See: Commission Minutes
12/13/69, p. 33, Vol. IX
Tapes #41 and 42

CRIMINAL LAW REVISION COMMISSION
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ARTICLE 6. INCHOATE CRIMES

Preliminary Draft No. 2; December 1969

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Subcommittee No. 3

ARTICLE 6. INCHOATE CRIMES

Preliminary Draft No. 2; December 1969

Section 1. Attempt; definition. 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.

COMMENTARY - ATTEMPT; DEFINITION

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.

The Illinois Code reflects the traditional approach on intent. Illinois requires a "specific intent" to commit a crime. (See the section in the appendix.) 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, Tentative Draft No. 10 (May 1960). The draftsmen of the tentative version of the new California Code agree with the MPC 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 (Section 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."

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 section 5.01 (2), the MPC states that to be a substantial step the act must be "strongly corroborative of the actor's criminal purpose." The MPC then proceeds to list the kinds of acts which could be held to be substantial in light of the "strongly corroborative" provision. Your reporter agrees with the comments in the draft of the California attempt section where it is said 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 MPC 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, The Criminal Law, c 6, sec 2 (1957), 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 section 13 (1) of this Article.

B. Derivation

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

C. Relationship to Existing Law

ORS 161.090 deals generally with the crime of attempt but is very sketchy on the elements of the offense. The section reads in its relevant part:

"Any person who attempts to commit a crime, and in the attempt does any act toward the commission of the crime but fails or is prevented or intercepted in the perpetration thereof, shall be punished...."

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 farther 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 13 (3), infra, deals with the situation where the state seeks conviction on both the inchoate and the principal offense by prohibiting conviction for both.

Although no statute exists properly defining attempt generally, a number of sections in the Oregon Revised Statutes deal with attempts to commit particular crimes. The provisions on attempt in these sections would be superseded by the general attempt provision in the draft section. (For attempt provisions relating to specific crimes, see the following ORS sections: 162.340, aiding any person to escape or attempt to escape from a state penal institution; 163.300, an attempt to kill or injure another by poison or other means; 164.090, attempt to burn property; 164.720, attempt to injure person or property by use of explosives; 165.045, attempt to use stink bombs in public places; 166.220, attempt to commit a felony while armed with certain concealable weapons; 167.720, attempt to bribe an athlete; 167.730, attempt to bribe athletic coaches or game officials).

Although Oregon has only a sketchy general attempt statute in its criminal laws, there is a provision relating to military justice in ORS 398.310 which is formulated in more useful terms. ORS 398.310 reads as follows:

> "(1) An act done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending even though failing to effect its commission, is an attempt to commit that offense.
>
> "(2) (Punishment provisions, omitted here.)

"(3) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated."

This attempt section in the military justice chapter is fairly close in language and concept to the proposed draft section.

TEXT OF MODEL PENAL CODE

Section 5.01. Criminal Attempt.

(1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) Conduct Which May Be Held Substantial Step Under Subsection (1)(c). Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(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.

# # #

TEXT OF ILLINOIS CRIMINAL CODE OF 1961

§ 8—4. Attempt

(a) Elements of the Offense.

A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense.

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TEXT OF CALIFORNIA TENTATIVE DRAFT

Section 800. Attempt: Definition.

A person is guilty of an attempt to commit a crime when, with intent to engage in conduct which would constitute such crime were the circumstances as he believes them to be, he performs or omits to perform an act which constitutes a substantial step toward commission of the crime.

# # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 110.00 Attempt to commit a crime

A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime. L.1965, c. 1030, eff. Sept. 1, 1967.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Attempt]

Sec. 1001. (1) A person commits a crime of attempt if with the intent to commit a specific offense he does any act towards the commission of such offense.

# # #

Section 2. 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 - ATTEMPT; IMPOSSIBILITY NOT A DEFENSE

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 MPC 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." MPC Comment to §5.01, Tent. Draft No. 10, 31 (May 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 kind 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 MPC 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." MPC Comment to §5.01, Tent. Draft No. 10, 31-2 (May 1960).

B. Derivation

The language chosen is similar to that of the Illinois provision on impossibility. The MPC 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 MPC is retained. Michigan and California have pursued the same course in their drafts.

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.

TEXT OF MODEL PENAL CODE

Section 5.01. Criminal Attempt.

(1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

# # #

TEXT OF ILLINOIS CRIMINAL CODE OF 1961

Section 8-4 Attempt.

(b) Impossibility.

It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.

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TEXT OF CALIFORNIA TENTATIVE DRAFT

Section 801. Attempt: Impossibility.

In a prosecution for an attempt, it is no defense that it was impossible to commit the crime.

# # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 110.10 Attempt to commit a crime; no defense

If the conduct in which a person engages otherwise constitutes an attempt to commit a crime pursuant to section 110.00, it is no defense to a prosecution for such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission, if such crime could have been committed had the attendant circumstances been as such person believed them to be. L.1965, c. 1030, eff. Sept. 1, 1967.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

Section 1001. Attempt.

