See: Commission Minutes
10/10/69, p. 17, Vol. IX
Tapes #37 & 38

11/7/69, p. 8, Vol. IX
Tape #38

CRIMINAL LAW REVISION COMMISSION
311 Capitol Building
Salem, Oregon

ARTICLE 22. PERJURY AND RELATED OFFENSES

Preliminary Draft No. 2; October 1969

Reporter: Roger D. Wallingford

Subcommittee No. 2

"Statement" is defined to include any representation. Representations of opinion, belief or other state of mind are included only if they relate to state of mind as distinguished from the facts which are the subject of the representation.

For a false statement to be "material" it must be one that could substantially influence the course of the proceedings. "Proceeding" refers to the official matter or inquiry in which the statement was received. At common law and in almost all American jurisdictions "materiality" is an expressly required element of the crime of perjury. Materiality has been defined to include anything which would be "capable of influencing the tribunal on the issue before it." (See Blackman v. United States, 108 F2d 572, 5th Cir 1940).

An examination of the Oregon cases indicates adherence to the "potential effect" rule in regard to testing the materiality of testimony. The majority of the cases deal with perjured testimony given during the course of judicial proceedings. The issue in these cases as it relates to perjury is whether the alleged falsification was material to a central issue in the proceeding wherein the falsification was made.

The cases affirm that it is the court's responsibility to determine what issues are material to the case. It is therefore a question of law whether or not a shown falsification is material. It, of course, remains a question of fact whether the statement was made as alleged, whether the party was properly sworn and whether the statement was true or false.

B. Derivation

The primary source of research material used in drafting these definitions is Michigan Revised Criminal Code section 4901. The definition of "statement" is that suggested by Model Penal Code section 241.0 (2).

C. Relationship to Existing Law

ORS 44.330 stipulates the form of the oath to be administered in Oregon.

ORS 44.340 provides for variation in the form of the oath.

ORS 44.350 provides for a form of solemn affirmation by persons with conscientious scruples against taking an oath.

ORS 44.360 states that an affirmation as prescribed by ORS 44.350 is equivalent to an oath and that a false affirmation is perjury equally with a false oath.

The problem of providing an adequate definition for "materiality" has proved troublesome to the courts. The leading Oregon case on the materiality of perjured testimony is State v. F. E. Stilwell, 109 Or 643, 221 P 174 (1924), wherein the Court stated:

> "In a perjury prosecution, it is always necessary to show that the testimony given, which must be alleged to have been willful, was material to an issue in the controversy, wherein it was given.
>
> "Testimony may be given aliunde the record to show the state of the cause and its precise posture at the time the alleged false testimony was introduced in order to demonstrate its materiality ...
>
> "... the materiality of the alleged false testimony may be shown by introducing all or so much of the pleadings in the action as to show the issues, together with the proof of such facts as tend to show testimony to be on a material issue.
>
> "... the materiality of testimony in question must be established by evidence, and cannot be left to presumption or inference, and proof that the testimony was admitted on the trial is not sufficient to warrant a jury in inferring that such testimony was material to the issue.
>
> "On the 'facts offered' in a case of perjury, it is the duty of the court to instruct the jury as to what facts constitute 'material testimony'."

Trullinger v. Dooly & Company, et al, 125 Or 269, 265 P 1117 (1928), held that to support a charge of perjury there must be some statement of fact showing the testimony given was not only false but wilfully false, and that the false testimony was material to the issue in the case on trial in which such testimony was given.

A review of the cases supports the view that section 1, definitions, does not depart from present Oregon law.

ARTICLE 22. PERJURY AND RELATED OFFENSES

Preliminary Draft No. 2; October 1969

Existing Law
ORS
162.110
162.140
44.330
44.340
44.350
44.360

Section 1. Perjury and related offenses; definitions. As used in this Article, unless the context requires otherwise:

(1) The definitions of "benefit" and "public servant" in Article ____ apply to this Article.

(2) "Material" means that which could have affected the course or outcome of any proceeding or transaction. Whether a false statement is "material" in a given factual situation is a question of law.

(3) "Statement" means any representation of fact and includes a representation of opinion, belief or other state of mind where the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation.

(4) "Sworn statement" means any statement knowingly given under oath or affirmation attesting to the truth of what is stated.

COMMENTARY - PERJURY AND RELATED OFFENSES; DEFINITIONS

A. Summary

The definitions of "benefit" and "public servant" in the Article on Bribery and Corrupt Influences apply to this Article.

A "sworn statement" is defined as one given under oath or affirmation and includes any legally authorized mode of swearing a person to the truth of his statements.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code:

Section 241.0. Definitions.

(2) "statement" means any representation, but includes a representation of opinion, belief or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation.

Section 240.0. Definitions.

(4) "official proceeding" means a proceeding heard or which may be heard before any legislative, judicial, administrative or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or deposition in connection with any such proceeding;

Text of Michigan Revised Criminal Code:

[Definitions]

Sec. 4901. (1) The definitions in sections 4501 and 4701 are applicable in this chapter unless the context otherwise requires:

(2) "Materially false statement" means any false statement, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the proceeding. Whether a falsification is material in a given factual situation is a question of law.

(3) "Oath" includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated. For the purposes of this chapter, written statements shall be treated as if made under oath if:

(a) The statement was made on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable; or

(b) The statement recites that it was made under oath, the declarant was aware of such recitation at the time he made the statement and intended that the statement should be represented as a sworn statement, and the statement was in fact so represented by its delivery or utterance with the signed jurat of an officer authorized to administer oaths appended thereto.

(4) An oath is "required or authorized by law" when the use of the oath is specifically provided for by statute or appropriate regulatory provision.

(5) "Official proceeding" means a proceeding heard before any legislative, judicial, administrative or other government agency or official authorized to hear evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or depositions in any such proceedings.

Section 2. Perjury. A person commits the crime of perjury if he makes a false sworn statement in regard to a material issue, knowing it to be false.

Section 3. False swearing. A person commits the crime of false swearing if he makes a false sworn statement knowing, ~~or having reason to know~~, it to be false.

Existing Law
ORS
162.110
162.120
162.130
162.140
162.150
44.360
132.690
305.990
253.990
260.500
247.121
247.420
247.991
342.935
482.990
486.211
543.990
683.150
690.270
731.260
744.255
707.660
707.990
610.990
305.815
305.990
311.990
481.990
484.990
658.415
658.991

COMMENTARY - PERJURY AND FALSE SWEARING

A. Summary

Perjury, at common law, is the "taking of a willful false oath by one who, being lawfully sworn by a competent court to depose the truth in any judicial proceeding, swears absolutely and falsely in a matter material to the point in issue, whether he believed or not." (Comm. v. Powell, 2 Metc (Ky) 10).

ORS 162.110 (1) defines the crime of perjury as wilfully swearing or affirming falsely under oath or affirmation in regard to any material matter for which the oath is given.

ORS 162.140 is the false swearing statute. It is defined in the same terms as perjury but does not require materiality.

False swearing was not made a crime in Oregon until the enactment of chapter 180, Laws of Oregon, 1937. It It was at this same session of the legislature that section 14-401, Oregon Code 1930, was amended by adding thereto the word "material". (See chapter 139, Laws of Oregon, 1937). To constitute perjury the false statement must be material to the matter concerning which the oath is taken, whereas the materiality of the false statement is not an element of the crime of false swearing.

The elements necessary to prove perjury are:

(1) A legally authorized oath or affirmation, and

(2) A false statement,

(3) Material to the issue, and made with

(4) Present knowledge that the statement is false.

False swearing applies to sworn falsifications that lack the element of materiality.

It has been estimated that perjury occurs in 75% of all criminal trials. (Hibschman, "You Do Solemnly Swear!", or That Perjury Problem, 24 J Crim L and Criminology, 901 (1934)).

The prevalance of perjury has become a matter of increasing concern in the United States. In a prefacatory note to the Model Act on Perjury (1952), the National Conference of Commissioners on Uniform State Laws discussed the defects in current perjury law thusly:

> "In the first place . . . a person may not be convicted of perjury if he makes contradictory statements under oath, unless the indictment charges and the prosecution proves that one of the contradictory statements is false. In the second place, proof of falsity of a statement alleged to be false must be established by two independent witnesses or by one witness and corroborating circumstances. In the third place, a false statement must be proved not only to be false but also to be material to the proceeding for which it was made. This rule has meant immunity for many witnesses who have wilfully given false evidence in court, and much delay and uncertainty have arisen in the course of the interpretation and application of the rule. In the fourth place, a great difficulty in administering the law of perjury has been the severity of the penalties specified by the statutes. In the less aggravated forms of perjury, much could be gained in effectiveness and respect by making penalties less severe in the books and more frequently applied in the court rooms. In some states, an effort was made to classify perjury by degrees. In other states, the attempt has been made to classify it according to the crimes of perjury, false swearing, and false information to authorities. In the fifth place, the attempt to define the crime as 'wilful' or 'voluntary,' rather than 'intentional' or by description of the actual state of mind of the defendant, has resulted in metaphysical distinctions by the courts, which have not aided prompt and successful prosecution."

ORS 162.120 establishes three grades of punishment for the crime of perjury and subornation of perjury.

Subsection (1) applies to perjury committed in a criminal proceeding for a crime punishable by death or life imprisonment. A maximum 20 year penalty is provided.

Subsection (2) applies to perjury committed in all other judicial proceedings and provides a maximum 10 year penalty.

Subsection (3) applies to perjury committed other than before a court of justice and to subornation of perjury. It provides a maximum penalty of five years.

Preliminary Draft No. 1 proposed two degrees of perjury, making a distinction between perjurious statements made during "official proceedings" and those made under all other circumstances. The subcommittee felt that while there was some validity to such a distinction, the problems inherent in a consistent application of the law of perjury would be better served by retaining only one degree of perjury with a moderate felony penalty.

ORS 162.140 (3) provides a penalty of one year in the county jail or a $5,000 fine, or both, for false swearing.

The general scheme of the Model Penal Code, section 241.1, is to define those situations where sworn falsification should constitute a felony. The Code determines that the following elements distinguish felonious perjury:

(1) Oath or equivalent affirmation,

(2) Intentional false statement,

(3) Materiality of the falsification, and

(4) Requirement that the falsification be in an official proceeding involving a hearing.

