

See: Minutes of Subcommittee No. 2  
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Tape #63

CRIMINAL LAW REVISION COMMISSION  
208 Agriculture Building  
Salem, Oregon

ARTICLE 11.

Assault and Related Offenses

Preliminary Draft No. 1; January 1969

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Subcommittee No. 2

ARTICLE 11.

ASSAULT AND RELATED OFFENSES

Preliminary Draft No. 1; January 1969

Section 1. Assault in the third degree.

(1) A person commits the crime of assault in the third degree if he:

(a) intentionally, knowingly, or recklessly causes physical injury to another; or

(b) negligently causes physical injury to another by means of a deadly or dangerous weapon.

Section 2. Assault in the second degree.

(1) A person commits the crime of assault in the second degree if he:

(a) intentionally or knowingly causes serious bodily injury to another; or

(b) intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon; or

(c) recklessly causes serious physical injury to another by means of a deadly or dangerous weapon.

Section 3. Assault in the first degree.

(1) A person commits the crime of assault in the first degree if he intentionally, knowingly or recklessly causes serious physical injury to another under circumstances manifesting extreme indifference to the value of human life.

Existing Law

ORS

163.230

163.240

163.250

163.255

163.260

163.270

163.280

163.310

163.320

163.330

164.230

162.380

162.400

COMMENTARY - ASSAULT

A. Summary

Criminal assault is made a separate substantive offense under the proposed draft. As defined by the draft, assault is the unlawful causing of physical injury committed with the particular mens rea specified in the individual assault provisions. The draft contains three ascending degrees of assault. The basic offense is aggravated by the following factors which, either singly or in combination raise the degree of the offense:

(1) the actor's culpability or motivation for the assault; and/or

(2) the seriousness of the injury actually inflicted or intended by the actor; and/or

(3) the dangerousness of the means employed by the actor to inflict injury.

### Culpability Factor

The proposed draft includes not only the intentional but also the reckless and criminally negligent infliction of physical injury. This inclusion is designed to eliminate the anomaly that now exists in the law whereby reckless or negligent conduct which causes death is punishable as homicide but reckless or negligent conduct which merely inflicts injury is not punishable as assault regardless of how serious the injury inflicted is. The assault article was drafted on the assumption that the terms intentionally, knowingly, recklessly and negligently as ultimately defined will be similar to the definitions set forth in section 2.02 (2) of the Model Penal Code and section 15.05 of the New York Revised Penal Law.

### Seriousness of the Injury Inflicted or Intended

The seriousness of the injury inflicted is a factor in determining the degree of assault. The infliction of physical injury constitutes assault in the third degree while the infliction of serious physical injury constitutes assault in the second or first degree. It is assumed that the terms "physical injury" and "serious physical injury" will be defined in the preliminary definition section substantially as follows:

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

"Serious physical injury means physical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."

Mere physical contact which does not produce bodily injury is not covered by the assault article. Trivial slaps, shoves, kicks, etc., may be covered by the lesser offense of harassment. Offensive but uninjurious sexual acts will be covered by the article on sex offenses.

### Means employed to Inflict Injury

The use of a deadly or dangerous weapon will ordinarily raise the degree of assault. The definition of deadly weapon and dangerous weapon make a distinction between an instrument that ordinarily has no other purpose except as a weapon and an instrument that is not necessarily intended as a weapon but becomes such because of its use. It is assumed that the terms "deadly weapon" and "dangerous weapon" will be defined in the general definition section substantially as follows:

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

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

Degree of Assault	Mens Rea Required	Type of Injury	Type of Weapon	Comments
Section 1. Assault in the Third Degree				<p>This section sets out the basic coverage of assault. In a number of subsections, though the intent is stated in terms of purpose to injure "another" the act is physical injury to any person. This is intended to preserve the common law concept of transferred intent.</p>
(1) (a) intentionally, knowingly or recklessly causes physical injury to another	(1) intentionally, knowingly, or recklessly	physical injury		<p>Subsection (1) (a) covers both the intentional and reckless infliction of physical injury to anyone. There is no specification of the means by which the injury is to be caused. The inclusion of recklessness means that the actor must disregard a known substantial and unjustifiable risk. This subsection is the counterpart of manslaughter in the second degree; if death results from the recklessness it is manslaughter but if only physical injury results it is third degree assault. Reckless assault embraces a wide variety of conduct of both commission and omission. It includes, but is not limited to, cases of physical injury caused by the reckless operation of motor vehicles.</p>