(2) It is no defense to a prosecution under this section that the offense charged to have been attempted was, under the actual attendant circumstances, factually or legally impossible of commission, provided it could have been committed had the attendant circumstances been as the actor believed them to be.

# # #

Section 3. Attempt; renunciation a defense. (1) A person is not liable under section 1 of this Article 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 - ATTEMPT; RENUNCIATION A DEFENSE

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 section 1, is a defense. According to Perkins this is contrary to the weight of authority.

> "The accepted view has 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, The Criminal Law 511 (1957).

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 MPC 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 completed effort (e.g., firing at the intended victim and missing); all he can do is desist from making a second attempt." MPC Tent. Draft No. 10, p. 71-3 (May 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 MPC 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 section 1, 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.

If this treatment of the defense is adopted, it should be recognized as very unusual. It is anticipated that in only the rarest situations in the new Oregon code will the burden of preponderation be placed on the defendant. The MPC is very reluctant to approve the shift of the burden to the accused in any situation and is even very sparing with the requirement of affirmative defenses. Still, it is submitted that because the provision for a renunciation defense is such a new concept virtually unsupported in existing case law the provision of this section imposing the greater burden on the accused seems warranted.

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 MPC 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. As discussed in the summary above, the weight of authority elsewhere is that the defense of renunciation is not available, but the establishment of the defense, although an innovation, 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 section 3 of that Article.)

TEXT OF MODEL PENAL CODE

Section 5.01. Criminal Attempt.

(4) Renunciation of Criminal Purpose. When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

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TEXT OF CALIFORNIA TENTATIVE DRAFT

Section 802. Attempt: Renunciation.

In a prosecution for an attempt, it is a defense that the person avoided its commission, either by preventing it or by abandoning his efforts to commit it, under circumstances manifesting a voluntary and complete renunciation of his criminal intent. If the act or omission involved in the attempt creates a danger to the person or property of another, renunciation is not a defense unless it is accompanied by a successful effort to abate the danger.

# # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 35.45 Renunciation

3. In any prosecution pursuant to section 110.00 for an attempt to commit a crime, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant avoided the commission of the crime attempted by abandoning his criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

Section 1001 Attempt.

(3) A person shall not be liable under this section if, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, he avoided the commission of the offense attempted by abandoning his criminal effort and, if mere abandonment is insufficient to accomplish this avoidance, by taking further and affirmative steps that prevented the commission thereof. The burden of injecting this issue is on the defendant, but this does not shift the burden of proof.

# # #

Section 4. Solicitation; definition. A person commits the crime of solicitation if with the intent of causing another to engage in specific conduct constituting a crime [felony] or an attempt to commit such crime [felony] he commands or solicits such other person to engage in that conduct.

COMMENTARY - SOLICITATION; DEFINITION

A. Summary

The need for a general criminal solicitation statute is well stated in the MPC 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." MPC Comment to sec. 5.02, Tent. Draft No. 10, 82 (May 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 MPC sec. 2.06 on complicity.) It should be remembered, however, that section 13 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 section 13, 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 section 2 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 sections 1 and 2, B nevertheless is guilty of the crime of attempt to receive stolen property; under the rules of complicity in MPC section 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 section 13, 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 section 1010 of 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 sec. 1010, Michigan Revised Criminal Code, p 93 (Sept. 1967).

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 MPC 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, 87-8 (May 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." Mich Rev Crim Code, Comment to §1010, p 94 (Sept 1967).

The section as originally drafted applied to all crimes--misdemeanors as well as felonies. Some difference of opinion exists as to whether it should be a crime to solicit the commission of a misdemeanor. The Michigan comment is helpful here:

> "In large part, the opposition to extension of the offense to the solicitation of all criminal acts has been plagued by its possible application to crimes which themselves are either generally not enforced or are considered 'trivial'. As pointed out in the Model Penal Code commentary, courts have been particularly concerned about application of the crime of solicitation to adultery, fornication, incest and liquor and revenue violations. With respect to adultery it has been urged in strong terms that its solicitation ought not to be criminal whether adultery is a felony or a misdemeanor. It is feared that many innocent gestures, remarks and innuendoes will be interpreted as invitations to commit adultery; to prevent the use of such expressions as the basis of blackmail or oppression, solicitation of adultery should be given judicial immunity [Model Penal Code, supra at 83]. This fear, of course, would not be relevant in Michigan since adultery and fornication are not crimes under chapter 70." Mich Rev Crim Code, Comment to sec 1010 p 95 (Sept 1967).

(The MPC also deletes adultery and fornication from the list of punishable crimes. This would appear to be the best policy for Oregon. See MPC Comment, Tent. Draft No. 4, pp 204-10 (April 25, 1955) - Reporter.)