Falsification made while not under an oath or affirmation would constitute a misdemeanor under Model Penal Code section 241.3 (1). If the falsification is under oath, it is nevertheless a misdemeanor under section 241.2 when either element (3) or (4) is missing.

The proposed sections attempt to incorporate these elements, with the exception of the requirement in (4).

The perjury section requires actual knowledge of the falsity of the statement, while the false swearing section requires either actual or implied knowledge that the statement was false. This distinction was made to make it clear that the crime of perjury involves an intentional, knowing misstatement. A false swearing offense, which goes to a collateral rather than a material issue, may be predicated upon a reckless disregard for the truth. In those cases where the element of knowing perjury presents a problem of proof the state would have a plea bargaining alternative in section 3.

State v. Smith, 47 Or 485, 83 P 865 (1905), held that in a prosecution for perjury it is incumbent on the state to show not only that the accused made the alleged false statements, but that he knew them to be false, or that he stated them under such circumstances that knowledge of the falsity would be imputed to him.

B. Derivation

The proposed two sections are a composite of Model Penal Code sections 241.1 and 241.2, and Michigan Revised Criminal Code sections 4905, 4906 and 4910.

C. Relationship to Existing Law

ORS 162.110 is the basic Oregon perjury statute. It establishes the necessary elements of the crime as (1) taking a legally required oath or affirmation, and (2) wilful swearing or affirming falsely, and (3) doing so in regard to any material matter.

ORS 162.120 provides three grades of punishment for perjury and subornation of perjury.

ORS 162.130 provides a maximum three year penalty for attempting to procure another to commit perjury. This statute will be repealed by the proposed section on criminal solicitation.

ORS 162.140 is the Oregon false swearing statute and is identical to the perjury statute with the exception of the materiality requirement.

ORS 162.150 allows testimony given in prior proceedings to be used against the declarant in a subsequent perjury trial.

The perjury, subornation of perjury, false swearing, and penalty provisions applicable thereto will be repealed by the proposed draft.

ORS 44.360 provides that a false affirmation is perjury equally with a false oath. This statute will be unnecessary as the definition of "oath" as used in the proposed perjury section includes all equivalent affirmations.

ORS 132.690 establishes the required contents for an indictment charging perjury. This section applies to indictments for false swearing. (See State v. King, 165 Or 26, 103 P 2d 751 (1940)). This is a procedural statute that will be considered under the criminal law procedural revision section.

ORS 305.990 is a perjury statute directed at persons presenting or furnishing false or fraudulent statements to the Oregon Tax Commission.

ORS 253.990 (2) is a perjury statute directed at persons making false statements in absentee ballots or in applications for absentee ballots.

ORS 260.500 states that no person shall knowingly make a false oath or affidavit where required by election law. Violation shall be deemed perjury.

ORS 247.121 (2), relating to registration of electors, and ORS 247.420, providing for special registration of voters, both have criminal penalty provisions for supplying false information under ORS 247.991 (1).

ORS 342.935 establishes the procedure for teacher tenure hearings and under subsection (3) provides that witnesses shall be subject to the perjury penalties under ORS 162.120.

ORS 482.990 (3) makes applicable the perjury statute to any person who makes a false affidavit or swears falsely in Department of Motor Vehicle matters.

ORS 486.211 provides that conviction of perjury in matters relating to the Department of Motor Vehicles is cause for revocation or suspension of a person's drivers license and vehicle registration.

ORS 543.990 (3) provides perjury penalties for the giving of false testimony in hearings before the State Engineer.

ORS 683.150 provides that any false testimony given in a hearing before the State Board of Optometry shall constitute perjury.

ORS 690.270 provides that the wilful making of any false statement as to a material matter in any oath or affidavit required by the provisions of the State Barber's Code shall be punishable as perjury.

ORS 731.260 prohibits the filing of false or misleading information required under the Insurance Code. ORS 731.992 provides a criminal penalty for violation of this section.

ORS 744.255 (1)(b) allows the Insurance Commissioner to suspend the license of an insurance adjuster or agent for wilful misrepresentations or misstatements as to any material matter.

ORS 707.660 stipulates the required oath for Bank and Trust Directors.

ORS 707.990 (1) provides that violation of ORS 707.660 (3) prohibiting false swearing as to ownership of stock is punishable by five years in prison.

ORS 610.990 provides that the making of a false affidavit to obtain a bounty fee is punishable as perjury.

ORS 305.815 prohibits the wilful subscribing of any document which contains a declaration that it is made under penalties for false swearing. This provision relates to administration of the Oregon Tax Court.

ORS 305.990 (5) provides a misdemeanor penalty for violation of ORS 305.815.

ORS 311.990 (7) provides that any person who makes a false oath under certain tax exemption and homestead tax deferral statutes is guilty of perjury.

ORS 481.990 (4), (10) provide for felony penalties for false swearing in motor vehicle registration matters.

ORS 484.990 provides a misdemeanor penalty for any person who wilfully certifies falsely in connection with the issuance of a traffic citation.

ORS 658.415 establishes the procedure required in applying for a farm labor contractor's license. ORS 658.991 (3) states that any person who wilfully swears or affirms falsely under ORS 658.415, whether or not the matter sworn to is material, shall be punished by imprisonment for not more than two years.

It is apparent that there are many criminal statutes directed at false swearing spread throughout the regulatory chapters of ORS. When the grading of offenses is considered, it might be advantageous to incorporate the criminal provisions for perjury and false swearing into the respective chapters by reference. This would insure the uniform application of criminal liability for similar prohibited conduct.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code:

Section 241.1. Perjury.

(1) Offense Defined. A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.

(2) Materiality. Falsification is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the proceeding. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law.

(3) Irregularities No Defense. It is not a defense to prosecution under this Section that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement. A document purporting to be made upon oath or affirmation at any time when the actor presents it as being so verified shall be deemed to have been duly sworn or affirmed.

(4) Retraction. No person shall be guilty of an offense under this Section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding.

(5) Inconsistent Statements. Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

(6) Corroboration. No person shall be convicted of an offense under this Section where proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant.

Text of Model Penal Code (Cont'd):

Section 241.2. False Swearing.

(1) False Swearing in Official Matters. A person who makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, when he does not believe the statement to be true, is guilty of a misdemeanor if:

(a) the falsification occurs in an official proceeding; or

(b) the falsification is intended to mislead a public servant in performing his official function.

(2) Other False Swearing. A person who makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, when he does not believe the statement to be true, is guilty of a petty misdemeanor, if the statement is one which is required by law to be sworn or affirmed before a notary or other person authorized to administer oaths.

(3) Perjury Provisions Applicable. Subsections (3) to (6) of Section 241.1 apply to the present Section.

Text of Illinois Criminal Code of 1961:

§ 32—2. Perjury

(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true.

Text of New York Revised Penal Law:

§ 210.00 Perjury and related offenses; definitions of terms

The following definitions are applicable to this article:

1. "Oath" includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated.

2. "Swear" means to state under oath.

3. "Testimony" means an oral statement made under oath in a proceeding before any court, body, agency, public servant or other person authorized by law to conduct such proceeding and to administer the oath or cause it to be administered.

4. "Oath required by law." An affidavit, deposition or other subscribed written instrument is one for which an "oath is required by law" when, absent an oath or swearing thereto, it does not or would not, according to statute or appropriate regulatory provisions, have legal efficacy in a court of law or before any public or governmental body, agency or public servant to whom it is or might be submitted.

5. "Swear falsely." A person "swears falsely" when he intentionally makes a false statement which he does not believe to be true (a) while giving testimony, or (b) under oath in a subscribed written instrument. A false swearing in a subscribed written instrument shall not be deemed complete until the instrument is delivered by its subscriber, or by someone acting in his behalf, to another person with intent that it be uttered or published as true.

6. "Attesting officer" means any notary public or other person authorized by law to administer oaths in connection with affidavits, depositions and other subscribed written instruments, and to certify that the subscriber of such an instrument has appeared before him and has sworn to the truth of the contents thereof.

7. "Jurat" means a clause wherein an attesting officer certifies, among other matters, that the subscriber has appeared before him and sworn to the truth of the contents thereof. L.1965, c. 1030, eff. Sept. 1, 1967.

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

§ 210.05 Perjury in the third degree

A person is guilty of perjury in the third degree when he swears falsely.

Perjury in the third degree is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 210.10 Perjury in the second degree

A person is guilty of perjury in the second degree when he swears falsely and when his false statement is (a) made in a subscribed written instrument for which an oath is required by law, and (b) made with intent to mislead a public servant in the performance of his official functions, and (c) material to the action, proceeding or matter involved.

Perjury in the second degree is a class E felony. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 210.15 Perjury in the first degree

A person is guilty of perjury in the first degree when he swears falsely and when his false statement (a) consists of testimony, and (b) is material to the action, proceeding or matter in which it is made.

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

Text of Michigan Revised Criminal Code:

[Perjury in the First Degree]

Sec. 4905. (1) A person commits the crime of perjury in the first degree if in any official proceeding he makes a materially false statement, which he does not believe to be true, under an oath required or authorized by law.

(2) Knowledge of the materiality of the statement is not an element of this crime, and the defendant's mistaken belief that his statement was not material is not a defense, although it may be considered by the court in imposing sentence.

(3) Perjury in the first degree is a Class C felony.

[Perjury in the Second Degree]

Sec. 4906. (1) A person commits the crime of perjury in the second degree if, with an intent to mislead a public servant in the performance of his duty, he makes a materially false statement, which he does not believe to be true, under an oath required or authorized by law.

(2) Perjury in the second degree is a Class A misdemeanor.

[False Swearing]

Sec. 4910. (1) A person commits the crime of false swearing if he makes a false statement, which he does not believe to be true, under an oath required or authorized by law.

(2) False swearing is a Class C misdemeanor.

Section 4. Unsworn falsification. A person commits the crime of unsworn falsification if he knowingly makes any false written statement to a public servant in connection with an application for a pecuniary or other benefit.

Existing Law ORS
708.705
708.710
697.715
726.140
314.075
497.230
671.440
471.143
482.610
481.150
481.990 (4)
678.085
688.120
677.080
698.560
571.125
321.730

COMMENTARY - UNSWORN FALSIFICATION

A. Summary

There is presently no Oregon criminal statute dealing with unsworn falsification in official matters.

