

See: Minutes of Subcommittee on
Grading and Sentencing
4/5/70, p. 56, Vol, X, Tape #57

Minutes of Commission
5/15/70, p. 61 & p. 62, Vol. IX
Tape #61

CRIMINAL LAW REVISION COMMISSION
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Salem, Oregon

ARTICLE 22. PERJURY AND RELATED OFFENSES

Tentative Draft No. 1; February 1970

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Subcommittee No. 2

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ARTICLE 22. PERJURY AND RELATED OFFENSES

Tentative Draft No. 1; February 1970

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

(1) The definition of "public servant" in
Article ___ applies to this Article.

(2) "Benefit" means any gain or advantage to
the beneficiary or to a third person pursuant to the
desire or consent of the beneficiary.

(3) "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.

(4) "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.

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

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COMMENTARY - PERJURY AND RELATED OFFENSES; DEFINITIONS

A. Summary

The definition of "public servant" in the Article on Bribery and Corrupt Influences applies to this Article. "Public servant" is defined in that Article to mean:

"(3) 'Public servant' includes:

"(a) A public officer or employe of the state or of any political subdivision thereof or of any governmental instrumentality within the state;

"(b) A person serving as an advisor, consultant or assistant at the request or direction of the state, any political subdivision thereof or of any governmental instrumentality within the state;

"(c) A person nominated, elected or appointed to become a public servant, although not yet occupying the position; and

"(d) Jurors."

The term "benefit" is defined liberally to include any gain or advantage accruing to the actor or to a third person pursuant to his desire or consent. The words "gain" and "advantage" are to be given their ordinary dictionary meaning.

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

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

For a false statement to be "material" it must be one that could 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 the definitions in section 1 is Michigan Revised Criminal Code sections 4901 and 4701. The definition of "statement" is 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. Stilwell, 109 Or 643, 221 P 174 (1924), wherein the court stated at pp. 659-668:

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

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

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;

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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.

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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.

Existing
Law

ORS

162.110

162.120

162.130

162.140

162.150

44.360

132.690

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

COMMENTARY - PERJURY AND FALSE SWEARING

The elements necessary to prove perjury are:

- (1) A false statement,
- (2) Given under oath or affirmation,
- (3) Material to the issue, and made with
- (4) Present knowledge that the statement is false.

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

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

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

"In the first place . . . a person may not be convicted of perjury if he 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."

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).

Sections 2 and 3 both require actual knowledge of the falsity of the proffered statement. It is intended that both offenses should be predicated upon an intentional, knowing misstatement. A reckless disregard for the truth may in some cases be sufficient to impute an intentional falsification.

B. Derivation

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: 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: 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.

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: The Oregon false swearing statute. Identical to the perjury statute with the exception of the materiality requirement.

False swearing was not made a crime in Oregon until the enactment of chapter 180, Laws of Oregon, 1937. 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.

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

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.

The perjury, subornation of perjury and false swearing statutes, and penalty sections 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 is unnecessary as the definition of "sworn statement" in the proposed Perjury Article includes all equivalent affirmations and should be repealed.

ORS 132.690: Sets out the required contents of an indictment charging perjury. The section also applies to indictments for false swearing. (See State v. King, 165 Or 26, 103 P2d 751 (1940)). This procedural statute will be considered under the revision of the procedural criminal law.

There is presently scattered throughout ORS a needless proliferation of statutes dealing with false statements made to governmental agencies. The legislature may decide to retain some of these provisions, while repealing others as no longer necessary. A conscientious analysis of each statute would require careful examination of every ORS volume. The time available for the criminal law revision project does not permit such an in-depth study.

The Commission recommends that as it becomes apparent that a specific statute provides double coverage it be repealed by the legislature. Of course, statutes incorporating by reference existing perjury and false swearing sections in the criminal code should be amended to conform with the new sections proposed by this Article.

A list of those statutes found by the Commission follows:

ORS 94.990 (1) (f): Provides a felony penalty for false swearing concerning any matter or proceeding involving registration of title under the Torrens Law. This subsection should be repealed by the false swearing section.

ORS 241.990 (2): States that wilful false swearing in any hearing or investigation before the county employes civil service commission is perjury and is punishable as such. This section should be repealed by the proposed perjury statute.

ORS 247.121: Prohibits an elector who requests registration from supplying information knowing it to be false. Subsection (1) requires such information to be submitted under oath or affirmation. Subsection (2) should therefore be repealed by the perjury section.

ORS 247.420: Prohibits supplying false information in connection with applications for special registration certificates. This information is required to be submitted under oath or affirmation. Subsection (3) should be repealed by the proposed perjury section.

ORS 247.991 (1): Penalty section for ORS 247.121 and 247.420. It should also be repealed.