> "Insofar as other misdemeanor offenses are concerned, there seems to be no justification to exclude liability for solicitation while upholding liability for solo attempts or attempts to aid and abet. Solicitation is, in one respect, more dangerous than a direct attempt by the individual, since it may give rise to cooperation among criminals that is in itself a special hazard. Solicitation may, indeed, be thought of as an attempt to conspire. 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. Moreover, the solicitor, working his will through one or more agents, manifests an approach to crime more intelligent and masterful than the efforts of his hireling, who clearly will be liable for his unsuccessful attempts. In sum, purposeful solicitation presents dangers calling for preventive intervention and is sufficiently indicative of a disposition towards criminal activity to warrant liability irrespective of the seriousness of the crime solicited." Comment to §1010, Mich Rev Crim Code, p 95 (Sept 1967).

The subcommittee was in doubt as to policy choice--whether to limit solicitation to felonies only or whether to make it a crime to solicit misdemeanors as well. The subcommittee decided to leave this policy choice with the Commission. As a result the alternative form is encompassed by the bracketed words appearing in the section draft.

B. Derivation

The language of the section comes from §1010 (1) of the Michigan section and from the MPC §5.02 (1). The policy expressed in the MPC is incorporated fully but 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 MPC 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 supply-

ing of materials by the solicitor to commit the crime, does not ordinarily constitute an attempt in the majority view. See Perkins, The Criminal Law 508-10 (1957), and MPC Comment to §5.02, Tent. Draft No. 10, pp 85-6 (May 1960). (Solicitation may in a very limited number of crimes also constitute an attempt to commit the crime. Examples are solicitation to sodomy or solicitation to bribery. See Perkins, pp 508-9.)

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 MPC 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. (It is interesting to speculate that the Oregon Supreme Court might have arrived at the conclusion that the defendant was in fact guilty of attempted arson but for a different and better reason. McGrath, the party solicited, took the materials to start the fire from the defendant and actually got within 20 feet of the barn he was to burn before he was frightened away, thus frustrating completion of the crime. McGrath's acts under most of the definitions of the then existing rules drawing the line between mere preparation and attempt, probably constituted an attempt. There is no conflict in the law that if a person

solicits a crime which is actually committed or attempted by the person solicited, the solicitor becomes equally guilty of the attempt or the completed crime on the principle of criminal complicity. It would appear that the case more properly should have been decided on this basis.)

The section also affects a few existing Oregon statutes. ORS 161.330 is the statute which comes closest to being a general solicitation formulation. It reads as follows:

> "Any person who threatens or advocates by speech, writing, printing, drawing, or by any other method, the commission of a felony, shall be guilty of a crime and upon conviction shall be punished by a fine of not less than $50 nor more than $1,000 or by imprisonment in the county jail for not less than one month nor more than one year, or by imprisonment in the penitentiary for not more than five years, or by both fine and imprisonment."

No case was found construing this section of ORS. The language of the statute is not very helpful in defining solicitation and for this reason alone should be supplanted by the suggested new section. But the existing statute's provision encompasses a different policy also; it applies only to incitement to commit felonies. The draft section, for the reasons set out in the summary above, would make solicitation of any crime--misdemeanor or felony--a crime.

One or two other instances of solicitation statutes were found in the Oregon statutes relating to specific crimes. ORS 162.130 makes it a crime to "procure or incite" another to commit perjury and ORS 162.140 makes similar provision relating to oath taking. These sections, and any others like them, would be unnecessary upon the enactment of the proposed section covering solicitation generally.

TEXT OF MODEL PENAL CODE

Section 5.02. Criminal Solicitation.

(1) Definition of Solicitation. A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

# # #

TEST OF ILLINOIS CRIMINAL CODE OF 1961

§ 8—1. Solicitation

(a) Elements of the offense.

A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense.

# # #

TEXT OF CALIFORNIA TENTATIVE DRAFT

Section 805. Solicitation: Definition.

A person is guilty of solicitation to commit a felony when with intent to promote or facilitate its commission he commands, encourages or requests another person to perform or omit to perform an act which constitutes such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.

# # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 100.00 Criminal solicitation in the third degree

A person is guilty of criminal solicitation in the third degree when, with intent that another person engage in conduct constituting a crime, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct.

Criminal solicitation in the third degree is a violation. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 100.05 Criminal solicitation in the second degree

A person is guilty of criminal solicitation in the second degree when, with intent that another person engage in conduct constituting a felony, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct.

Criminal solicitation in the second degree is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 100.10 Criminal solicitation in the first degree

A person is guilty of criminal solicitation in the first degree when, with intent that another person engage in conduct constituting murder or kidnapping in the first degree, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct.

Criminal solicitation in the first degree is a class D felony. L.1965, c. 1030, eff. Sept. 1, 1967.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Criminal Solicitation]

Sec. 1010. (1) A person commits the crime of criminal solicitation if with the intent to cause another to engage in specific conduct constituting a crime, he commands or solicits such other person to engage in that conduct.

# # #

Section 5. 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 - SOLICITATION; RENUNCIATION A DEFENSE

The language of this section is derived largely from MPC §5.02 (3). The New York and Michigan codes also provide a defense of renunciation; the Illinois code does not. California in its tentative draft makes a renunciation defense for attempt but, rather surprisingly, provides no renunciation defense in solicitation. The comments pertinent to renunciation as a defense to criminal attempt are generally applicable here. See section 3, supra.