Degree of Assault	Mens Rea Required	Type of Injury	Type of Weapon	Comments
(b) negligently causes physical injury to another by means of a deadly or dangerous weapon	negligently	physical injury	deadly or dangerous weapon	This subsection covers any deadly or dangerous weapons including any type of vehicle, any vessel or aircraft.
Section 2 Assault in the Second Degree				It is contemplated that the offense will rise from a misdemeanor to a felony where the intent is to cause serious physical injury or where the actor has used a dangerous or deadly weapon.
(1) (a) intentionally, or knowingly causes serious physical injury to another	intentionally, or knowingly	serious physical injury		Subsection (a) raises the intentional crime a degree when the injury inflicted is serious.
(b) intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon.	intentionally, or knowingly	physical injury	deadly or dangerous instrument	Subsection (b) makes intentional assault with a deadly or dangerous weapon a felony regardless of whether the injury intended or inflicted is "serious" - e.g. one who fires a pistol and inflicts only a flesh wound is guilty of assault in the second degree even if he only intended to graze the person.

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Degree of Assault	Mens Rea Required	Type of Injury	Type of Weapon	Comments
(c) recklessly causes serious physical injury to another by means of a deadly or a dangerous weapon	recklessly	serious physical injury	deadly or dangerous weapon	Reckless assault is raised from the third to the second degree when each of two aggravating factors exists: (1) serious physical injury and (2) a deadly or dangerous weapon.
3. Assault in the first degree				Assault in the first degree is intended to cover the most serious and culpable assaults.
(1) intentionally, knowingly or recklessly causes serious physical injury to another under circumstances manifesting extreme indifference to the value of human life	intentionally, knowingly, or recklessly	serious physical injury		This section is intended to cover the most serious forms of life endangering conduct and includes the following: (1) one who with homicidal intent causes non-fatal serious physical injury (also guilty of attempted murder) (2) mayhem (3) reckless conduct evincing extreme depravity, e.g. shooting into a crowd without any specific homicidal intent.

As stated by the authors of the New York Draft Penal law,

"The proposed assault formulation, requiring actual physical injury, places the crime of assault in the main category of offenses (robbery, larceny, perjury, etc.) which are committed only when the offender succeeds in his criminal objective. And as with other offenses of this nature, an unsuccessful endeavor (a common law assault not resulting in a battery) constitutes an attempt. (Commission staff Notes pp. 330-31). Attempted assault, then, will be governed by the same rules which apply to attempts to commit other crimes. It will be necessary to discuss attempted assault in terms of the law of attempts, in particular in regard to the elements of proximity and impossibility.

Section 110.00 of the New York Revised Penal Law defines an attempt to commit a crime as follows:

"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." In deciding what "tends" to effect the commission of such crime, the New York courts have adopted the "dangerous proximity test." (Acts in furtherance of a criminal project do not reach the stage of an attempt unless they carry the project forward within dangerous proximity to the criminal end to be obtained).

The Model Penal Code definition of attempt, section 5.01 is as follows:

"(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 negating 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."

Under this definition the conduct of the defendant is judged not in terms of proximity to success, but as probative of a firmness of criminal purpose and as such reflects the view of the drafters of the Model Penal Code that "the primary purpose of punishing attempts is to neutralize dangerous individuals and not to deter dangerous acts." (Comment 7(g) T. D. #10, 1960)

The attempt section has not as yet been drafted. Regardless of which approach is ultimately taken in regard to the law of attempt, it can be generally stated that in terms of battery the sphere of interest sought to be protected is personal safety and that this sphere is usually not threatened until the actor had advanced to within dangerous proximity of success. An attempt to commit a crime may be ineffective because the instrumentality chosen is not suited to the criminal purpose. Under Oregon case law attempted battery requires "present ability". State v. Godfrey, 17 Or 300, 20 P. 625 (1889). Under the proposed draft the defense of intrinsic impossibility will not be available. The actor who fails in his endeavor to inflict physical injury, whether because his aim is bad or his weapon unloaded, is guilty of an "attempted assault."

The proposed draft does not contain any "assault with intent to commit" provisions (ORS 163.270, 163.280) since an assault with intent to commit another offense will, in every case, constitute an attempt to commit that offense. Assault with intent to rob, rape or kill will be dealt with as robbery, attempted rape or attempted murder when such occurs.

Consent under certain circumstances is a defense to a prosecution for assault, e.g. ordinary physical contacts, sports, surgery. In holding consensual assaults illegal, courts rely on the social undesirability of the activity incident to the assault. The proposed draft provides for a reduced penalty in the case of a consensual fight or scuffle not involving the use of a deadly weapon or the infliction of serious physical injury. This gradation in penalty is based on the view that consensual scuffles or fights are not of the same degree of culpability as are non-consensual assaults.