ORS 253.990 (2): States that any person who makes a false statement in his oath upon the envelope containing an absentee ballot shall be guilty of perjury.

ORS 254.510 to .570 and 254.990: Punish misrepresentations, false statements, false or fraudulent signatures and false affidavits and certificates in the circulation, certification and filing of initiative, referendum and recall petitions.

ORS 260.500: States that the making of a false oath or affidavit in connection with any of the provisions of the election laws shall be deemed perjury and be punished accordingly.

ORS 305.815: Prohibits the making and subscribing of a false return, statement or document submitted to the State Tax Commission, under penalty of false swearing.

ORS 305.990 (1) and (2): Prohibit public officials from furnishing the State Tax Commission with false and fraudulent statements, and the giving of false testimony before the State Tax Commission or Court, both punishable as perjury.

ORS 308.990 (6): Punishes as perjury furnishing the State Tax Commission with false or fraudulent statements in connection with assessments of designated utilities and companies and optional gross earnings tax on revenues from rural telephone exchanges.

ORS 309.990 (3): Penalizes as perjury furnishing the State Tax Commission with false information regarding equalization of property taxes.

ORS 311.990 (7): A perjury statute directed at the making of a false oath in connection with the collection of property taxes.

ORS 314.075: Prohibits making a false income tax return and supplying false information to the State Tax Commission.

ORS 314.991 (1): The penalty provision for ORS 314.075. In addition to a misdemeanor penalty and \$1,000 fine it contains a \$1,000 penalty provision.

ORS 321.225 (2): Prohibits making false statements on timber tax returns.

ORS 321.350 (2): Prohibits making any false return or false representation on reforestation tax returns.

ORS 321.955 (5): Prohibits making a false or incorrect report upon severance of merchantable timber.

ORS 321.991: The penalty provision for the three named ORS chapter 321 statutes. Subsection (1) penalizes violation of ORS 321.225 as a misdemeanor. Subsection (3) penalizes violation of ORS 321.350 as a misdemeanor. Subsection (6) penalizes ORS 321.955 as perjury.

ORS 321.730 (6): States that no person shall make a false statement in an application for forest land classification. ORS 321.991 (5) penalizes violation of ORS 321.730 (6) with a \$500 fine and three months imprisonment.

ORS 323.990 (2) and (3): Punish as a misdemeanor the rendering of false reports in connection with state cigarette tax revenues.

ORS 342.935: Sets out the procedure for teacher tenure hearings. Subsection (3) provides that witnesses shall be subject to perjury penalties.

ORS 407.060: Prohibits any false oath or false statement in veterans' bonus or loan applications.

ORS 407.430: Prohibits any written or oral false statement in support of a World War II veteran's bonus.

ORS 407.990: Provides a misdemeanor penalty for violation of ORS 407.060 or 407.430.

ORS 416.990: Penalizes false statements made in connection with the relatives' responsibility law.

ORS 473.170 (1) (b): Prohibits false statements by manufacturers in reports to the State Liquor Commission. ORS 473.990 (1) punishes violation of ORS 473.170 (1) (b) with a \$500 fine and six months imprisonment.

ORS 481.150 (4): Prohibits false statements in vehicle registration applications.

ORS 481.225 (7): Penalizes as false swearing false statements in applications for special licenses for farm vehicles.

ORS 481.990 (4): Makes a false statement of a material fact in an application for a motor vehicle certificate of title punishable as a felony. Subsection (10) makes false swearing in regard to any matter required by ORS chapter 481 punishable as perjury. Subsection (12) makes violation of ORS 481.225 (7) a misdemeanor.

ORS 482.990 (3): Treats as perjury any false sworn statement made in connection with applications for operators' and chauffeurs' licenses.

ORS 484.990: Penalizes the false certification of matters set forth in a traffic offense citation.

ORS 486.211 (4) (b): Gives as one ground for revocation or suspension of license and vehicle registration perjury or the making of a false affidavit.

ORS 486.991 (3): Makes it a misdemeanor to submit false information in any report required by ORS chapter 486.

ORS 488.820: Penalizes giving false statements or information to the State Marine Board. ORS 488.990 (8) punishes violation of ORS 488.820 by a \$50 fine and 30 days imprisonment.

ORS 488.995: Penalizes certifying falsely in connection with a boating offense citation or complaint.

ORS 497.230: Prohibits false statements of residence on fish and game license applications. ORS 497.990 states that violation of any provisions of ORS chapter 497 is a misdemeanor.

ORS 543.990 (3): Treats as perjury the giving of false testimony in any hearing before the State Engineer.

ORS 604.380: Prohibits making any false certificate, affidavit or record of transfer in connection with livestock brands and marks. ORS 604.992 penalizes violation of any provisions of ORS chapter 604 as a misdemeanor.

ORS 610.990 (3): States that the making of a false affidavit in an application for a predatory animal bounty is perjury.

