

(3) Any person violating this section, in addition to the penalty prescribed in ORS 758.990, is liable in a civil suit for all damages occasioned thereby.

COMMENTARY

This section amends ORS 758.060 to delete matter that is covered in the draft by § 234, tampering with private communications.

SPECIAL NOTE ON AMENDED STATUTES: Sections 306 to 316 amend the substance of existing statutes located outside the Code to make them compatible with the new sections. The printed bill will contain numerous "housekeeping" amendments to statutes outside the Code to delete or change language or cross references that would become obsolete under the proposed revision. In the interest of printing economy these subordinate amendments are not included in this draft.

Section 317. Captions and headings. The part, article and section headings or captions used in this Act are used only for convenience in locating or explaining provisions of this Act and are not intended is be part of the statutory law of the State of Oregon.

Section 318. Repealed sections. ORS 133.230, 133.280, 133.370, 133.380, 136.150, 136.160, 136.390, 136.400, 136.410, 136.560, 136.730, 137.111, 137.112, 137.113, 137.114, 137.115, 137.117, 137.119, 137.150, 137.200, 137.205, 137.340, 137.510, 141.720, 141.730, 141.740, 144.230, 145.030, 145.110, 161.010, 161.020, 161.030, 161.040, 161.050, 161.060, 161.070, 161.075, 161.080, 161.090, 161.100, 161.110, 161.120, 161.210, 161.220, 161.230, 161.240, 161.250, 161.310, 161.320, 161.330, 162.010, 162.020, 162.030, 162.040, 162.110, 162.120, 162.130, 162.140, 162.150, 162.160, 162.210, 162.220, 162.230, 162.240, 162.310, 162.320, 162.322, 162.324, 162.326, 162.330, 162.340, 162.380, 162.400, 162.430, 162.440, 162.450, 162.510, 162.520, 162.530, 162.540, 162.550, 162.560, 162.570, 162.580, 162.590, 162.600, 162.610, 162.620, 162.630, 162.640, 162.650, 162.665, 162.660, 162.670, 162.680, 162.690, 162.700, 162.710, 162.720, 162.730, 162.740, 163.010, 162.020, 163.040, 163.050, 163.070, 163.080, 163.091, 163.100, 163.110, 163.120, 163.130, 163.140, 163.210, 163.220, 163.230, 163.240, 163.250, 163.255, 163.260, 163.270, 163.280, 163.290, 163.300, 163.330, 163.340, 163.410, 163.420, 163.430, 163.440, 163.450, 163.460, 163.470, 163.480, 163.490, 163.500, 163.610, 163.620, 163.630, 163.635, 163.640, 163.650, 163.660, 164.010, 164.020, 164.030, 164.040,

164.070, 164.080, 164.090, 164.100, 164.110, 164.210, 164.220, 164.230, 164.240, 164.250, 164.260, 164.310, 164.320, 164.330, 164.340, 164.350, 164.355, 164.360, 164.362, 164.364, 164.366, 164.368, 164.370, 164.380, 164.385, 164.390, 164.392, 164.410, 164.420, 164.430, 164.440, 164.450, 164.452, 164.455, 164.460, 164.462, 164.465, 164.470, 164.480, 164.485, 164.490, 164.500, 164.505, 164.510, 164.520, 164.530, 164.540, 164.550, 164.555, 164.560, 164.570, 164.580, 164.590, 164.610, 164.620, 164.630, 164.635, 164.640, 164.650, 164.660, 164.670, 164.680, 164.690, 164.700, 164.710, 164.720, 164.730, 164.740, 164.750, 164.760, 164.770, 164.780, 164.810, 164.820, 164.830, 164.840, 164.850, 164.860, 164.871, 164.880, 164.890, 164.900, 165.005, 165.010, 165.012, 165.015, 165.020, 165.025, 165.030, 165.035, 165.040, 165.045, 165.105, 165.110, 165.115, 165.120, 165.125, 165.130, 165.135, 165.140, 165.145, 165.150, 165.155, 165.160, 165.165, 165.170, 165.175, 165.180, 165.185, 165.190, 165.205, 165.210, 165.215, 165.220, 165.225, 165.230, 165.235, 165.240, 165.245, 165.250, 165.255, 165.260, 165.265, 165.270, 165.280, 165.285, 165.290, 165.295, 165.300, 165.305, 165.310, 165.315, 165.320, 165.325, 165.330, 165.335, 165.340, 165.345, 165.350, 165.352, 165.355, 165.405, 165.410, 165.415, 165.420, 165.425, 165.430, 165.435, 165.440, 165.445, 165.450, 165.455, 165.460, 165.465, 165.505, 165.510, 165.515, 165.520, 165.525, 165.530, 165.532, 165.535, 165.540, 165.545, 165.550, 165.605, 165.610, 165.615, 165.620, 165.625, 165.655, 165.660, 165.665, 165.670, 165.675, 165.680, 166.010, 166.020, 166.030, 166.040, 166.050, 166.060, 166.110, 166.120, 166.130, 166.140, 166.150, 166.160, 166.560, 166.610, 166.630, 166.640, 166.650, 166.710, 167.005, 167.010, 167.015, 167.020, 167.025, 167.030, 167.035, 167.040, 167.045, 167.050, 167.055, 167.105, 167.110, 167.115, 167.120, 167.125, 167.130, 167.135, 167.140, 167.145, 167.151, 167.152, 167.157, 167.170, 167.205, 167.210, 167.215, 167.220, 167.225, 167.227, 167.230, 167.235, 167.237, 167.240, 167.245, 167.250, 167.295, 167.300, 167.405, 167.410, 167.415, 167.420, 167.425, 167.430, 167.505, 167.510, 167.515, 167.520, 167.525, 167.530, 167.535, 167.540, 167.545, 167.550, 167.555, 167.605, 167.610, 167.615, 167.620, 167.625, 167.630, 167.635, 167.640, 167.645, 167.705, 167.710, 167.715, 167.720, 167.725, 167.730, 167.735, 167.740, 167.745, 168.015, 168.025, 168.050, 168.055, 168.065, 168.075, 168.080, 168.085, 168.090, 169.130, 169.160, 181.420, 191.050, 191.990, 260.780, 260.790, 288.991, 295.991, 323.992, 357.965, 376.140, 390.665, 407.060, 407.430, 407.990, 432.160, 433.645, 474.020, 474.110, 474.170, 474.180, 474.210, 475.070, 475.090, 475.120, 475.625, 475.635, 476.740, 476.750, 477.715, 477.730, 496.685, 517.450, 561.210, 610.300, 618.290, 657.305, 662.990, 683.300, 722.235, 725.200 and 726.140 are repealed.

Section 319. Effective date. This Act takes effect on _____.