The proposed draft does not treat separately assaults against particular classes of persons such as government officials or public officers since such



persons are adequately protected by the general provisions (ORS 163.330, 162.380, 162.400). Any special problems can be dealt with in the articles relating to offenses against Public Administration.

A number of recent codes include the "placing of another in fear of imminent serious bodily injury" within the provisions relating to simple assault. See, 38 Ill. Rev. Stat. 12-1; La., sec. 36; 40A Minn. Stat. Ann. 609.22 (1); Model Penal Code s. 211.1 (c). Such conduct, though culpable, does not constitute either assault or attempted assault under the proposed draft for "physical injury is neither inflicted nor intended." Accordingly, the separate offense of menacing has been created to cover such conduct. In so doing the draft follows the schematic arrangement of the New York Revised Penal Law and the Michigan Revised Criminal Code.

Mayhem, under the proposed draft, has been eliminated as a separate offense, since every mayhem is of necessity an assault involving serious bodily harm. If the maiming amounts to attempted murder it can be prosecuted as such.

#### B. Derivation

Assault in the third degree is adapted from section 211.1 (1) of the Model Penal Code, assault in the second degree from section 211.1 (2) (b) of the Model Penal Code and section 120.05 of the New York Revised Penal Law and assault in the first degree from section 211.1 (2) (a) of the Model Penal Code.

#### C. Relationship to Existing Law

At common law assault was defined either as (1) an offer with force or violence to do a corporal hurt to another or (2) an unlawful act which places another in reasonable apprehension of receiving an immediate battery. Battery was defined as the unlawful application of force to the person of another. Both assault and battery were misdemeanors at common law. There was no crime of felonious or aggravated battery but the court had discretion to vary the punishment according to the nature of the circumstances. If the actor's conduct amounted to a separate felony the battery merged therein. Mayhem, a common law felony into which battery merged, was defined as "violently depriving another of the use of such of his members as may render him less able in fighting either to defend himself or to annoy his adversary." In the proposed draft these three common law offenses have been consolidated into the one statutory offense of assault. Such a formulation closes the gap between battery and mayhem by making certain types of assaults felonies.

There is no statutory definition of either assault or battery in Oregon. Statutes dealing with criminal assaults do not define the crime but rather provide for various types of aggravated assaults. The factors which aggravate an assault tend to fall into three categories:

(1). Motivation for the assault

Assault in Oregon is frequently aggravated according to the actor's purpose in committing the assault:

- (a) "intent to intimidate" (ORS 163.240)
- (b) "intent to kill" (ORS 163.280)
- (c) "intent to rob" (ORS 163.270, 163.290, 163.330)
- (d) "intent to commit rape" (ORS 163.270)
- (e) "intent to commit mayhem" (ORS 163.270)

(2) Dangerous means, whether or not resulting in injury.

Under Oregon law an assault committed with a dangerous weapon or while armed with a dangerous weapon carries a higher penalty than assault committed while unarmed (ORS 163.260):

- (a) ORS 163.240 - Assault while Armed with a dangerous weapon - 10 years
- (b) ORS 163.250 - Assault with a dangerous weapon - 10 years
- (c) ORS 163.255 - Assault while Unarmed by means of force-- - 5 years
- (d) ORS 163.280 - Assault with intent to kill; Assault and robbery while armed with a dangerous weapon - Life or any lesser term
- (e) ORS 163.290 - Robbery or theft while not armed with a dangerous weapon - 15 years
- (f) ORS 162.380 - Assault with deadly weapon--- - 20 years
- (g) ORS 162.400 - Assault with deadly weapon - 20 years

(3) Serious Bodily Injury Actually Inflicted

Assault is aggravated when serious bodily injury is inflicted:

- (a) Mayhem (ORS 163.230)

The above three aggravating factors which now exist in Oregon law have been incorporated into the proposed draft and are the criteria used in determining the degree of assault.

Assault in Oregon case law has been defined as "any intentional attempt by force or violence to do injury to the person of another coupled with the present ability to do such injury." State v. Godfrey, 17 Or 300, 20 P 625 (1889); State v. Selby, 73 Or 378, 144 P.657; State v. Cancelmo, (1928).

Assault can mean either (1) an act which reasonably puts one in fear of corporal injury or (2) an act intended to cause corporal injury by one who has the present ability to carry out such intent. State v. McLennen, 160 Or 59, 60, 16 P.879 (1888); State v. Linville, 127 Or 565, 572, 273 P. 338 (1928). Thus, the tort law derived concept of "intentional creation of the apprehension of receiving a battery" exists in present Oregon case law and will be retained under the proposed law as the newly designated offense of menacing.