The purpose of the proposed section is to broaden the reach of perjury legislation. The section does not require that the false statement be made under oath. It is obvious that this type of deception in official matters can create an equally impermissible interference with the proper administration of government.

The essential elements of the offense include:

(1) A written application for a pecuniary or other benefit, including

(2) A false written statement, with

(3) Express knowledge of the falsity of that statement.

It is not necessary that the public servant be actually misled. The conduct to be condemned is the disclosed intent to achieve an unlawful advantage in official matters.

If a pecuniary or other benefit were unlawfully obtained, it would probably be actionable under statutes prohibiting theft by fraud and deception. The Michigan Revised Criminal Code reporters point out one possible flaw in this approach:

> "We believe this interference in itself justifies a separate criminal provision which, as a practical matter, will probably be used primarily

> in the cases of unsuccessful falsifications as an alternative to the attempted theft provisions. In any event, reliance solely upon the theft provisions would be unsatisfactory because the theft provisions usually will not cover falsifications in reports or applications for permits and licenses since such items ordinarily will not be 'property' under the definition of Section 3201 (9)." (See Michigan Revised Criminal Code, Committee Commentary, p. 408).

The scope of unsworn falsification is limited to applications for pecuniary or other benefits. These two terms are defined to include any gain or advantage to the beneficiary or to a third party.

There are many legally required forms and records that do not involve benefit applications. The accuracy of this information can be assured by the use of appropriate penalty notices.

It is felt that the proposed draft would offer a number of advantages over existing law:

(1) It would fill any present or future gaps in the law. It would avoid the problem presented by the Legislative Assembly authorising a new form of economic grant or special license and failing to enact a companion provision punishing falsification in the written application for such benefits.

(2) It would restore the oath taking process to a legitimate level of solemnity by providing practical legislative alternatives. The notarial oath is too often today treated as a meaningless formality.

(3) It would provide uniform criteria for the mens rea requirements of unsworn falsification.

(4) It would provide uniformity of punishment provisions.

In respect to (3) and (4) above reference is made to the present Oregon law.

ORS 708.705 prohibits any bank or trust company official or employee from making false statements or reports to the Superintendent of Banks.

ORS 708.710 provides that no bank or trust company official or employee shall make any false entries in business affairs.

ORS 708.990 (6) provides that violation of either of the two aforementioned bank and trust company regulatory statutes is punishable by a maximum fine of $5,000 or 10 year prison sentence, or both.

ORS 697.715 prohibits false statements in the annual business statement required of collection agencies and debt consolidation agencies under ORS 697.710. ORS 697.990 provides that violation of this provision is punishable by a $500 fine or six months in jail, or both.

ORS 726.140 prohibits pawnbrokers from making false statements or entries in any report filed with the Superintendent of Banks. ORS 726.990 provides a $500 fine and six months in jail, or both, as punishment.

ORS 314.075 prohibits any person, corporation or partnership from making a false or fraudulent income tax statement. ORS 314.991 (1) provides a penalty of $1,000 fine and one year imprisonment, or both.

There are a number of other criminal penalty provisions situated in ORS directed at unsworn falsification in official matters.

Model Penal Code section 224.14, Securing Execution of Documents Fraudulently, is part of their section on Forgery and Fraudulent Practices. There are many regulatory statutes with criminal sanctions attached in ORS relating to this type of misconduct, e.g.:

ORS 497.230, False statement on application for fish or game license;

ORS 678.085, False representation in application for nurse's license;

ORS 698.560, False representation to obtain an auctioneer's license.

While the conduct prohibited by these provisions often does not involve a pecuniary benefit, they all involve some type of benefit as opposed to a right.

Model Penal Code section 224.14 reads:

> "A person commits a misdemeanor if by deception he causes another to execute any instrument affecting or purporting to affect or likely to affect the pecuniary interest of any person."

A similar provision has been approved by Subcommittee No. 1 for inclusion in the Article on Business and Commercial Frauds. (Preliminary Draft No. 1, section 15, p. 62). That section also covers oral misstatements made to obtain pecuniary benefits from governmental agencies that are evidenced by a document.

The problem of overlapping coverage should be solved by the section prohibiting cumulative convictions and sentences based on the same conduct. There are other distinguishing elements between the two sections. Coverage is provided under the unsworn falsification section for conduct involving an intent to mislead a public servant. Deceptive practices between private parties would be covered by a section patterned after Model Penal Code section 224.14, supra.

B. Derivation

The section on unsworn falsification is derived from Model Penal Code section 241.3 and Michigan Revised Criminal Code section 4940.

C. Relationship to Existing Law

There are at least 25 provisions in the present ORS providing criminal sanctions for unsworn falsification in official matters. A number of these were noted in the commentary for illustrative purposes.

There are no reported Oregon cases dealing directly with this type of falsification. Since the most common motive behind this conduct is the obtaining of pecuniary benefits by false pretenses, the cases are ordinarily talking in terms of the completed crime.

State v. Hammelsy, 52 Or 156, 157, 96 P 865 (1908), quotes Anderson's Law Dic p. 808: "A false pretense is a representation of some fact or circumstance, calculated to mislead, which is not true" and 2 Bishop's Criminal Law 415: "... a false pretense is such a fraudulent representation of an existing or past fact by one who knows it not to be true, as is adopted to induce the person to whom it is made to part with something of value."

The proposed criminal code section on theft, section 1, provides a broad definition of the word "property". Since the attempt provisions are applicable to the theft by deception section, it is obvious that the same conduct may

violate both statutes, i.e., a false unsworn statement submitted to obtain state veteran's benefits would constitute both an attempt to obtain "benefits" by deception and unsworn falsification.

It is submitted that the section on unsworn falsification provides guidelines sufficient to avoid a Pirkey problem. For example, the intent to mislead a public servant is not a requisite mens rea element under the theft by deception statutes.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code:

Section 241.3. Unsworn Falsification to Authorities.

(1) In General. A person commits a misdemeanor if, with purpose to mislead a public servant in performing his official function, he:

(a) makes any written false statement which he does not believe to be true; or

(b) purposely creates a false impression in a written application for any pecuniary or other benefit, by omitting information necessary to prevent statements therein from being misleading; or

(c) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or

(d) submits or invites reliance on any sample, specimen, map, boundary-mark, or other object which he knows to be false.

(2) Statements "Under Penalty." A person commits a petty misdemeanor if he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.

(3) Perjury Provisions Applicable. Subsections (3) to (6) of Section 241.1 apply to the present section.

Text of New York Revised Penal Law:

§ 210.45 Making a punishable false written statement

A person is guilty of making a punishable false written statement when he knowingly makes a false statement, which he does not believe to be true, in a written instrument bearing a legally authorized form notice to the effect that false statements made therein are punishable.

Making a punishable false written statement is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

Text of Michigan Revised Criminal Code:

[Unsworn Falsification to Authorities]

Sec. 4940. (1) A person commits the crime of unsworn falsification to authorities if, with an intent to mislead a public servant in the performance of his duty, he:

(a) Makes any written statement, which he does not believe to be true, in an application for any pecuniary or other benefit, or a record or report required by law to be submitted to any governmental agency;

(b) Submits or invites reliance on any writing which he knows to be a "forged instrument," as that term is defined in section 4001(g); or

(c) Submits or invites reliance on any sample, specimen, map, boundary-mark or other object he knows to be false.

(2) The provisions of sections 4915 and 4930 shall be applicable to all prosecutions under this section.

(3) Unsworn falsification to authorities is a Class B misdemeanor.

Section 5. Perjury and false swearing; irregularities no defense. It is no defense to a prosecution for perjury or false swearing that:

(1) The defendant was not competent, for reasons other than mental disability or immaturity, to make the false statement; or

(2) The statement was inadmissible under the rules of evidence; or

(3) The oath or affirmation was taken or administered in an irregular manner; or

(4) The defendant mistakenly believed the false statement to be immaterial.

COMMENTARY - PERJURY AND FALSE SWEARING; IRREGULARITIES NO DEFENSE

A. Summary

Subsection (1) makes it clear that criminal liability attaches to perjured statements regardless of the competency of the witness. The general rule is stated by Wharton:

> "If an incompetent witness is permitted to testify and testifies falsely, it is perjury. This rule is applied even when a party himself is a witness. [Further], it is no defense to perjury that the witness' false testimony was inadmissible and was improperly admitted in evidence." (See 3 Wharton 1314).

The words "competent witness" are defined in law as "one who is legally qualified to be heard to testify in a cause". (Black's Law Dictionary, 4th Ed, p. 355).

Subsection (1) is not applicable to incompetency due to mental disability or immaturity, since such persons are exempted by the criminal responsibility section. (See also CJS Perjury 12-15).

Subsection (2) is designed to prevent a person from defending perjured statements on the ground that the testimony was subject to objection and should not have been received.

Subsection (3) codifies the general rule that irregularities in the administration of the oath is not a defense to perjury prosecution. (See 3 Wharton 1297). It should be noted that while a defense to perjury cannot be predicated upon irregularities in the oath, the defense of lack of legal authority or jurisdiction of the person administering the oath may be raised.

Subsection (4) negatives any defense on the ground that the declarant mistakenly believed the false statement to be immaterial. This is in accord with a legislative trend exemplified by California and New York. This would subject some persons to criminal liability for making what they felt to be inconsequential false statements to public officials. In those instances the intent to mislead a public official might be absent. The Model Penal Code commentators answered this argument:

> "Witnesses are not usually qualified to make judgments on materiality in the technical sense in which that concept is here employed; and at least one of our purposes is to compel the witness to make his objections to immaterial questions openly, rather than by swearing to false answers. Furthermore, a defense of mistake on this point would in practice probably prevent convictions except where the significance of the information was obvious. Thus a difficult requirement of materiality would be reintroduced in practice, despite the policy expressed in our definition of the term." (Tent. Draft No. 6, Commentary, pp. 112-13, (1957)).

B. Derivation

Michigan Revised Criminal Code section 4935 for subsections (1), (2) and (3).

New York Revised Penal Law section 210.35 used for subsection (4).

Model Penal Code section 241.1 also used for subsections (2) and (3).

C. Relationship to Existing Law

State v. Craig, 94 Or 302, 185 P 764 (1919), involved a false statement made under an oath administered by a county assessor. In affirming a demurrer to the complaint, the Court stated:

> "It requires no citation of authorities to show that perjury cannot be predicated upon a false oath taken before an officer or person not authorized by law to administer it."