TEXT OF MODEL PENAL CODE

Section 5.02 Criminal Solicitation.

(3) Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

# # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 35.45 Renunciation

4. In any prosecution for criminal solicitation pursuant to article one hundred or for conspiracy pursuant to article one hundred five in which the crime solicited or the crime contemplated by the conspiracy was not in fact committed, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant prevented the commission of such crime.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

Section 1010 Criminal Solicitation

(2) A person shall not be liable under this section if under circumstances manifesting a voluntary and complete renunciation of criminal purpose, he (a) notified the person solicited of his renunciation and (b) gave timely warning to law enforcement authorities or otherwise made a substantial effort to prevent the performance of the criminal conduct commanded or solicited. The burden of injecting this issue is on the defendant, but this does not shift the burden of proof.

# # #

Section 6. Conspiracy; definition. A person is guilty of criminal conspiracy if with the intent that conduct constituting an offense be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

COMMENTARY - CONSPIRACY; DEFINITION

The MPC, Tent. Draft No. 10, pp 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 MPC 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. 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 Oregon definition eschews the common law formulation and, in accord with the MPC draft, proscribes the conspiracy only when it has a

crime as its object. But Oregon's formulation is more restricted than the formulation in the MPC in that Oregon prohibits only conspiracies whose objects are felonies; the MPC version extends also to conspiracies to commit misdemeanors.

2. The Conspiratorial Relationship; the Unilateral Approach.

Of this aspect the MPC 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'." Comments, T.D. No. 10, p 104 (May 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 MPC 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 section 12, infra. See the commentary to section 12.)

(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. NY Rev Penal Law, secs 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. See e.g., Direct Sales Co. v. U. S., 703 (1943).

The effect of the "intent" clause on Oregon law is difficult to state depending on how one reads the decision in State v. Boloff, 38 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 MPC very closely except for the MPC provision as to an overt act. The MPC 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." Mich Rev Crim Code, Comment to §1015, p 99 (Sept 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 section 10, 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 section 1015 (1) of the Michigan draft is followed. The Michigan draft closely parallels the MPC policy in section 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 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 knowlege 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.

TEXT OF MODEL PENAL CODE

Section 5.03. Criminal Conspiracy.

(1) Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

(a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

(5) Overt Act. No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

# # #

TEXT OF ILLINOIS CRIMINAL CODE OF 1961

§ 8—2. Conspiracy

(a) Elements of the offense.

A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator.

# # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 105.15 Conspiracy in the first degree

A person is guilty of conspiracy in the first degree when, with intent that conduct constituting murder or kidnapping in the first degree be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

Conspiracy in the first degree is a class C felony. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 105.20 Conspiracy; pleading and proof; necessity of overt act

A person shall not be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators in furtherance of the conspiracy. L.1965, c. 1030, eff. Sept. 1, 1967.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Criminal Conspiracy]

Sec. 1015. (1) A person is guilty of criminal conspiracy if with intent that conduct constituting an offense be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

# # #

Section 7. Scope of conspiratorial relationship. If a person is guilty of conspiracy, as defined in section 6 of this Article, and knows that a person with whom he conspires to commit a crime has conspired 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.

Section 8. Conspiracy with multiple criminal objectives. If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship. The provisions of this section apply although the agreement is renewed with, or the conspiratorial relationship is extended to include, other persons.

COMMENTARY - SCOPE OF CONSPIRATORIAL RELATIONSHIP AND CONSPIRACY WITH MULTIPLE CRIMINAL OBJECTIVES

Of these sections and section 6 the MPC says:

> "The Draft relies upon the combined operation of [sections 6, 7 and 8] to delineate the identity and scope of a conspiracy. All three provisions focus upon the culpability of the individual actor. [Sections 6 and 7] 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. [Section 8] provides that his conspiracy is a single one despite a multiplicity of criminal objectives so long as

such crimes are the object of the same agreement or continuous conspiratorial relationship." Comments, T.D. No. 10, pp 119-20 (May 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 MPC 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 6] 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 [section 6] tend to become somewhat ambiguous when applied to a relationship that involves no direct communication or cooperation. Consequently, [section 7] of the draft has been designed to facilitate the inquiry in such cases.

"[Section 7] 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 [section 6]. 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 [section 6] 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 [section 7] 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."

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 section 6, each individual "spoke" has an agreement only with A and cannot be said, under section 8, to have known that A would conspire with others to commit the same kind of crime.

2. Effect of Multiple Criminal Objectives. The problem dealt with in section 8 of the draft is illustrated by the following example: A and B agree to rob a bank. In order to accomplish this goal they also plan to steal a car, break into a hardware store and steal some guns, all for the purpose of robbing the bank. Under the draft section they can be convicted only of one conspiracy--not for separate counts of conspiracy to steal the car, conspiracy to burglarize the store and conspiracy to rob the bank. This is apparently in accord with present general law (no Oregon cases were found). The same rule would obtain where there are successive violations of the same statute pursuant to one overall conspiracy.