The proposed draft does embody a reorientation of present Oregon law. It limits assault as a concept to the infliction of actual physical injury. It makes assault a substantive crime and does away with the requirements of present ability leaving the general attempt provisions controlling on this issue. In light of the following comments made by the Oregon Supreme Court in State v. Wilson, 218 Or 586, 346 P. 2d 115 (1959). This position does not appear to be a radical departure:

"We are of the opinion that criminal assault, even as defined by this court, should be regarded as a distinct crime rather than an uncompleted battery--(at 586)--The mere fact that assault is viewed as preceding a battery should not preclude us from drawing a line on one side of which we require the present ability to inflict corporal injury denominating this as assault and on the other side conduct which falls short of a present ability, yet so advanced toward the assault that it is more than mere preparation and which we denominate an attempt." (at 588).

It is intended that an attempt to commit an assault is a lesser included offense and that the conviction will be for the attempt where it, but not the assault is established by the evidence.

Under the present law virtually all of the assault offenses require either a general intent to commit a battery or a specific intent to commit some designated kind of physical injury. However, the courts have interpreted "assault" which is an intentional act to include both an assault and battery even though the battery was an unintentional act. Many courts hold that the intent to injure can be inferred from recklessness while others say that recklessness replaces intent--the proposed draft includes both the reckless and criminally negligent infliction of bodily injury.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 211.1 Assault

(1) Simple assault. A person is guilty of assault if he:

- (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
- (b) negligently causes bodily injury to another with a deadly weapon; or

(c) Attempts by physical menace to put another in fear of imminent serious bodily harm.

Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

(2) Aggravated Assault. A person is guilty of aggravated assault if he:

- (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or
- (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

Aggravated assault under paragraph (a) is a felony of the second degree; aggravated assault under paragraph (b) is a felony of the third degree.

###

TEXT OF NEW YORK

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TEXT OF NEW YORK REVISED PENAL LAW

Section 120.00 Assault in the third degree.

A person is guilty of assault in the third degree when:

1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or
2. He recklessly causes physical injury to another person; or
3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the third degree is a class A misdemeanor. § 120.05.  
c. 1967. Sept. 1, 1967.

Section 120.05 Assault in the second degree.

A person is guilty of assault in the second degree when:

1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or
2. With intent to cause physical injury to another person he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or
3. With intent to prevent a peace officer from performing a lawful duty, he causes physical injury to such peace officer; or
4. He recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or
5. For a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness or other physical impairment or injury to another person by administering to him, without his consent, a drug, substance or preparation capable of producing the same.
6. In the course of and in furtherance of the commission or attempted commission of a felony, other than a felony defined in article one hundred thirty, or of immediate flight therefrom, he, or another participant if there be any, causes physical injury to a person other than one of the participants.

Assault in the second degree is a class D felony. § 120.05. c. 1967.

Text of New York Revised Penal Law, (Cont'd)

Section 120.10 Assault in the first degree.

A person is guilty of assault in the first degree when:

1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or
2. With intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person; or
3. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person; or
4. In the course of and in furtherance of the commission of a felony or of immediate flight therefrom, he, or another participant if there be any, causes serious physical injury to a person other than one of the participants.

Assault in the first degree is a class C felony.

Section 4. Menacing

A person commits the crime of menacing if by word or conduct he intentionally attempts to place another person in fear of imminent serious physical injury.

COMMENTARY - MENACING

A. Summary.

The proposed draft recognizes, as do most modern codes, that "placing or attempting to place another person in fear of imminent serious bodily harm" is a type of conduct warranting criminal sanction. The menacing section is based on two premises: (1) that an intent to cause apprehension of injury is a culpable mens rea and (2) that an intent to injure is more serious than an intent to cause apprehension of injury. As drafted, this section is a compromise between codes which equate an attempted battery with a tortious assault (MPC, Ill., Minn., La.) and those codes which recognize no crime unless the actor intended to inflict a battery (Wisc.). As an example: X with intent to frighten Y, points a gun at Y which Y thinks is loaded but which in fact is not loaded. Under the Model Penal Code such conduct would constitute a simple assault. (211.1 (1) (c)). Under the proposed draft and the New York and Michigan codes such conduct would constitute the lesser crime of menacing. The conduct would not constitute either assault or attempted assault since physical injury was neither inflicted nor intended. However, any threat of physical injury accompanied by an intent and attempt to execute it also constitutes attempted assault.