Christman v. Salway, 103 Or 666, 205 P 541 (1922), involved an improperly notarized mechanic's lien. The notary seal was affixed but the notary had not attested to the seal by signing his name. After taking judicial notice that a notary public is a state officer, the Court stated:

> "The authority conferred upon a notary to administer an oath is a statutory power and must be exercised in conformity with the directions of the statute. Where the statute expressly requires the officer to sign his name as an attestation of the administering of an oath, the direction is mandatory. (See Lindsay v. Huth,74 Mich 712, 42 NW 358). As the statute requires that every instrument executed before a notary public shall contain his official signature in order that full faith and credit shall be given to such instrument, it follows that a pretended certificate or any notary public without such signature is inoperative and void."

State v. Walton, 53 Or 557, 101 P 389 (1909), concerned perjured testimony given in a prior trial that was reversed on appeal. The Court stated:

> "Perjury cannot be committed in a judicial proceeding absolutely void for want of jurisdiction. But where the Court, before whom the oath of a witness is taken, has jurisdiction of the subject matter and of the parties, and the testimony given is material to the inquiry then before the court, false swearing is perjury, though the proceedings may be so irregular or erroneous as to require a reversal on appeal....it would be most unreasonable to require that all proceedings of a court, in which a witness testified falsely, should be in strict conformity to law before the witness could be proceeded against for perjury."

Model Penal Code Commentary (Tent. Draft No. 6, p. 127, 1957) states:

> "The guiding principle is that when the community commands or authorizes certain statements to be made with special formality or on notice of special sanction, the seriousness of the demand for honesty is sufficiently evident to warrant application of criminal sanctions. Upon this principle it makes little difference what formula is employed to set this seal of special importance on the declaration."

Present Oregon case law supports the following views:

(1) Authority to administer a valid oath or affirmation is conferred by statute. Lacking such statutory authority, the oath or affirmation is without sufficient legal validity to support a perjury prosecution. (State v. Craig, supra).

(2) Where a statute confers authority to administer an oath or affirmation and expressly sets out the procedure to be followed, such direction is mandatory. Failure to adhere to the statutory procedure invalidates the oath. (Christman v. Salway, supra).

(3) Perjury cannot be committed in a proceeding absolutely void for want of jurisdiction. (State v. Walton, supra).

Subsection (3) would not be a departure from existing Oregon law. State v. Craig, supra, turned on the legal authority to administer the oath, not the legal sufficiency of an oath administered by one with authority. Christman v. Salway, supra, might be viewed as contra, but the issue in that case was not perjury but the legal effect of a notarized, but unattested, mechanic's lien.

State v. Walton, supra, involved not the regularity of the oath, but concerned itself with the validity of the proceedings wherein it was taken.

Michigan Revised Criminal Code section 4935 (d) states:

> "It is no defense, that the person administering the oath lacked authority to do so, if the taking of the oath was required or authorized by law." See also United States v. Dupont, 176 F 823, DC Or(1910), wherein it was held that "perjury cannot be assigned if an oath not required by law."

The Oregon perjury statute, ORS 162.110, extends to false swearing where an oath is authorized as well as where testimony is required to be sworn. Thus, under subsection (3), if the person administering the oath was acting under legal authority, but gives the oath in an irregular manner, the irregularity would provide no defense to a perjury prosecution. Christman v. Salway, supra, would be overruled to the extent that it holds that a legally authorized oath administered in an irregular manner is void for purposes of perjury prosecution.

There are no Oregon cases on the issue of a person's competency to commit perjury or perjury charges predicated upon testimony inadmissible under the rules of evidence.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code:

Section 241.1. Perjury.

(2) Materiality. Falsification is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the proceeding. It is no defense that the declarant mistakenly

(3) Irregularities No Defense. It is not a defense to prosecution under this Section that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement. A document purporting to be made upon oath or affirmation at any time when the actor presents it as being so verified shall be deemed to have been duly sworn or affirmed.

Text of New York Revised Penal Law:

§ 210.35 Making an apparently sworn false statement in the second degree

A person is guilty of making an apparently sworn false statement in the second degree when (a) he subscribes a written instrument knowing that it contains a statement which is in fact false and which he does not believe to be true, and (b) he intends or believes that such instrument will be uttered or delivered with a jurat affixed thereto, and (c) such instrument is uttered or delivered with a jurat affixed thereto.

Making an apparently sworn false statement in the second degree is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

Text of Michigan Revised Criminal Code:

[Perjury and False Swearing: Irregularities No Defense]

Sec. 4935. It is no defense to a prosecution for perjury or false swearing:

(a) That the defendant was not competent, for reasons other than mental disability or immaturity, to make the false statement alleged.

(b) That the statement was inadmissible under the law of evidence.

(c) That the oath was administered or taken in an irregular manner.

(d) That the person administering the oath lacked authority to do so, if the taking of the oath was required or authorized by law.

Existing Law

ORS 162.160

Section 6. Perjury and false swearing; corroboration required. In any prosecution for perjury or false swearing, except a prosecution based upon inconsistent statements pursuant to section 7, falsity of a statement may not be established solely through contradiction by the testimony of a single witness.

COMMENTARY - PERJURY AND FALSE SWEARING; CORROBORATION REQUIRED

A. Summary

ORS 162.160 states: "Perjury shall be proved by the testimony of two witnesses, or one witness and corroborating circumstances."

In most criminal prosecutions the degree of proof necessary to convict is the traditional "reasonable doubt" standard. A historical exception to this rule is the perjury case. Since the age of Blackstone, perjury has been declared not capable of proof on the uncorroborated testimony of a single witness, "because there is then but one oath against another." U. S. v. Wood, 39 US 430, 14 Pet 430, 10 L Ed 527 (1840). The "two witness rule" is now a statutory requirement in England. (See Perjury Act of 1911, 1 & 2 Geo 5, c 6, 13).

The leading case on the "two witness rule" is Weiler v. United States, 65 S Ct 548, 323 US 606, 89 L Ed 495 (1945), where a unanimous Court reversed a perjury conviction on the ground that failure to charge the "two witness rule" was error:

> **"The special rule which bars conviction for perjury solely upon the evidence of a single witness is deeply rooted in past centuries. That it renders successful perjury prosecutions more difficult than it otherwise would be is obvious and most criticism of the rule has stemmed from this result. It is argued that since effective administration of justice is largely dependent upon truthful testimony, society is ill-served by an 'anachronistic' rule which tends to burden and discourage prosecutions for perjury. Proponents of the rule on the other hand, contend that society is well-served by such consequence. Lawsuits frequently engender in**

> **defeated litigants, sharp resentments and hostilities against adverse witnesses, and it is argued, not without persuasiveness, that rules of law must be so fashioned as to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions . . . Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon an 'oath against an oath.' The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted." See generally, Orfield, Proof of Perjury and the "Two Witnesses" Requirement in Federal Criminal Cases, 17 Sw L J 227 (1963).**

Recent law revision committee studies have shown a marked ambivalence in regard to the "two witness rule".

The Commissioners on Uniform State Laws in their 1952 Model Act on Perjury concluded that the rule had no place in modern practice. Section 4 (1) of the Model Act on Perjury provides that proof of guilt beyond a reasonable doubt is sufficient, "... and it shall not be necessary also that proof be by a particular number of witnesses or by documentary or other type of evidence."

The Model Penal Code advisory committee recommended elimination of the corroboration rule. Their position was supported by the Council. The Model Penal Code reporters favored retention of the rule and prevailed. As the reporters pointed out in the Commentary to Tent. Draft No. 6, p. 137 (1957):

> "The reporter continues to favor retention of some special proof safeguards in this area ... this would apply to a narrow class of cases, which would rarely be prosecuted anyway: namely, where there is no other evidence but the testimony of a single contradictory witness ... the recommended alternative is really a special gloss on 'reasonable doubt' - equivalent to saying that no pure case of oath-against-oath can satisfy the general requirement of proof beyond reasonable doubt in a perjury case."

The term "proof of falsity" used in the proposed section refers to the objective falsity of the statement. The corroboration rule is inapplicable to the burden of proving other elements of the crime.

People v. Doody, 172 NY 165, 64 NE 807 (1902), held:

> "The rule in perjury cases where one oath is to be placed against another, that there must be two witnesses to prove the charge or one witness and corroborating circumstances, has no application where the proof of the crime is necessarily based upon circumstantial evidence."

Perkins, in commenting on this rule, states:

> "[The rule] should, however, be limited to the situation for which it was designed, namely to prevent a conviction of perjury when there is no evidence other than the word of one witness against that of defendant. It has no place in a case in which the falsity of defendant's testimony can be established by evidence of another kind." (See Perkins on Criminal Law, Foundation Press, p. 393 (1957)).

New York Revised Penal Law section 210.50 adopted the rule, which represented a codification of a well established rule of law in New York. Michigan Revised Criminal Code section 4920 also adopted the provision. Their Committee Commentary, pp. 402-3, reflects the rationale for its adoption:

> **"The policy question to be decided is whether the protection of witnesses counter-balances the occasional inability to convict an apparent perjurer. . . The Committee feels that the policy issue. . . should be decided in favor of inducing free witness testimony. Acceptance of this rationale should not, however, justify a broad, mechanical application of the "special-corroboration"rule. The witness-protection thesis rests on the argument that 'since equally honest witnesses may well have differing recollections of the same event, . . . a conviction for perjury ought not to rest entirely upon oath against oath." If it did, an innocent witness would be subject to undue harassment every time another disputes his recollection [see U.S. v. Weiler, supra]. This rationale does not justify, however, requiring special corroboration where proof of perjury does not rest upon oath against oath.**
>
> **"Several courts have recognized this limitation and have introduced a number of qualifications to the "special-corroboration" rule. Thus, no contradicting witness is required where direct observation is impossible, as where defendant is accused of perjury as to his own mental state, e.g., 'I don't remember.'**

> **Such a prosecution can proceed entirely on circumstantial evidence. Similarly an authenticated record of conviction is sufficient in itself to demonstrate the falsity of the defendant's sworn denial that he had never been convicted of crime. So also, if defendant on trial for perjury admits the falsity but defends on the ground of good faith, no other witness to falsity is required; out-of-court admissions by the defendant, for example in letters he has written, may perform the same function."**

Your reporter feels that the rationale behind the corroboration rule is sound and should be retained.