ORS 656.990 (1): Makes it a misdemeanor to submit a false statement or representation, or false payroll report, to the State Workmen's Compensation Board.

ORS 657.300: Prohibits false statements by an employer to the Department of Employment Commissioner. ORS 657.305 prohibits making a false statement to obtain a benefit under the state unemployment compensation law. ORS 657.495 prohibits making a false statement to lower contributions paid to the unemployment compensation fund. ORS 657.990 (2) penalizes violation of ORS 657.300 as a misdemeanor. Subsection (3) penalizes violation of ORS 657.305 and 657.495 by a \$500 fine and 90 days imprisonment.

ORS 658.991 (3): States that any person who swears or affirms falsely in an application for a farm labor contractor's license is subject to two years imprisonment and a \$5,000 fine.

ORS 659.260: Prohibits an employer of labor from filing a false statement with an employment agency to secure labor. ORS 659.990 (5) punishes violation of ORS 659.260 with a \$100 fine and 60 days imprisonment.

ORS 671.440 (2): Prohibits making a false oath or affirmation in connection with application for registration as architect to State Board of Landscape Architect Examiners. ORS 671.990 penalizes violation of ORS 671.440 (2) as a misdemeanor.

ORS 677.080: Prohibits making any false statement on a matter relative to the right of a person to practice medicine or to obtain a license under ORS chapter 677. ORS 677.990 penalizes violation of ORS 677.080 (1) as a misdemeanor.

ORS 678.085: Prohibits making a false statement or representation in applying for a nurses' or nursing home license. ORS 678.990 (1) penalizes violation of ORS 678.085 with a \$200 fine and 30 days imprisonment for the first offense, and a \$500 fine and 30 days imprisonment for each subsequent offense.

ORS 679.170 (6): Prohibits making a false statement in an affidavit required by the State Board of Dental Examiners. ORS 679.991 (1) punishes violation of ORS 679.170 (6) as a misdemeanor.

ORS 683.150 (5): Declares that a sworn witness in a hearing before the Oregon State Board of Examiners in Optometry shall be guilty of perjury if he gives false testimony. It is recommended that subsection (5) of this statute be repealed.

ORS 683.180 (6): Prohibits making any false statement in an application for an examination before the State Board of Examiners in Optometry.

ORS 688.120: Prohibits making false or fraudulent statements in obtaining registration as a physical therapist. ORS 688.990 makes violation of ORS 688.120 a misdemeanor.

ORS 689.990 (4): Makes it a misdemeanor to secure the registration of a person as a pharmacist by making any false representations.

ORS 690.220 (2): Prohibits obtaining a barber's certificate of registration by fraudulent misrepresentations.

ORS 690.270: States that the making of any false statement as to a material matter in any oath or affidavit required by ORS chapter 690 is perjury and punishable as such.

ORS 694.145: Prohibits making a false, material statement in an application for registration as a hearing aid dealer.

ORS 697.715: States that the making of any false declaration in the annual statement required under the Collection Agencies and Debt Consolidating Agencies Code is a violation of ORS chapter 697.

ORS 707.660 (3): States that no bank director, in taking the oath required by ORS chapter 707, shall swear or affirm falsely as to the ownership of stock. ORS 707.990 (1) penalizes violation of ORS 707.660 (3) as a felony.

ORS 708.705 (1): Prohibits an officer, director, owner or employe of a bank or trust company from making any false statement or report to the Superintendent of Banks. ORS 708.990 (6) penalizes violation of ORS 708.705 (1) as a felony.

ORS 725.200: Prohibits making false statements in any record or report filed with the Superintendent of Banks. ORS 725.990 (1) makes violation of ORS 725.200 a misdemeanor.

ORS 726.140: Prohibits pawnbrokers from making false statements in records or reports filed with the Superintendent of Banks. ORS 726.990 makes violation of ORS 726.140 punishable by a \$500 fine and six months imprisonment.

ORS 731.260: Prohibits filing with the Insurance Commissioner any information known to be false or misleading. ORS 731.992 (1) makes violation of ORS 731.260 punishable as a misdemeanor.

ORS 757.450 (2): Prohibits making any false statement in a Public Utilities Commission hearing or filing with the Commissioner a false statement or representation. ORS 757.990 (1) penalizes violation of ORS 757.450 (2) as a felony.

ORS 760.315 (3): Prohibits giving a false answer in any records submitted to the PUC by an officer, agent or employe of any railroad. ORS 760.990 (4) penalizes violation of ORS 760.315 (3) with a \$1,000 fine.

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.

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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.

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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.

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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.

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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 any benefit.