Menacing is intended to cover not only menacing physical acts but also threatening words unaccompanied by a physical movement. The following conduct would be considered menacing: X stands with his right hand in his coat pocket, and threatens to shoot Y.

"Physical menace" implies such conduct as would cause fear to a reasonable man. The standard to be applied, is an objective one. Obviously empty threats to inflict serious injury are not so harmful as to deserve criminal sanction.

Unsuccessful attempts to place another in fear are included within the menacing section. It is intended that the following cases would constitute the offense of menacing:

- (1) The victim apprehends the danger but does not fear it.
- (2) The actor's conduct is such as would cause fear to a reasonable man but the intended victim is aware that the actor

will not inflict the threatened harm; e.g. victim knows the actor's gun is not loaded.

(3) The intended victim is unaware of the actor's threat; e.g. he is blind and does not know the actor is pointing a gun at him.

Conditional threats of violence made to coerce another to engage or refrain from engaging in conduct will be covered by the section on coercion. Less serious forms of abuse, e.g. pranks, jokes, will be covered in the section on harassment.

#### B. Derivation

Menacing is adapted from New York Revised Penal Law, Sec. 120.15. The Model Penal Code includes the offense of menacing in its general assault provision. (Sec. 211.1 (1)(c)).

#### C. Relationship to existing law.

Oregon case law in defining assault includes the element of apprehension in its definition:

" An intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as create a well-founded fear of imminent peril, coupled with the apparent present ability to effectuate the attempt, if not prevented, constitutes an assault." State v. Linville, 127 Or 565, 572, 273 P. 338 (1928).

But as pointed out in State v. Wilson, 218 Or 586, 346 P.2d 115 (1959) the act of placing one in apprehension of receiving a battery is not assault unless there is also the intent to inflict injury:

"\*\*\* apprehension of injury on the part of the victim need not be shown to make out the crime. Further, it seems clear that an act done with the intention to place one in apprehension of injury only and not to inflict corporal injury would not constitute the crime of assault in this state. And too, according to the definition, an act done with the intention to inflict corporal injury but where the actor did not have the present ability to inflict corporal injury would not be a criminal assault." at 584.

The proposed draft, therefore, creates a new offense of menacing to cover the situation where the actor places or attempts to place another person in fear of imminent serious bodily harm and where serious injury is neither intended nor inflicted.



TEXTS OF REVISIONS OF OTHER STATES

Text of New York Revised Penal Law

Section 120.15 Menacing

A person is guilty of menacing when, by physical menace, he intentionally places or attempts to place another person in fear of imminent serious physical injury.

Menacing is a class B misdemeanor.

Text of Model Penal Code

Section 211.1 Assault

(1) Simple Assault. A person is guilty of assault if he:

- (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
- (b) negligently causes bodily injury to another with a deadly weapon; or
- (c) attempts by physical menace to put another in fear of imminent serious bodily harm.

Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

(2) Aggravated Assault. A person is guilty of aggravated assault if he:

- (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or
- (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly (sic) weapon.

Aggravated assault under paragraph (a) is a felony of the second degree; aggravated assault under paragraph (b) is a felony of the third degree.

Section 5 Recklessly endangering another person.

A person commits the crime of recklessly endangering another person if he recklessly engages in conduct which creates a substantial risk of serious bodily injury to another person.

( Existing  
( Law  
(  
( ORS  
( 163.320  
( 163.340  
(

COMMENTARY --- RECKLESSLY ENDANGERING ANOTHER PERSON

A. Summary

This section creates a new offense known as recklessly endangering another person. This offense is designed to prohibit reckless conduct which places another person in danger of serious bodily harm. The statute covers potential risks as well as cases where a specific person is within the zone of danger.

In Offenses Involving Danger to the Person there are three areas where reckless conduct is made criminal:

- (1) if it causes death it is manslaughter.
- (2) if it causes injury it is assault.
- (3) if it causes neither death nor injury it is recklessly endangering another person.

This may be illustrated by the following example:

X, without any specific intent to injure or kill recklessly shoots into a crowd. If death results, the crime is murder, if injury results, the crime is assault, and if neither death nor injury results, the crime is recklessly endangering another person.

An unsuccessful attempt to cause intended physical injury is an attempted assault. Reckless conduct which is likely to cause physical injury, but does not do so, does not constitute attempted assault for one cannot attempt to act recklessly. There must be intent or knowledge before there can be an attempt. As an example, if X recklessly throws a rock through the window of a house without knowing or caring whether anyone was within, he is guilty of assault if anyone is injured but, if no one is injured, he is not guilty of attempted assault but he is guilty of recklessly endangering another person.