> "The significance of the...rule of course extends beyond the question of cumulation of penalties. By holding that a single conspiracy may embrace a multiplicity of criminal objectives

the rule affects the determination of the conspiracy's scope for all purposes. Consequently, it operates to the defendant's disadvantage insofar as these purposes involve a conspirator's accountability for all the activities of all the persons embraced in the conspiracy--e.g., with respect to his liability under present law for substantive crimes, the admissibility against him of hearsay acts and declarations, and satisfaction of the overt act requirement or statutes of limitation or rules of venue and jurisdiction. ...However, with respect to the question of cumulative convictions and sentences involved in the [illustrative] case, and the related questions of multiple prosecution and former jeopardy, a finding of a single large conspiracy rather than separate smaller ones is in the defendant's interest, and the rule therefore operates to his advantage." MPC Comments, T.D. No. 10, pp 128-9 (May 1960).

3. Changes in Personnel; Liability of Adherents. On this issue the MPC says:

"Somewhat more troublesome is the question raised by changes in personnel. Although conceptual 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." Comments, T.D. No. 10, p 130 (May 1960).

B. Derivation

The language of section 7 follows MPC §5.03 (2). The language of section 8 follows MPC §5.03 (3).

C. Relationship to Existing Law

The provisions in sections 7 and 8 are new to Oregon law.

TEXT OF MODEL PENAL CODE

Section 5.03 Criminal Conspiracy.

(2) Scope of Conspiratorial Relationship. If a person guilty of conspiracy, as defined by Subsection (1) of this Section, knows that a person with whom he conspires to commit a crime has conspired 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.

(3) Conspiracy With Multiple Criminal Objectives. If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.

# # #

TEXT OF CALIFORNIA TENTATIVE DRAFT

Section 821. Conspiracy: Multiple Criminal Objectives.

If a person conspires to commit a number of crimes, he may be convicted of only one conspiracy so long as those multiple crimes are the object of the same agreement.

Section 822. Conspiracy: Scope.

If a person is guilty of a conspiracy with one co-conspirator to commit a crime and knows or contemplates that his co-conspirator has conspired or will [may] conspire with another to commit the same crime, he is guilty of conspiring with any such other person to commit that crime, whether or not he knows of his identity.

# # #

Section 9. Joinder, severance and venue in conspiracy prosecutions. (1) Joinder. Persons charged with conspiracy may be prosecuted jointly if:

(a) They are charged with conspiracy with each other; or

(b) The conspiracies charged, whether they have the same or different parties, are so related that they constitute different aspects of a scheme of organized criminal conduct.

(2) Neither the liability of any defendant nor the admissibility against him of the acts or declarations of another shall be enlarged by joinder under subsection (1) of this section.

(3) Severance. In a joint prosecution the court shall order a severance or take a special verdict as to any defendant who so requests, if it deems it necessary or appropriate to the fair determination of his guilt or innocence, and shall take any other proper measures to protect the fairness of the trial.

(4) Venue. Venue shall lie in any county in which the defendant entered into a conspiracy or in which an overt act pursuant to such conspiracy was done by him or by a person with whom he conspired.

COMMENTARY —

JOINDER, SEVERANCE AND VENUE IN CONSPIRACY PROSECUTIONS

A. Summary

The provisions of this section are readily identifiable as largely procedural in nature. Placing them here as part of the substantive law seems justified, however, because they operate so importantly on the substantive law of conspiracy. These procedural matters so often affect the outcome of the prosecution that they are in the practical sense inseparable from the substantive definition of conspiracy.

Justice Jackson, concurring in Krulewitch v. United States, 336 US 440 (1949), stated some of the difficulties at the trial of a conspiracy case. From the standpoint of the prosecution the difficulties in proving a large conspiracy are immense. Unless great freedom is allowed at the trial in matters of joinder, venue and evidence, the state will be precluded from tracing the broad aspects of the crime without which the jury cannot understand the course of criminal conduct and the place of individual defendants within it. But, Justice Jackson points out, if the prosecution's job is difficult, the situation in which a defendant finds himself may be even more difficult. The hazard from loose application of the rules of evidence (free admission of hearsay evidence) and venue are great. A codefendant in a conspiracy trial occupies "an uneasy seat", says Justice Jackson. It is difficult for the individual defendant to make his own case stand on its own merits in the minds of jurors "who are ready to believe that birds of a feather are flocked together." If he is silent, the defendant is taken to admit it and as is often the situation, codefendants can be prodded into accusing or contradicting each other.

The prosecution on a charge of conspiracy most certainly poses a problem of balancing of interests. Accepting the premise that concerted criminal action is a more dangerous threat than individual inchoate criminal activity, it is necessary to give to the state the authority to cope with the activity in an effective way while eliminating from existing law some of the aspects which may unfairly prejudice the individual defendant.