B. Derivation

Michigan Revised Criminal Code section 4920.

C. Relationship to Existing Law

ORS 162.160 is a statutory enunciation of the common law requirement in perjury cases for two corroborating witnesses or one witness and corroborating circumstances. The statute has a long Oregon history (1862). The same basic provision is found in ORS 41.270 relating to usage and ORS 162.040 relating to treason.

In State v. Buckley, 18 Or 228 (1889), the Supreme Court first considered application of the statute:

> "Our own statute (Hill's Code, 778) has prescribed the quantum of evidence necessary to a conviction in this class of cases as follows ... Perjury shall be proved by the testimony of more than one witness....by the testimony of two witnesses, or one witness and corroborating circumstances ... what is meant by 'corroborating' circumstances is evidence aliunde which tends to prove the prisoner's guilt independent of his declaration."

State v. King, 165 Or 26, 103 P2d 751 (1940), held that the statute requiring that perjury be proved by testimony of two witnesses, or one witness and corroborating circumstances, does not apply to false swearing, and such crime can be established by circumstantial evidence. The Court felt that the legislative history of the false swearing statute (Ch 180, Laws of Oregon, 1937), as shown by the legislative journals, plainly indicated the intention of the legislature to permit false swearing to be established by circumstantial evidence.

Your reporter feels that no logical grounds exist for the retention of this distinction. The element of materiality is the factor that distinguishes perjury from false swearing. Materiality goes to the quality of the testimony, while the corroboration rule concerns itself with the quantum of proof required to convict. The persuasive arguments in favor of retaining this section apply equally to perjury and false swearing.

The adoption of this section would therefore overrule State v. King, supra, to the extent that it holds that there exists in Oregon law a divergent corroboration requirement between perjury and false swearing prosecutions.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code:

Section 241.1. Perjury.

(6) Corroboration. No person shall be convicted of an offense under this Section where proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant.

Text of New York Revised Penal Law:

§ 210.50 Perjury and related offenses; requirement of corroboration

In any prosecution for perjury, except a prosecution based upon inconsistent statements pursuant to section 210.20, or in any prosecution for making an apparently sworn false statement, or making a punishable false written statement, falsity of a statement may not be established by the uncorroborated testimony of a single witness. L.1965, c. 1030, eff. Sept. 1, 1967.

Text of Michigan Revised Criminal Code:

[Perjury and False Swearing: Corroboration]

Sec. 4920. In any prosecution for perjury or false swearing, except a prosecution based upon inconsistent statements pursuant to section 4915, falsity of a statement may not be established solely through contradiction by the testimony of a single witness.

Existing Law
ORS 132.690

Section 7. Perjury and false swearing; inconsistent statements. (1) If a person has made inconsistent sworn statements, both being made within the statute of limitations and within the jurisdiction of this state, it shall not be necessary to allege in an indictment or allegation which statement is false. It shall be sufficient to set forth the inconsistent sworn statements and allege in the alternative that one or the other is false and that the defendant knowingly made the false statement.

(2) The highest offense of which a person may be convicted is determined by hypothetically assuming each statement to be false. If perjury and false swearing could be established by the making of the two statements, the person may be convicted only of false swearing.

COMMENTARY - PERJURY AND FALSE SWEARING; INCONSISTENT STATEMENTS

A. Summary

The common law rule on inconsistent statements is noted by Perkins, id. at 390:

> "A conviction of perjury could not be based on two contradictory sworn statements, even if one was obviously intentionally false, unless it could be established which one this was."

53 Mich L Rev 1165 (1955) discusses the serious handicap this rule has created in such prosecutions. The article comments, p. 1174-76:

> **"Amending legislation is the only feasible way to meet the problem of contradictory statements under oath while preserving the offender's constitutional right to trial by jury. There is ample cause for special legislation to cover this unique situation without modifying the whole law of perjury, and at least ten states have so recognized by enacting modifications of one form or another.**

"The Arizona statute, for instance, simply provides that one who makes contradictory statements under oath is guilty of perjury, and the prosecution need not show which one was true or false. The accused is also permitted to assert as an affirmative defense that at the time he made each statement he believed it to be true... it appears to shift the burden of proof from the prosecution to the defendant, and may be objectionable on this ground...

"Tennessee appears to require the prosecution to set forth one statement in the indictment as being the false one, but then aids the prosecution with a presumption of falsity when the contrary evidence is brought in as evidence...[both]these statutes, either expressly or by implication, do away with the corroborative evidence rule, and Arizona would appear to permit disjunctive indictments...

"As long as the corroborative evidence requirement and the rule against the use of the disjunctive remain in the law, and the accused has given contradictory statements and nothing more, the prosecution is stymied. It seems hightly unjust that a person, guilty by his own admission, should be allowed to take cover behind procedural technicalities which no longer have support in sound policy...it cannot be argued that there are policy and moral arguments against this type of legislation. On the other hand, there is also the practical necessity of discouraging others from violating their oaths...the proposed amendment offers one step in the right direction."

Perkins, id. at 390, notes:

" ... [this is] a rule sometimes, and very wisely, changed by statute. Generally, it has been said, a belief as to the falsity of testimony may be inferred by the jury from proof of the falsity itself. And because of this fact prior testimony may be evidence that subsequent contradictory testimony proved to be untrue was knowingly false, but the burden is on the prosecution in this regard." (See Young v. U. S., 212 F2d 236, 241, 94 US App DC 54 (1954), cert den, 347 US 1015, 74 S Ct 870 (1954)).

The common law rule has been abandoned in the most recent criminal code revisions, e.g., NY Rev Penal Law sec 210.20; Ill Crim Code of 1961, sec 32-2 (b); Mich Rev Crim Code sec 4915.

The Model Penal Code Commentary to Tentative Draft No. 6 (1957), pp. 131-34, discusses the rationale behind this departure from existing law:

"Where a person has made inconsistent statements, it is obvious that one of them must be false, and there is some probability that the falsity was intentional. Yet the defendant may escape conviction because the state cannot prove which of the contradictory statements was false and known to be so. Thus a witness may testify for the prosecution before a grand jury or committing magistrate, and for the defense, or 'I don't remember,' when the time for trial arrives; or a witness may testify for the state at trial, and later contradict himself in a sworn affidavit on motion for new trial. The question is whether these situations call for remedial legislation, and, if so, what kind? . . ..

". . .anything done to give special legal effect to inconsistent swearings may operate as a law compelling consistency rather than truth. A witness may be warranted in refusing to testify at all in the second proceeding on the ground of self-incrimination: if he changes his story he sets up a criminal case against himself under the special statute dealing with inconsistent statements; if he yields to the pressure of the statute he preserves his consistency but only by repeating what, in his view, is a previous false statement, originally made in innocence but now certainly knowing.

"...Is there, then, a legitimate goal other than to compel witnesses to tell consistent stories? The minimum goal would appear to be that suggested by Judge Augustus Hand in the Buckner case, [(U.S. v. Buckner, 118 F 2d 468, 470 (2d Cir. 1941)], namely to make it possible to submit to the jury a case where declarant has made contradictory statements under circumstances strongly suggesting that one or the other was wilfully false. If each statement must be treated as an isolated possible offense, charged in separate counts, subject to judicial compulsion on the prosecutor to elect which count he will proceed on before the case goes to the jury, consideration of the case is unrealistically compartmentalized. The fact of self-contradiction, within a relatively brief period, especially in the course of a single developing investigation-prosecution, may, although it does not necessarily, support an inference of bad faith."

There is some protection provided for the innocent victim of inconsistent statements. The prosecution cannot rely solely upon the introduction of two inconsistent statements; it must also prove that the defendant could not have honestly believed each statement to be true when made.

Subsection (2) makes it clear that when two inconsistent sworn statements are pleaded disjunctively, the defendant may be convicted only of the lesser crime, assuming hypothetically that both statements are false.

The requirement that both statements be made within the statute of limitations is to protect a defendant from prosecution involving events long past. The danger to be avoided lies in the difficulty of establishing the truth long after the event, when memories have dimmed and witnesses have disappeared. (See U. S. v. Laut, 17 FRD 31, SD, NY (1955), where the Court dismissed a perjury count on the ground, among others, that the policy of the statute of limitations was violated by indicting the defendant in 1954 for "lying in 1951 about telling the truth in 1950").

The rationale supporting the requirement that both statements be made within the jurisdiction of the state is to prevent conviction of perjury or false swearing on the basis of inconsistent statements made in foreign jurisdictions. If it were otherwise, the prosecution could prove that the statement made in Oregon was true, thus convicting the defendant for having committed a crime outside the state.

B. Derivation

The proposed section is derived from New Jersey Penal Code section 2A:131-5 and Michigan Revised Criminal Code section 4915. Reference was also made to Model Penal Code section 241.1 (5) and New York Revised Penal Law section 210.20.

C. Relationship to Existing Law

There is no Oregon law comparable to the proposed section. In discussing perjury cases generally, the Oregon Supreme Court has had occasion to enunciate rulings that have some application thereto:

State v. Smith, 47 Or 485, 83 P 865 (1905), held:

> " ... In a [perjury] prosecution it is incumbent on the State to show that the accused made the alleged false statements, knowing them to be false; or under circumstances from which such knowledge may be imputed to him."

In State v. Buckley, 19 Or 228 (1889), the Court stated:

> "A conviction for the crime of perjury cannot be sustained where there was no other evidence except proof of the taking of the oath, the giving of the evidence upon which the perjury is assigned, followed by proof that at other times the person, when not under oath, made statements, the legal effect of which was to contradict his declaration under oath ... because of the solemnity of the oath, credit is to be given to the statement under oath rather than to those not under oath."

By dicta, p. 232, the Court quoted 2 Wharton Crim Law 2275 to the effect that:

> "... and it is said, when a defendant has made two distinct statements under oath, one directly the reverse of the other, it is not enough to produce the one in evidence to prove the other to be false."

State v. King, 165 Or 26, 103 P2d 751 (1940), cited a number of Oregon cases in support of the rule that:

> "It is well settled in this state that an indictment which substantially follows a statutory form applicable to the crime is sufficient, if the defendant is thereby definitely apprised of the nature and cause of the accusation." (See State v. Weston, 102 Or 102, 201 P 1083 (1922)).