This section is intended to cover the reckless pointing of fire-arms and, therefore, it was deemed unnecessary to include a special subsection prohibiting this particular conduct. The rude or threatening exhibition of deadly weapons will also be covered by the sections dealing with threats and disorderly conduct.

The proposed draft, unlike MPC section 211.2, does not include the words "danger of death." It was felt that these words were redundant in light of the definition of "serious physical injury." (MPC Sec. 210.0 (3) "'serious bodily injury' means bodily injury that creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or protracted loss or impairment of the function of any bodily member or organ.")

B. Derivation:

Recklessly Endangering Another Person is adapted from New York Revised Penal Law Sec. 120.20.

C. Relationship to Existing Law.

This section creates a new offense of Recklessly Endangering Another Person. Under existing Oregon law reckless conduct which creates a risk of death or serious bodily injury is treated on an ad hoc basis. The following statutes are examples of some of the numerous reckless conduct statutes which now exist in Oregon law.

ORS	SUBJECT	PENALTY
483.992	Penalty for driving recklessly or while under the influence of liquor or drugs	\$500 - 1000; 90 days - 1 yr. in jail or both
493.160	Prohibited operation of aircraft	\$500; 6 mo. in jail or both
163.310	Penalty for negligently wounding another	\$500; 6 mo. in jail or both
163.320	Pointing firearm at another; courts having jurisdiction over action	\$10 - \$500; 10 days - 6 mo. in jail or both
163.340	Management of watercraft injury to property and endangering life.	\$500 - \$1000; 5 yrs. in penitentiary or both
164.440	Dumping rubbish on private land or public way	\$100; 30 days in jail
164.530	Throwing or shooting at motor or railway vehicle	\$500; 1 yr. in jail; or 2 yrs. in penitentiary
166.010	Dueling or challenging another to duel	10 yrs. in penitentiary
166.110	Riding or driving animals recklessly	\$50
166.150	Permitting vicious animals to be at large	\$10 - \$50
166.320	Setting spring-gun or set-gun	\$100 - \$500; 30 days to 6 mo. in jail or both
166.560	Abandoning refrigerators in places accessible to children	Misdemeanor
166.630	Throwing debris and discharging firearms on highway or railroad right of way	Same as ORS 483.990 (1). \$500; 90 days in jail or both

These statutes all reflect a legislative judgment that the specified conduct involves a serious risk to the health and safety of the public.

The proposed section creates a general offense to cover reckless conduct which creates a substantial risk of serious bodily injury to another person. This section is not intended to affect or eliminate any of the numerous ad hoc statutes now existing in Oregon. When this revision reaches its final stages, if overlap or duplication is found to exist, then these statutes may be eliminated or amended as of that time.

Also, the penalty provisions will have been determined by that date and it is foreseen that the penalty may be a determinative factor in deciding which separate offenses should be eliminated, or which should be retained.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 211.2 Recklessly Endangering Another Person.

A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.

Text of New York Revised Penal Code

Section 120.20 Reckless Endangerment in the Second Degree

A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

Reckless endangerment in the second degree is a Class A misdemeanor.

Section 120.25 Reckless Endangerment in the First Degree

A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person.

Reckless endangerment in the first degree is a class D felony.

Text of Wisconsin Laws

c. 623 Section 341.30

Whoever endangers another's safety by reckless conduct may be fined not more than \$1000 or imprisoned not more than one year in the county jail or both.

Text of Indian Penal Code

Section 336

Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment . . . for a term which may extend to three months, or with fine . . . or with both.

Section 6. Coercion

	<u>Existing Law</u>
	161.330
	163.480
	163.490
	163.500

A person commits the crime of coercion when he compels or induces another person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will:

- (1) Cause physical injury to some person; or
- (2) Cause damage to property; or
- (3) Engage in other conduct constituting a crime; or
- (4) Accuse some person of a crime or cause criminal charges to be instituted against him; or
- (5) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
- (6) Cause or continue a strike, boycott or other collective action injurious to some person's business; except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act; or
- (7) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
- (8) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
- (9) Inflict any other harm which would not benefit the actor.

Section 7 Coercion; defense

In any prosecution for coercion committed by instilling in the victim a fear that he or another person would be charged with a crime, it is a defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of the threatened charge.