(1) Joinder. The joinder provision set out in subsection (1) of the draft section is liberal but not unlimited. It allows joint prosecution if the parties are charged with

conspiracy with each other, or the conspiracies alleged, though they have different parties, "are so related that they constitute different aspects of a scheme of organized criminal conduct." The language of the draft, of course, covers the case of a single conspiracy. It also covers every case, regardless of the number of separate conspiracies involved where it is essential to the prosecution to present all aspects of a complex criminal organization in a single trial. Noteworthy, too, is the language of subsection (1) which allows joinder of separate conspiracies having unrelated objectives so long as they involve the same persons. The reason for allowing this is that the fact of repeated association of the same persons for criminal purposes is sufficient to warrant such joinder. Although these joinder provisions are liberal, they are limited by the venue requirement of subsection (4) of the draft and the court's power to grant relief through severance under subsection (3) of the draft.

(2)The explicit provision in subsection (2) prohibiting the use against the defendant of evidence of acts and hearsay declarations of another when separate conspiracies are joined is aimed at minimizing some of the abuses possible today.

It affects no changes in the present doctrine governing vicarious admissions. This doctrine is a rule of evidence applicable in many situations so that it is deemed beyond the scope of this penal code revision. The operation of this doctrine is intentionally affected, however, with respect to a particular defendant.

(3) Severance. Subsection (3) of the draft section provides for the possibility of a severance, a special verdict, or other appropriate measure where the joinder of defendants or counts makes it necessary to assure a fair trial. This provision acts as a counterweight to the liberal joinder provisions allowed in subsection (1). The provision for court relief is broadly stated to cover all of the various kinds of unfairness that might result from a joint trial. Such things would include jury confusion due to the complexity and size of the conspiracies joined, prejudices from being associated with other defendants, and improper application of the vicarious admission rule.

(4) Venue. Subsection (4) places venue for conspiracy prosecutions in any county in which the defendant entered into the conspiracy charged or in which an overt act pursuant to such conspiracy was done by him or by a person with whom he conspired. Often the conspiracy charge has had the effect, in Justice Jackson's words, of "reducing protection to a phantom" of constitutional guarantees that a defendant will

be tried by an impartial jury of the district where the crime is committed. If the rule is to prevail that venue for the conspiracy lies in the county where any act, trivial or important, takes place, the state may, and often does, compel one to defend at a great distance from any place where he did any act, because some confederate did some trivial and, by itself, innocent act in the chosen district. The draft requires that venue will attach to any such act of the conspiracy but only when done by the defendant or one with whom he has conspired. This provision bears out the premise of section 7 of the draft which is designed to limit fairly the scope of the conspiracy. Thus, a codefendant, joined in the conspiracy prosecution, with whom the defendant did not conspire, within the meaning of section 7, cannot by his act in the conspiracy permit the state to force the defendant to come to a far distant county to defend himself.

B. Derivation

The language of this section closely follows MPC §5.03 (4), although this draft has a somewhat different organization. The proposed California draft, §815, follows the MPC provision rather closely, but venue is less restricted. "A conspiracy may be prosecuted in any county where an overt act was committed." Illinois in chapter 38, sections 1-6, Illinois Criminal Code of 1961, states the same rule as is proposed in California. The Illinois code has no specific provision on joinder and severance within the part of the code defining the crime of conspiracy; the general joinder and severance provisions apply. See ch 38, sec 111-4 and 114-7. The New York Revised Penal Law has no specific joinder or severance provision on conspiracy--the general provisions of its criminal procedure code apply. The New York law does contain a venue provision, however, in New York Revised Penal Law §105.25 similar to that of Illinois and the proposed California draft.

C. Relationship to Existing Law

No Oregon cases were found discussing issues relating to joinder, severance or venue with respect to a prosecution for conspiracy. Oregon follows the vicarious admission rule in allowing hearsay statements of confederates in the conspiracy to be used. See State v. Ryan, 47 Or 338, 82 P 703 (1905); State v. Weitzel, 157 Or 334, 69 P2d 958 (1937). Should the draft section be adopted, it will be necessary to adjust any general joinder provision now in existence or which might be enacted separately when the Commission takes up procedural revision. See especially ORS 136.060, the present joinder provision which reads as follows:

"When two or more defendants are jointly indicted for a felony, any defendant requiring it shall be tried separately; but in other cases, defendants jointly indicted may be tried separately or jointly, in the discretion of the court."

TEXT OF MODEL PENAL CODE

Section 5.03 (4) Joinder and Venue in Conspiracy Prosecutions.

(a) Subject to the provisions of paragraph (b) of this Subsection, two or more persons charged with criminal conspiracy may be prosecuted jointly if:

(i) they are charged with conspiring with one another; or

(ii) the conspiracies alleged, whether they have the same or different parties, are so related that they constitute different aspects of a scheme of organized criminal conduct.