As stated in Carter v. State, 181 Ark 665, 27 SW2d 781:

> "The rule that it is not necessary to negative the truth of the alleged false testimony itself necessarily implies that its converse is true and what the converse is. In that event the implication is equivalent to such an allegation." (See also People v. Clements, 107 NY 205, 13 NE 782).

In State v. Kalyton, 29 Or 375, 45 P 756 (1896), Justice Wolverton discussed the perjury statute, stating:

> "The statute [Hill's Code 1286] has made it essential to the indictment that it shall set forth in what action, if in an action, and in what court, the oath alleged to be false was taken, and, a priori, they must be proven when controverted."

State v. Stilwell, 109 Or 643, 221 P 174 (1924), at p. 668, holds:

> "Before one can be convicted of perjury, it must be established beyond a reasonable doubt that he testified as charged, and that the testimony so given was willfully false. It is not necessary that the whole of the testimony given by defendant at the time of the alleged perjury should be given in evidence, so much thereof as relates to the particular part on which the perjury is assigned is sufficient."

U. S. v. Mayer, Fed Case No. 15, 753, Deady 127 (DC Or 1865), held:

> "Upon an indictment for perjury, an affidavit of the defendant's directly contradicting the one upon which the perjury is assigned is not sufficient evidence of the falsity of the latter."

ORS 132.690 is a procedural statute giving the requisite allegations for a perjury indictment.

This statute would have to be revised to reflect cognizance of the alternative pleading form authorized by the proposed section.

While none of the cited Oregon cases dealt directly with a perjury conviction based on two inconsistent statements pleaded in the alternative, some of the language quoted suggests that the Oregon Court would disfavor such procedure. To the extent that the Oregon Court has indicated that the alternative pleading of two sworn inconsistent statements, without an allegation which statement is false, is fatal to a perjury indictment or charge, it would be overruled by the proposed statute.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code:

Section 241.1. Perjury.

(5) Inconsistent Statements. Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

Text of New York Revised Penal Law:

§ 210.20 Perjury; pleading and proof where inconsistent statements involved

Where a person has made two statements under oath which are inconsistent to the degree that one of them is necessarily false, where the circumstances are such that each statement, if false, is perjuriously so, and where each statement was made within the jurisdiction of this state and within the period of the statute of limitations for the crime charged, the inability of the people to establish specifically which of the two statements is the false one does not preclude a prosecution for perjury, and such prosecution may be conducted as follows:

1. The indictment or information may set forth the two statements and, without designating either, charge that one of them is false and perjuriously made.

2. The falsity of one or the other of the two statements may be established by proof or a showing of their irreconcilable inconsistency.

3. The highest degree of perjury of which the defendant may be convicted is determined by hypothetically assuming each statement to be false and perjurious. If under such circumstances perjury of the same degree would be established by the making of each statement, the defendant may be convicted of that degree at most. If perjury of different degrees would be established by the making of the two statements, the defendant may be convicted of the lesser degree at most. L.1965, c. 1030, eff. Sept. 1, 1967.

Text of Michigan Revised Criminal Code:

> **[Perjury and False Swearing: Inconsistent Statements]**
>
> Sec. 4915. (1) Where a person has made inconsistent statements under oath, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.
>
> (2) The highest offense of which a person may be convicted in such an instance shall be determined by hypothetically assuming each statement to be false. If perjury of different degrees would be established by the making of the two statements, the person may be convicted of the lesser degree at most. If perjury or false swearing would be established by the making of the two statements, the person may be convicted of false swearing at the most.

Text of New Jersey Penal Code:

Sec. 2A:131-5. Allegations in indictment as to false statements; prima facie evidence of falsity of statements; sufficiency of evidence to convict.

If a person has made contrary statements under oath, it shall not be necessary to allege in an indictment or allegation which statement is false but it shall be sufficient to set forth the contradictory statements and allege in the alternative that one or the other is false.

Proof that both statements were made under oath duly administered is prima facie evidence that one or the other is false; and if the jury are satisfied from all of the evidence beyond a reasonable doubt that one or the other is false and that such false statement was wilful, whether made in judicial proceeding or before a person authorized to administer an oath and acting within his authority, it shall be sufficient for a conviction.

Section 8. Initiating a false report. A person commits the crime of initiating a false report if he knowingly initiates a false alarm or report to be transmitted to a fire department, law enforcement agency or other organization that deals with emergencies involving danger to life or property.

Existing Law
ORS
476.740
476.990 (6)
165.545
161.310

COMMENTARY - INITIATING A FALSE REPORT

A. Summary

Criminal statutes dealing with false fire alarms are found in nearly all American jurisdictions. The rationale giving impetus to criminal liability is based upon the waste of government resources involved and the creation of circumstances where personnel and equipment is made unavailable to deal with legitimate emergencies.

The section is intended to reach fire and police departments, and all other organizations, public and private, that respond to emergency alarms involving perilous circumstances.

The section applies whether the false alarm was directly or indirectly caused to be transmitted. Criminal liability should not be dependent on whether the person acted himself or caused another to act for him.

False police reports have been prosecuted in this country under such catch-all statutes as "disorderly conduct." An example of this type of statute is ORS 161.310 which reads:

> "161.310 Punishment for gross injury to another's person or property and offenses against public peace, health or morals. If no punishment is expressly prescribed for the act by the criminal statutes, any person who wilfully and wrongfully commits any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to public morals, upon conviction, shall be punished by imprisonment in the county jail for not less than one month nor more than six months, or by fine not less than $50 nor more than $200."

The power of the judiciary to punish this type of behavior was first clearly asserted in King v. Manley, 1 KB 529 (1933), where the Court affirmed the conviction of a defendant for making a false robbery report, commenting:

> "[Her report caused] police maintained at public expense for the public benefit to devote their time and services to the investigation of false allegations, thereby temporarily depriving the public of the services of these public officers, and rendering liege subjects of the King liable to suspicion, accusation and arrest ... "

There are a few states that now deal directly with this offense. Wisconsin Criminal Code section 346.30 (a) provides up to six months imprisonment for giving false information to law enforcement officers "regarding the commission of a crime or a fictitious crime with intent to induce the officer to act in reliance thereon."

The Wisconsin statute may be unduly broad in that it would seem to cover any false oral statement given to a police officer in the course of an investigation. If such statements are to be subject to prosecution, it seems reasonable that they be reduced to writing and signed by the declarant, and that an intent to mislead be established.

Section 120 of the Canadian Criminal Code is even broader, with a five year maximum not only for false information implicating another and reports of fictitious offenses, but also for "causing a public officer to enter upon an investigation by ... doing anything ... to divert suspicion from himself."

The term "law enforcement agency" includes all persons involved in the law enforcement process. A false report to a prosecuting attorney, if transmitted to the police, is as disruptive to effective public administration as one made directly to the police.

Your reporter feels that the proposed section will provide our law enforcement agencies with some necessary protection from unjustified harassment and interference with their official duties.

B. Derivation

Subsection (1) is almost identical to Michigan Revised Criminal Code section 2535, which was derived from Model Penal Code section 241.4.

Subsection (2) is derived from New York Revised Penal Law section 240.50 (3).

C. Relationship to Existing Law

The oregon statute on false fire alarms is ORS 476.740:

> "No person shall wantonly or maliciously transmit or cause to be transmitted by any means a false alarm of any emergency to any municipal fire department or rural fire protection district within the State of Oregon."

ORS 476.990 (6) states:

> "Violation of ORS 476.740 ... is a misdemeanor."

ORS 165.545 (1) excepts fire and police governmental agencies from the statutes prohibiting recording, replaying or broadcasting telephonic or radio messages directly concerning their operations if done at operational centers. Subsection (2) states:

> "No recording of telephonic or radio conversation recorded by fire or police governmental entities shall be admissible in evidence in any court of this state."

Your reporter feels that it might be advisable to consider amending subsection (2) to except such recordings where the recorded conversation constitutes a false alarm. In view of modern voice identification techniques, such evidence may, in the future, be a valuable aid in prosecuting the crime of rendering false reports. The reliability of the voiceprint technique as an identification device is not yet firmly established in the law.

In State v. Cary, 49 NJ 343, 1 Cr L 2181 (1967), the Court approved an order of the trial court compelling the defendant to submit to a voice recording for identification purposes. The police had obtained a tape recording of a male voice telephoning the police with information about the crime. After hearing, the trial judge concluded that:

> " ... any identification opinion resulting ... from a comparison of the type to defendant's voiceprint ... would not, as of this time, be admissible as evidence in the case." State v. Cary, 99 NJ Sup Ct 323, 334, 2 Cr L 2485 (Law Div 1968).

On appeal the state requested that the case be remanded for further expert testimony. The Court ordered a remand, stating:

> "We think that the interestsof justice require that as complete a record as possible be compiled before a decision is made concerning the admissibility of such a new technique in the detention of crime ... in light of the far reaching implications of admission of voiceprint evidence ... we remand to the trial court for further testimony." (State v. Cary, NJ Sup Ct 2/6/69).

ORS 141.720 through ORS 141.740 outline the required procedure for obtaining an ex parte order for interception of telecommunications, radio communications or conversations. ORS 141.740 prohibits the release of any testimony obtained thereby except by written order of the court.

It is submitted that ORS 141.720 through ORS 141.740 would not be applicable to police and fire department recordings made in the ordinary course of official operations at their operational centers. Such recordings are not "intercepted" telephone communications as intended by the statute.

The proposed section would extend criminal sanctions for false alarms to all agencies responding to emergency calls. The section prohibiting false reports to law enforcement agencies would be new to Oregon law.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code:

Section 241.4. False Alarms to Agencies of Public Safety.

A person who knowingly causes a false alarm of fire or other emergency to be transmitted to or within any organization, official or volunteer, for dealing with emergencies involving danger to life or property commits a misdemeanor.

Text of New York Revised Penal Law:

§ 240.50 Falsely reporting an incident

A person is guilty of falsely reporting an incident when, knowing the information reported, conveyed or circulated to be false or baseless, he:

3. Gratuitously reports to a law enforcement officer or agency (a) the alleged occurrence of an offense or incident which did not in fact occur; or (b) an allegedly impending occurrence of an offense or incident which in fact is not about to occur; or (c) false information relating to an actual offense or incident or to the alleged implication of some person therein.

Falsely reporting an incident is a class B misdemeanor. L. 1965, c. 1030, eff. Sept. 1, 1967.