COMMENTARY---COERCION

A. Summary

Coercion consists of compelling a person by intimidation to commit or refrain from committing an act. Coercion as an offense embraces broad categories of threats and is, therefore, separated from the offense of terroristic threats. The offense of terroristic threats is intended to cover a narrowly defined type of threat, such as may arise from letters or anonymous phone calls threatening death, kidnaping or bombing. Coercion is also separated from the offense of theft by extortion. Extortion is basically a form of coercion in which the act compelled is the payment of money. The proposed draft defines coercion in terms similar to theft by extortion and the kinds of threats which form a basis for the offense of coercion are equated with those contained in the theft by extortion draft. The following discussion of the kinds of threats which comprise the offense of theft by extortion are also applicable to the coercion draft:

"As recommended by the Model Penal Code, subsection (1) covers threats to injure anyone, on the theory that if the threat is in fact the effective means of compelling another (to act or refrain from acting,) the nature of the relationship between the victim and the person he chooses to protect is immaterial. The issues are whether the threat is intended to intimidate and whether it is effective for that purpose.

"Subsection (2) is aimed at the threat to cause damage to someone's business, home or other property.

"The provisions of subsection (3) are taken directly from New York Revised Penal Law and are similar to the Model Penal Code which employs the language "commit any other criminal offense."



"Subsection (4) resembles closely the language now appearing in ORS 163.480.

"Subsection (5) amounts to a threat to defame. Unlike defamation actions, the truth of the matter threatened to be exposed would not constitute a defense to a prosecution under this subsection. It is emphasized, however, that the subsection is not intended to make it criminal to conduct legitimate negotiation or to agree to settlement of an asserted claim as consideration for a promise to forbear from civil litigation.

" The provisions of subsection (6) are aimed at racketeering, but do not in any way jeopardize the collective bargaining process, since even menaces are not criminal if the benefits are to be received by the group on behalf of which the "bargaining" is conducted.

" Subsection (7) is self-explanatory.

" Subsection (8) is aimed at extortion committed under cover of public office and is close to the "bribery" type of crimes now incorporated in ORS 162.230, 162.240 and 162.510."

(Theft T.D. #1, April 1968 p.9)

Section 9 is a statement of the general principle on which other threats are to be included within the coercion section. This broad provision is necessitated by the impossibility of comprehensively defining coercive conduct by a list of more specific threats of the kind contained in the first eight subdivisions. This provision penalizes conduct such as the demand for a favor upon a teacher's threat to flunk a pupil.

Coercion as defined by the proposed draft requires successful intimidation: the victim must actually act or refrain from acting. A mere threat or attempt failing of its coercive purpose would constitute attempted coercion.

The proposed draft is based on the premise that the forceful compulsion by means of a threat to act or forbear from acting, ought to be recognized as a crime even though the offense committed cannot be measured by monetary standard. The problem arises in coercion as to how to measure the gravity of the actor's misconduct since the act sought to be compelled may be of slight significance such as threatening to call the police unless the victim ceases seeing the defendant's daughter or the act may be as serious as attempting to compel the victim to leave town. The Model Penal Code, section 212.5(2) attempts to measure the gravity of the defendant's misconduct on the basis of whether the threat is to commit a felony or the actor's purpose is felonious. New York Revised Penal Law section 135.65 raises the offense a degree on the basis of (1) the kind of threat specified and (2) the kind of conduct which he compels the victim to perform.

The proposed draft adopts neither of these measures but defines only one degree of coercion. This affords some protection against such threats but avoids imposing additional penalties on the basis of artificial distinctions. This is in accord with the Committee Commentary (Sec. 2125) to the Michigan Revised Criminal Code which states as follows:

" The committee is not persuaded that the utility in subjecting some persons who commit coercion to extended prison terms outweighs the difficulties inherent in classifying the particular threats made."

Section 7 is the counterpart of the exemption in coverage in the theft by extortion draft (Theft, T.D. #1, April 1968, p.18 subsection 9(3)). This section provides a defense to a defendant charged with coercion committed by one particular kind of threat, namely, a threat to "accuse some person of a crime or cause criminal charges to be instituted against him," and where the defendant's coercive action is undoubtedly an attempt to compel or induce the victim to take reasonable steps to make good the wrong perpetrated by him. As an example, a defendant accused of coercion for having compelled a youth, under threat of charging him with criminal mischief, to paint defendant's fence which the youth had marked up in an act of vandalism would have this defense available to him.

#### B. Derivation

Section 6 of the proposed draft is adopted from section 135.60 of the New York Revised Penal Law and section 212.5 (1) of the Model Penal Code.

Section 7 is adopted from section 135.75 of the New York Revised Penal Law.

#### C. Relationship to Existing Law

Under present Oregon law "any person...who threatens any injury to the person or property of another...or threatens to accuse another of any crime with intent thereby to extort any pecuniary advantage or property from him, or with intent to compel him to do any act against his will, shall be punished..." (ORS 163.480). The crime is committed when the threat is made and there is no requirement that property be obtained. The proposed draft follows the present law but separates the offenses of theft by extortion and coercion.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 212.5. Criminal Coercion.