(b) In any joint prosecution under paragraph (a) of this Subsection:

(i) no defendant shall be charged with a conspiracy in any county [parish or district] other than one in which he entered into such conspiracy or in which an overt act pursuant to such conspiracy was done by him or by a person with whom he conspired; and

(ii) neither the liability of any defendant nor the admissibility against him of evidence of acts or declarations of another shall be enlarged by such joinder; and

(iii) the Court shall order a severance or take a special verdict as to any defendant who so requests, if it deems it necessary or appropriate to promote the fair determination of his guilt or innocence, and shall take any other proper measures to protect the fairness of the trial.

# # #

TEXT OF ILLINOIS CRIMINAL CODE OF 1961

§ 8—2. Conspiracy

(a) Elements of the offense.

A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator.

(b) Co-conspirators.

It shall not be a defense to conspiracy that the person or persons with whom the accused is alleged to have conspired:

(1) Has not been prosecuted or convicted, or
(2) Has been convicted of a different offense, or
(3) Is not amenable to justice, or
(4) Has been acquitted, or
(5) Lacked the capacity to commit an offense.

(c) Penalty.

A person convicted of conspiracy may be fined or imprisoned or both not to exceed the maximum provided for the offense which is the object of the conspiracy: Provided, however, that no penalty for conspiracy to commit treason, murder, or aggravated kidnaping shall exceed imprisonment for 20 years, and no penalty for conspiracy to commit any other offense shall exceed imprisonment for 5 years. 1961, July 28, Laws 1961, p. 1983, § 8–2.

# # #

TEXT OF NEW YORK PENAL LAW

§ 105.00 Conspiracy in the fourth degree

A person is guilty of conspiracy in the fourth degree when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or causes the performance of such conduct.

Conspiracy in the fourth degree is a class B misdemeanor.

§ 105.05 Conspiracy in the third degree

A person is guilty of conspiracy in the third degree when, with intent that conduct constituting a felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

Conspiracy in the third degree is a class A misdemeanor.

TEXT OF NEW YORK PENAL LAW (Cont'd.)

§ 105.10 Conspiracy in the second degree

A person is guilty of conspiracy in the second degree when, with intent that conduct constituting a class B or class C felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

Conspiracy in the second degree is a class E felony.

§ 105.15 Conspiracy in the first degree

A person is guilty of conspiracy in the first degree when, with intent that conduct constituting murder or kidnapping in the first degree be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

Conspiracy in the first degree is a class C felony.

§ 105.20 Conspiracy; pleading and proof; necessity of overt act

A person shall not be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators in furtherance of the conspiracy.

§ 105.25 Conspiracy; jurisdiction and venue

1. A person may be prosecuted for conspiracy in the county in which he entered into such conspiracy or in any county in which an overt act in furtherance thereof was committed.

2. An agreement made within this state to engage in or cause the performance of conduct in another jurisdiction is punishable herein as a conspiracy only when such conduct would constitute a crime both under the laws of this state if performed herein and under the laws of the other jurisdiction if performed therein.

3. An agreement made in another jurisdiction to engage in or cause the performance of conduct within this state, which would constitute a crime herein, is punishable herein only when an overt act in furtherance of such conspiracy is committed within this state. Under such circumstances, it is no defense to a prosecution for conspiracy that the conduct which is the objective of the conspiracy would not constitute a crime under the laws of the other jurisdiction if performed therein.

# # #

Section 10. 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 - RENUNCIATION OF CRIMINAL PURPOSE

A. Summary

The explanation of this provision in the MPC comments reads as follows:

> "The test adopted in [section 10] 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 pursuade 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 (Section 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 [section 11]."

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 section 3, 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 MPC section 5.03 (6). The last sentence in subsection (1) is adopted from section 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 MPC 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.

TEXT OF MODEL PENAL CODE

Section 5.03 (6)

(6) Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

# # #

TEXT OF NEW YORK REVISED PENAL LAW

Section 35.45 Renunciation.

4. In any prosecution for criminal solicitation pursuant to article one hundred or for conspiracy pursuant to article one hundred five in which the crime solicited or the crime contemplated by the conspiracy was not in fact committed, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant prevented the commission of such crime.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Criminal Conspiracy]
Section 1050

(2) A person shall not be liable under this section if under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, he gave a timely warning to law enforcement authorities or made a substantial effort to prevent the performance of the criminal conduct contemplated by the conspiracy. Renunciation by one conspirator does not, however, affect the liability of another conspirator who does not join in the abandonment of the conspiratorial objective. The burden of injecting the issue of renunciation is on the defendant, but this does not shift the burden of proof.

# # #

Section 11. Duration of the conspiracy. For the purpose of application of section ___[the statute of limitations]:

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

(2) Such 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; and

(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 - DURATION OF THE CONSPIRACY

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 MPC as a problem of complicity and is dealt with in MPC section 2.06. See the comments to the section in Tentative Draft No. 1, pp 20-24 (May 1, 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. Goodlove, 144 Or 193, 24 P2d (1933). In two of these cases, Gardner and Goodlove, 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 section 10, 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 MPC section 5.03 (7). California's proposed draft follows the MPC provision closely also. Michigan, Illinois and New York have not made any provision for abandonment as it affects the running of the statute of limitations for the crime of conspiracy.