Text of Michigan Revised Criminal Code

[Rendering a False Alarm]

Sec. 4535. (1) A person commits the crime of rendering a false alarm if he knowingly causes a false alarm of fire or other emergency to be transmitted to or within an official or volunteer fire department or any other government agency that deals with emergencies involving danger to life or property.

(2) Rendering a false alarm is a Class A misdemeanor.

Section 9. Criminal impersonation. A person commits the crime of criminal impersonation if with intent to obtain a benefit or to injure or defraud another he falsely impersonates a public servant and does an act in such assumed character.

Existing Law
ORS
165.215
165.315
165.310
165.320
165.325
165.330
165.335
165.340
165.345
165.350
165.352
165.355
162.540
162.550
162.570
162.580
194.310
33.010 (f)
462.520
618.290
474.170
399.155
181.140
206.350
649.030
672.340

COMMENTARY - CRIMINAL IMPERSONATION

A. Summary

> "In general, false personation is pretending to be someone or something one is not in order to defraud." (32 Am Jur 2d, p. 167).
>
> "False personation is committed by falsely assuming the identity of a particular person, or by falsely pretending to be a person with a certain status, with a certain occupation, or of a certain official character." (Lane v. U. S. (CA 6 Ohio) 17 F2d 923).

Legislation prohibiting impersonation of public officials is found in most American penal codes. A minority of states limit their impersonation laws to law enforcement officers, e.g., Colo State Ann, c 116, 3 (1935).

The rationale for imposing criminal liability for this type of conduct is twofold:

(1) It seeks to prevent an unwarranted imposition on people under the guise of proper authority, and

(2) It seeks to maintain respect for genuine authority by discouraging discreditable impersonations.

A few penal codes require only a false pretense of official status. (See NJ State Ann 2A: 135-10 (1953)). However, a majority of the statutes require an act in furtherance of the impersonation. (See Cal Pen Code Ann, 146a (West 1955); Wis Stat 946.69 (1955); NY Rev Pen Law, 190.25; Mich Rev Crim Code, 4545, 4550).

This view was stated by the North Carolina Court in State v. Church, 242 NC 230, 87 SE2d 256:

> "To constitute the statutory offense of unlawfully personating a peace officer, there must be something in addition to the false pretense. It is not sufficient that the person charged merely represented himself as an officer. He must have represented himself as a particular officer specified in the statute, and there must have been an overt act in furtherance of the false personation."

The proposed section adopts the rationale of the majority by requiring that the impersonator do some act in his assumed character.

A minority of states limit their impersonation law to law enforcement officials. The majority, however, provide coverage for all public servants: La Rev Stat Ann 14:112; Wis Stat 946.69, 946.70 (1955).

A specific mens rea requirement is made part of the offense; the intent to either:

(1) Obtain a benefit for the actor or a third person, or

(2) Injure another person, or

(3) Defraud another person.

The proposed statute does not explicitly reject the defense of non-existence of the officer or person the actor falsely assumed. There are no Oregon cases on this issue. The rejection of this defense is well-recognized in other jurisdictions.

U. S. v. Barnow, 239 US 74, 60 L Ed 155, 36 S Ct 19, stated the rule:

> "It is not necessary that the officer allegedly impersonated in fact exist."

U. S. v. Hamilton, (DA 7 Ind) 276, F2d 96, held:

> "Under a statute making one a criminal who personates an officer and acts as such, the words 'acts as such' means acting in the pretended character, and not necessarily doing an act authorized to the assumed capacity."

Honest mistake of fact would exempt a person from the statute since impersonation under such circumstances would lack the required mens rea for criminal liability. Statutes making false personation a crime are generally construed so that an unlawful, usually a fraudulent, intent is an essential element of the offense. (See Dickson v. U. S., (CA 10 Colo) 182 F2d 131; Thompson v. State, (Tex Crim) 24 SW 298).

The use of the word "false" or "falsely" in such statutes has been construed to imply a guilty knowledge.

Stahmann v. State, 126 Tex Crim 192, 70 SW2d 709, held:

> "As used in a statute punishing whoever falsely assumes or pretends to hold certain specified offices, the language 'falsely assumes or pretends' implies a guilty knowledge; guilty knowledge is therefore an essential constituent of the offense, so that one honestly believing that he held a position he claimed to have did not commit a crime whether his belief was reasonable or not."

Some statutes require proof of reliance on the false impersonation. (See NY Rev Penal Law 190.25 (3)). Your reporter felt that since the wrongful intent of the actor gives impetus to the crime, a reliance requirement is not warranted.

Levine v. U. S., 104 App DC 281, 261 F2d 477, upheld this position:

> "[In] a statute making it illegal to personate a public officer and attempt to perform the duties or exercise the authority pertaining to such officer, it is not necessary for the prosecution to establish that the party to whom the false personation was made relied upon it."

The purpose of the proposed section is protection of the reputation of public servants, which suffers from false impersonations. Various other code sections have been devised to protect the victims of theft and other fraudulent practices arising from such impersonation. An example of the application of theft provisions to false impersonation is found in Perkins v. State, 67 Ind 270, which holds:

> "One who falsely represents to another that he is a police officer with a warrant for arrest and that he has the power to compromise the offense, thereby obtaining valuable consideration for not making the arrest, ... is guilty of the offense of obtaining property by false pretense."

A criminal impersonation section was first proposed in the Forgery Article; Preliminary Draft No. 1. The section read:

> "Section 12. Criminal impersonation. A person commits the crime of criminal impersonation if he:
>
> "(1) Impersonates another and does an act in such assumed character with intent to obtain a benefit or injure or defraud another; or
>
> "(2) Pretends to be a representative of some person or organization and does an act in such pretended capacity with intent to obtain a benefit or to injure or defraud another."

The proposed section was intended to prevent misrepresentation of identity which does not amount to theft or attempted theft.

The draft was considered by Subcommittee No. 1 on November 15, 1968. The subcommittee felt that as a matter of policy the Commission should not give cognizance to the special interest type statutes that had grown up through the years that fell into the category of criminal impersonation. The members felt that it was necessary to retain a section on impersonating police officers, which would logically be placed in the Article on Crimes Against Public Administration.

Support for this view is found in the cases:

Raymer v. State, 27 Okla Crim 398, 228 P 500, held:

> "General impersonation statutes are not extended to cover false pretending of membership in a group or society."

There are statutes making it a criminal offense to wear a badge or other official insignia of a society to which the bearer does not belong. Decisions on the constitutionality of such statutes are conflicting.

State v. Turner, 183 Kan 496, 328 P2d 733, app dismd 359 US 206, 3 L Ed 2d 759, 79 S Ct 739, held that the regulation of the wearing and display of badges and insignia of secret societies is a proper exercise of the state's police power.

State v. Holland, 37 Mont 393, 96 P 719, held such a statute unconstitutional as an improper delegation of legislative power to the societies involved, in that a society by adopting its own insignia determined whether or not other persons could use that particular insignia.

It is submitted by your reporter that the public interest does not demand criminal sanctions for false personation of membership in private organizations. If such conduct is coupled with an intent to commit theft or other fraudulent practices, there exist appropriate statutes to deal with such behavior.

The proposed section would therefore cover the impersonation of any public official, including law enforcement officers. It would not cover U. S. military personnel or fraternal, religious or charitable organizations.

There is a substantial body of federal law in this field applicable to federal officers and employees:

18 USC 912: Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States, or any department, agency or office thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both. June 25, 1948, c 645, 62 Stat 742.

18 USC 913: Whoever falsely represents himself to be an officer, agent, or employee of the United States, and in such assumed character arrests or detains any person or in any manner searches the person, buildings, or other property of any person, shall be fined not more than $1,000 or imprisoned not more than three years, or both. June 25, 1948, c 645, 62 Stat 742.

B. Derivation

Reference was made to New York Revised Penal Law section 190.25 (1), Model Penal Code section 241.9 and Michigan Revised Criminal Code sections 4055, 4545 and 4550.

C. Relationship to Existing Law

There are a number of Oregon statutes prohibiting impersonation and misrepresentation of membership in specified organizations.

ORS

165.215 Obtaining money or property by falsely impersonating another.

165.310 Using unauthorized misrepresentation to solicit membership in a society.

165.315 Nonmember of organization obtaining aid by representing membership.

165.320 Mailability of letters containing misrepresentations regarding societies.

165.325 Creation of society having name or purpose similar to that of existing body.

165.330 Organization of corporation to violate ORS 165.310 to 165.325.

165.335 Circulating signs or rituals of fraternal society without authority.

165.340 Pretending to be member or agent of religious or charitable society.

165.345 Misrepresenting present or past membership in the Armed Forces.

165.350 Wearing uniform of armed services when not a member.

165.352 Unlawful wearing of uniform or insignia indicating membership in organized militia.

165.355 Unlawfully wearing discharge emblem.

162.540 Assuming to be magistrate or peace officer and requiring assistance.

162.550 Disguising oneself with intent to obstruct execution of law or hinder officer.

162.570 Wearing of stars and badges.

162.580 Sales of badges without permit.

194.310 Impersonation of notary or Commissioner of Deeds.

33.010 (f) Assuming to be an attorney.

462.520 Falsely using name of racing official as source of information in commission of touting.

618.290 Impersonation of state sealer or his deputies.

474.170 Obtaining drug unlawfully by use of a false name or misrepresentation.

399.155 Unlawful wearing of uniform or insignia of organized militia.

181.140 Wearing Oregon State Police uniforms by other persons.

206.350 Wearing Multnomah County Sheriff's Department uniforms.

649.030 Unauthorized use of a registered insignia.

672.340 False impersonation of professional engineer or former professional engineer of a like or different name.

The only reported Oregon case found is State v. Renick, 33 Or 584, 56 P 275, 44 LRA (1899), which involved an indictment for obtaining money by means of a false token. Defendant Renick used a fictitious name and falsely told one Carrie Meyers that he was unmarried. Under this false pretense he obtained $190 from the Meyers woman. He was charged with obtaining money under false pretenses upon the theory that he himself constituted the false token. In affirming a demurrer to the indictment the Court stated:

> "A person is not himself a false token so as to be indictable for obtaining money by means of a false token and false pretenses ... where he procures money from a woman by a promise of marriage and by offering himself to her under a fictitious name, and by falsely stating that he is unmarried."