(1) Offense Defined. A person is guilty of criminal coercion if, with purpose unlawfully to restrict another's freedom of action to his detriment, he threatens to:

- (a) commit any criminal offense; or
- (b) accuse anyone of a criminal offense; or
- (c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or
- (d) take or withhold action as an official, or cause an official to take or withhold action.

It is an affirmative defense to prosecution based on paragraphs (b), (c) or (d) that the actor believed the accusation or secret to be true or the proposed official action justified and that his purpose was limited to compelling the other to behave in a way reasonably related to the circumstances which were the subject of the accusation, exposure or proposed official action, as by desisting from further misbehavior, making good a wrong done, refraining from taking any action or responsibility for which the actor believes the other disqualified.

(2) Grading. Criminal coercion is a misdemeanor unless the threat is to commit a felony or the actor's purpose is felonious, in which cases the offense is a felony of the third degree.

Text of New York Revised Penal Law

§135.60 Coercion in the second degree

A person is guilty of coercion in the second degree when he compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will:

1. Cause physical injury to a person; or
2. Cause damage to property; or
3. Engage in other conduct constituting a crime; or
4. Accuse some person of a crime or cause criminal charges to be instituted against him; or
5. Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
6. Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act; or
7. Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
8. Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
9. Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

Coercion in the second degree is a class A misdemeanor.

§135.65 Coercion in the first degree

A person is guilty of coercion in the first degree when he commits the crime of coercion in the second degree, and when:

1. He commits such crime by instilling in the victim a fear that he will cause physical injury to a person or cause damage to property; or

Text of New York Revised Penal Law (Cont'd.)

2. He thereby compels or induces the victim to:
- (a) Commit or attempt to commit a felony; or
  - (b) Cause or attempt to cause physical injury to a person; or
  - (c) Violate his duty as a public servant.

Coercion in the first degree is a class D felony.

§135.70 Coercion; no defense

The crimes of (a) coercion and attempt to commit coercion, and (b) bribe receiving by a labor official as defined in section 180.20, and bribe receiving as defined in section 200.05, are not mutually exclusive, and it is no defense to a prosecution for coercion or an attempt to commit coercion that, by reason of the same conduct, the defendant also committed one of such specified crimes of bribe receiving.

§135.75 Coercion; defense

In any prosecution for coercion committed by instilling in the victim a fear that he or another person would be charged with a crime, it is an affirmative defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge.

Text of Michigan Revised Criminal Code

§2125 [Coercion]

Sec. 2125. (1) A person commits the crime of coercion if he compels or induces a person to engage in conduct that the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage, by instilling in him through use of a threat a fear that, if the demand is not complied with, the actor or another will bring about the harm threatened.

- (2) "Threat" as used in this section includes:

Text of Michigan Revised Criminal Code (Cont'd.)

(a) threatening the imminent use of force against any person who is present at the time; and

(b) threats as defined in section 3201 (1).

(3) The actor does not commit coercion by instilling in a person a fear that he or another person will be charged with a crime, if the actor honestly believes the threatened charge to be true and his sole purpose is to compel or induce the person to take reasonable action to correct the wrong which is the subject of the threatened charge. The burden of injecting the issue is on the defendant, but this does not shift the burden of proof.

(4) Coercion is a Class A misdemeanor.

§3201 (1) "Threat" means a menace, however communicated, to:

(i) Cause physical harm in the future to the person threatened or to any other person; or

(xi) Do any other act which would not in itself substantially benefit the actor but which is calculated to harm substantially another person with respect to his health, safety, business, calling, career, financial condition, reputation, or personal relationships.

Text of Illinois Criminal Code

§ 12-6. Intimidation

(a) A person commits intimidation when, with intent to cause another to perform or to omit the performance of any act, he communicates to another a threat to perform without lawful authority any of the following acts:

- (1) Inflict physical harm on the person threatened or any other person or on property; or
- (2) Subject any person to physical confinement or restraint; or
- (3) Commit any criminal offense; or
- (4) Accuse any person of an offense; or
- (5) Expose any person to hatred, contempt or ridicule; or

Text of Illinois Criminal Code (Cont'd.)

- (6) Take action as a public official against anyone or anything, or withhold official action, or cause such action or withholding; or
- (7) Bring about or continue a strike, boycott or other collective action.

(b) Penalty.

A person convicted of intimidation shall be fined not to exceed \$500 or imprisoned in a penal institution other than the penitentiary not to exceed 6 months, or both.