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 MPC 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 MPC, 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.

TEXT OF MODEL PENAL CODE

Section 5.03 (7)

(7) Duration of Conspiracy. For purposes of Section 1.06 (4):

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

(b) such 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; and

(c) 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.

# # #

TEXT OF CALIFORNIA TENTATIVE DRAFT

[Section 824. Conspiracy: Duration.

For purposes of Section _____ [limitation of actions]:

(1) A conspiracy terminates when its objectives are accomplished [when the crime or crimes which are its object is or are committed] or the agreement is abandoned by the defendant and his co-conspirators.

(2) If a defendant abandons the agreement, the conspiracy is terminated as to him only when he advises those with whom he conspired of his abandonment or informs the law enforcement authorities of the existence of the conspiracy and his participation.]

# # #

Section 12. 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 ___.

COMMENTARY - SOLICITATION AND CONSPIRACY; AVAILABILITY OF CERTAIN DEFENSES

A. Summary

Subsection (1) (a) is designed to apply in the following situation: 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., section 2, 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 section 6, 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 section 2.06 (2) of the MPC.

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 MPC section on complicity, section 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 section 13, 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 MPC and reflected in this draft.

B. Derivation

The language of the draft follows MPC section 5.04 fairly closely except for subsection (1) (c). This provision is derived from the proposed California draft, section 813 (1) (c). It makes more specific a policy probably included within present language of the MPC 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 co-conspirator 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 pro-

posed in section 6, 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.

TEXT OF MODEL PENAL CODE

Section 5.04. Incapacity, Irresponsibility or Immunity of Party to Solicitation or Conspiracy.

(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.

(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 Section 2.06(5) or 2.06(6)(a) or (b).

# # #

TEXT OF CALIFORNIA TENTATIVE DRAFT

Section 823. Conspiracy: Availability of Defenses.

(1) In any prosecution for conspiracy, it is no defense that:

(a) a co-conspirator would not be guilty of conspiracy or the crime which was its object because of his lack of criminal responsibility or other legal incapacity, or because of his lack of culpability required for the crime; or

(b) the crime can be committed only by a particular class of persons to which either the defendant or a co-conspirator does not belong; or

(c) a co-conspirator has legal immunity from prosecution, or has not been prosecuted for or convicted of the conspiracy or a crime based upon the conduct in question, or has previously been acquitted; or

(d) the agreement of a purported co-conspirator was feigned.

(2) It is a defense to a charge of conspiracy that if the criminal object were achieved, the defendant would not be guilty of a crime under the law defining the crime or as an accomplice under Section 454(1) or 454(2).

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TEXT OF NEW YORK REVISED PENAL LAW

§ 105.30 Conspiracy; no defense

It is no defense to a prosecution for conspiracy that, owing to criminal irresponsibility or other legal incapacity or exemption, or to unawareness of the criminal nature of the agreement or the object conduct or of the defendant's criminal purpose or to other factors precluding the mental state required for the commission of conspiracy or the object crime, one or more of the defendant's co-conspirators could not be guilty of conspiracy or the object crime.

Section 13. Multiple convictions barred in inchoate crimes. (1) It is no defense to a prosecution under sections 1, 4 or 6 of this Article 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 on more than one offense defined by this Article for conduct designed to commit or to culminate in commission of the same crime.

(3) A person may 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 1, 4 and 6 of this Article in a single indictment or information, provided the penal conviction is consistent with subsections (2) and (3) of this section 13.

COMMENTARY - MULTIPLE CONVICTIONS BARRED IN INCHOATE CRIMES

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, section 1020. The language of subsection (2) is based on MPC section 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.

TEXT OF MODEL PENAL CODE

Section 5.05

(3) Multiple Convictions. A person may not be convicted of more than one offense defined by this Article for conduct designed to commit or to culminate in the commission of the same crime.

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TEXT OF ILLINOIS CRIMINAL CODE OF 1961

§ 8—5. Multiple Convictions

No person shall be convicted of both the inchoate and the principal offense.

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TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Inchoate Crimes: Consummation of the Object Offense; Multiple Convictions]

Sec. 1020. (1) It is no defense to a prosecution under sections 1001, 1005, 1010 or 1015 that the offense the defendant either attempted to commit, attempted to assist another to commit, commanded or solicited another to commit, or conspired to commit was actually committed pursuant to such attempt, conspiracy, solicitation or command.

(2) A person may not be convicted on the basis of the same course of conduct of both the actual commission of an offense and:

(a) An attempt to commit that offense;

(b) An attempt to assist in the commission of that offense; or

(c) Criminal solicitation of that offense.

(3) A person may not be convicted of more than one of the offenses defined in sections 1001, 1005, 1010 and 1015 for a single course of conduct designed to commit or to culminate in the commission of the same crime.

(4) Nothing in this section shall be construed to bar inclusion of multiple counts charging violations of the substantive crime and sections 1001, 1005, 1010 and 1015 in a single indictment or information, provided the penal conviction is consistent with sections 1020(2) and 1020(3).

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