All present statutes applicable to impersonation of public officials and police officers would be repealed by the proposed section. Those statutes relating to private organizations would, of course, also be repealed.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code:

Section 241.9. Impersonating a Public Servant.

A person commits a misdemeanor if he falsely pretends to hold a position in the public service with purpose to induce another to submit to such pretended official authority or otherwise to act in reliance upon that pretense to his prejudice.

Text of New York Revised Penal Law:

§ 190.25 Criminal impersonation

A person is guilty of criminal impersonation when he:

1. Impersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another; or

2. Pretends to be a representative of some person or organization and does an act in such pretended capacity with intent to obtain a benefit or to injure or defraud another; or

3. Pretends to be a public servant, or wears or displays without authority any uniform or badge by which such public servant is lawfully distinguished, with intent to induce another to submit to such pretended official authority or otherwise to act in reliance upon that pretense.

Criminal impersonation is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

Text of Michigan Revised Criminal Code:

[Criminal Impersonation]

Sec. 4055. (1) A person commits the crime of criminal impersonation if he:

(a) Assumes a false identity and does an act in his assumed character with intent to gain a pecuniary benefit for himself or another or to injure or defraud another; or

(b) Pretends to be a representative of some person or organization and does an act in his pretended capacity with intent to gain a pecuniary benefit for himself or another or to injure or defraud another.

(2) Criminal impersonation is a Class B misdemeanor.

[Impersonating a Public Servant]

Sec. 4545. (1) A person commits the crime of impersonating a public servant if he falsely pretends to be a public servant and does any act in that capacity.

(2) It is no defense to a prosecution under this section that the office the actor pretended to hold did not in fact exist.

(3) Impersonating a public servant is a Class B misdemeanor.

[Impersonating a Peace Officer]

Sec. 4550. (1) A person commits the crime of impersonating a peace officer if he falsely pretends to be a peace officer and does an act in that capacity.

(2) Impersonating a peace officer is a Class A misdemeanor.

Text of Proposed Minnesota Criminal Code (1962)

609.475 Impersonating Officer

Whoever falsely impersonates a police or military officer or public official with intent to mislead another into believing that he is actually such officer or official may be sentenced to imprisonment for not more than 90 days or to payment of a fine of not more than $100.

See: Commission Minutes
12/12/69, p. 2, Vol. IX
Tape #39

CRIMINAL LAW REVISION COMMISSION
311 Capitol Building
Salem, Oregon

ARTICLE 22. PERJURY AND RELATED OFFENSES

Preliminary Draft No. 2; October 1969

Proposed Amendment No. 2

Perjury and False Swearing; Retraction

(As proposed by Commission, November 7, 1969)

Reporter: Roger D. Wallingford

Subcommittee No. 2

PROPOSED AMENDMENT No. 2

Section ____. Perjury and false swearing; retraction. (1) It is a defense to a prosecution for perjury or false swearing committed in an official proceeding that the defendant retracted his false statement:

(a) In a manner showing a complete and voluntary retraction of the prior false statement; and

(b) During the course of the same official proceeding in which it was made; and

(c) Before the subject matter of the official proceeding is submitted to the trier of fact.

(2) "Official proceeding", as used in this section, means a proceeding before any judicial, legislative or administrative body or officer, wherein sworn statements are received, and includes any referee, hearing examiner, commissioner, notary or other person taking sworn statements in connection with such proceedings.

COMMENTARY - PERJURY AND FALSE SWEARING; RETRACTION

The common law rule held that while retraction may be used to show inadvertence in making the false statement, perjury once committed cannot be purged even by a correction during the same hearing. (See U.S. v. Norris, 300 US 564, 57 S Ct 535 (1937)).

There is increasing authority in support of a retraction defense to perjury, based upon the theory that it serves a socially desirable purpose in the search for truth. Similar provisions have recently been adopted by the states of Michigan, Illinois and New York. The U.S. Supreme Court argues against this rationale in the Norris case, supra:

"The argument overlooks the tendency of such a view to encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have its intended effect, but, if discovered, the witness may purge himself of crime by resuming his role as witness and substituting the truth for his previous falsehood. It ignores the fact that the oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross-examination, by extraneous investigation or other collateral means."

Model Penal Code 241.1 (4) reads:

"(4) Retraction. No person shall be guilty of an offense under this section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding."

The Model Penal Code reporters support their adoption of a retraction provision as follows:

"The draft attempts to preserve incentive to correct falsehoods, without impairing the compulsion to tell the truth in the first place. The danger that witnesses might be encouraged to take a chance on perjury is limited by the draft's requirement that recantation take place before the falsity becomes manifest." (Tent. Draft No. 6, 1957, p. 129)

In accord with this view is Brannen v. State, 94 Fla 656, 114 S 429 (1927), wherein it was held:

"The law encourages the correction of erroneous and even intentionally false statements on the part of a witness, and perjury will not be predicated upon such statements when the witness, before the submission of the case, fully corrects his testimony."

The New York retraction section adopted the Model Penal Code language (See New York Revised Penal Law s. 210.25). The Michigan and Illinois retraction sections do not require proof that the correction was made "before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding."

A conflicting judicial policy is represented by the New York and federal rule as espoused by the Norris case, supra. This conflict is discussed in 64 ALR 2d 276 in an annotation entitled "Retraction as defense in perjury prosecutions:"

> "The difference between the federal and New York rule may perhaps be explained by a difference in judicial policy. The federal rule requires a witness to testify truthfully at all times, and subjects him to punishment for perjury if he intentionally falsifies his testimony, without regard for any change of heart by the witness, on the theory that to do otherwise is to encourage false swearing.
>
> "The policy behind the New York rule, however, seems to be that it is highly important that the tribunal receiving the testimony know that truth and, as a means of achieving this end, it may be wise to encourage even one who wilfully testifies falsely to come forward with the truth, so that justice may be done.
>
> "Under the New York rule the recantation must be prompt and must come before harm has been done to the inquiry under way, and before the witness has learned that his falsehood has been discovered by others.... Under the federal rule, recantation may be effective to show an absence of criminal intent on the part of a witness offering false testimony....It may well be that these two rules tend to coalesce, producing similar results under a similar set of circumstances.
>
> "Some courts have stated or held that if the witness recants within an appropriate time and under satisfactory circumstances, and tells the truth to the tribunal before which he originally appeared, then the offense of perjury and of false swearing has not been committed by him." (Florida, Missouri, New York, Pennsylvania).

State court decisions have taken diametrically opposed positions. State v. Brinkley, 189 SW 2d 314 (Mo 1945): "If the accused corrects his false testimony before the case in which he gave it has been submitted, the law will not treat it as perjury." Butler v. State, 429 SW 2d 479 (Tex 1968):"Appellant would have this court follow the New York rule which is clearly in the minority and hold that since [defendant] recanted while still on the stand, the crime of perjury was not committed. We have concluded the contrary and follow the federal and majority rule which is that if a witness intended to commit perjury, no manner of recanting will absolve him...."

The special safeguards incorporated into the New York and Model Penal Code retraction sections make them overly complex. These safeguards require a showing that (1) the retraction was made before the prior falsification substantially affected the proceeding, and (2) before it became manifest that the falsification was or would be exposed.

In regard to (1) above, logic leads us to the conclusion that an effective retraction is most imperative after the false testimony has "substantially affected the proceeding." It is at this stage of the proceedings that the rights of the parties have been clearly prejudiced. In regard to (2), substantial problems are raised by requiring a determination that the retraction be made "before it became manifest that the falsification...would be exposed."

Section ____, in providing a retraction defense, attempts to avoid the potential problems posed by the language in Model Penal Code section 241.1 (4). The word "retract" is defined as "2. to withdraw or disavow (a statement, promise, offer, charge, etc.); recant or revoke." (Webster's New World Dict (1968)). As drafted, retraction as a defense to perjury or false swearing would be valid only where:

(1) The retraction was complete and voluntary. "Voluntary" is used here to mean "8. in law, a) acting or or done without compulsion or persuasion. b) done without profit, payment, or any valuable consideration." (Webster's New World Dict (1968)); and

(2) The retraction is made during the course of the same official proceeding in which the false statement was made. It is intended that statements made in separate hearings at separate stages of the same proceeding shall be deemed to have been made in the course of the same

proceeding, until such time as the issues framed by the proceedings have been submitted to the trier of fact; and

(3) The retraction is made before the subject matter of the proceeding wherein the false statement was made is submitted to the trier of fact.

Subsection (2) defines "official proceeding" to include proceedings before any judicial, legislative or administrative agency or officer, and extends to authorized persons acting on their behalf.

A retraction defense will not be available to prosecutions based upon false sworn statements made in connection with matters not involving an official proceeding. The underlying policy decision giving vitality to a retraction defense does not apply to these areas.

TEXT OF MODEL PENAL CODE

Section 241.1. Perjury.

(4) Retraction. No person shall be guilty of an offense under this Section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding.

# # #

TEXT OF ILLINOIS CRIMINAL CODE OF 1961

Sec. 32-2. Perjury

(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true.

(b) Proof of Falsity.

An indictment or information for perjury alleging that the offender, under oath, has made contradictory statements, material to the issue or point in question, in the same or in different proceedings, where such oath or affirmation is required, need not specify which statement is false. At the trial, the prosecution need not establish which statement is false.

(c) Admission of Falsity.

Where the contradictory statements are made in the same continuous trial, an admission by the offender in that same continupus trial of the falsity of a contradictory statement shall bar prosecution therefor under any provisions of this Code.

Penalty.

A person convicted of perjury shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 14 years, or both fined and imprisoned.

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TEXT OF NEW YORK REVISED PENAL LAW

§ 210.25 Perjury; defense

In any prosecution for perjury, it is an affirmative defense that the defendant retracted his false statement in the course of the proceeding in which it was made before such false statement substantially affected the proceeding and before it became manifest that its falsity was or would be exposed. L.1965, c. 1030, eff. Sept. 1, 1967.

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TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Perjury and False Swearing: Retraction]

Sec. 4930. No person shall be convicted of perjury if he retracted his false statement in the course of the same proceeding in which it was made. Statements made in separate hearings at separate stages of the same trial or administrative proceeding shall be deemed to have been made in the course of the same proceeding. The burden of injecting the issue of retraction is on the defendant, but this does not shift the burden of proof.

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