<u>Existing Law</u>	
	ORS
(	57.991
(	59.135 (2)
(	59.991 (1)
(	61.990 (3)
(	106.079
(	106.990 (1)
(	240.710
(	242.640
(	242.822
(	242.990 (1) (2)
(	288.991
(	307.990
(	319.875
(	319.990 (4)
(	319.990 (1)
(	508.530 (2)
(	520.155
(	571.055 (2) (b)
(	579.230
(	587.990 (1)

COMMENTARY - UNSWORN FALSIFICATION

A. Summary

The purpose of the proposed section is to broaden the reach of existing 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 any 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 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 proposed section 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 authorizing a new form of economic grant or special license and failing to enact a companion provision punishing falsification in the written application for such benefits.

(2) It 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.

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."

The proposed criminal code section on theft 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.

The problem of overlapping coverage should be solved by a 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 a public servant. Deceptive practices between private parties will 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 no reported Oregon cases dealing directly with unsworn falsification. Since the usual motive behind such conduct is the obtaining of a pecuniary benefit by false pretenses, the cases usually turn on elements of a completed crime.

State v. Hammelsy, 52 Or 156, 157, 96 P 865 (1908), quotes Anderson's Law Dictionary at page 808:

"A false pretense is a representation of some fact or circumstance, calculated to mislead, which is not true' . . . or, as Mr. Bishop defines it, '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 adapted to induce the person to whom it is made to part with something of value' (2 Bishop's Criminal Law, s. 415)."

There are a number of existing statutes that prohibit unsworn falsification in official matters. While the conduct prohibited by these provisions often does not involve a pecuniary benefit, it invariably involves some type of benefit as opposed to a right. The Commission was again faced with a proliferation of statutes that mitigated against close examination and specific recommendation. A summary of those statutes follow, with the ultimate decision as to their retention or repeal left to later legislative determination:

ORS 57.991: Prohibits a corporation officer or director from signing or filing a false statement with the Corporation Commissioner.

ORS 59.135 (2): Prohibits any person from making untrue statements in connection with the sale or purchase of securities. Subsection (4) prohibits making or filing with the commissioner any false statement, report or document.
ORS 59.991 (1): Provides a felony penalty for violation of any provision of ORS chapter 59, the Oregon Securities Law.

ORS 61.990 (3): Penalizes as a felony the preparation or filing of a false or fraudulent report required under the nonprofit corporation law.

ORS 106.079: Prohibits the making of any material false statement by an applicant, laboratory director or physician in connection with marriage license applications. ORS 106.990 (1) punishes violation of ORS 106.079 with a \$100 fine and 30 days imprisonment.

ORS 240.710: Prohibits making any false statement, certificate, mark, rating or report with regard to any civil service test, certification or appointment.

ORS 242.640: Prohibits certain conduct in connection with the Custodian's Civil Service Law, including false examination reports and false representations concerning the examination. ORS 242.822 covers the same type of prohibited conduct in regard to civil service for firemen. ORS 242.990 (1) and (2) provides a misdemeanor penalty for violation of ORS 242.640 and 242.822.

ORS 288.991: Provides a felony penalty for making false representations in writing in support of an application for payment or reissuance of an instrument as defined in ORS 288.140. This conduct covers both theft by deception and unsworn falsification.

ORS 307.990: Penalizes the delivery of any false statement of a material fact to an officer charged with assessment of county property taxes.

ORS 319.875: Prohibits making a false statement in any report, petition or application required under motor vehicle and aircraft fuel tax law. ORS 319.990 (4) makes violation of ORS 319.875 a misdemeanor.

ORS 319.990 (1): Penalizes the making of any false statement in a statement required for the refund of money or tax under ORS chapter 319.

ORS 508.530 (2): Prohibits any person from falsifying any reports required by the Fish and Game Commission.

ORS 520.155: Prohibits false entries or statements in reports to the State Board of Geology.

ORS 571.055 (2) (b): Prohibits making a false statement to the Department of Agriculture in an application for a nurseryman's license.

ORS 579.230: Prohibits a purchaser from making a false report to the Oregon Potato Commission.

ORS 587.990 (1): Penalizes making any false statement in an application provided for storage of grain by the Department of Agriculture.

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.

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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.

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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.

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Section 5. Perjury and false swearing; irregularities no defense.

It is no defense to a prosecution for perjury or false swearing that:

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

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

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

COMMENTARY - PERJURY AND FALSE SWEARING;

IRREGULARITIES NO DEFENSE

A. Summary

Subsection (1) is designed to prevent a person from defending perjured statements on the ground that the testimony was subject to objection and should not have been received.

Subsection (2) codifies the general rule that irregularities in the administration of the oath is not a defense to perjury prosecution. (See 3 Wharton 1297). It should be noted that while a defense to perjury cannot be predicated upon irregularities in the oath, the defense of lack of legal authority or jurisdiction of the person administering the oath may be raised.

Subsection (3) negatives any defense on the ground that the declarant mistakenly believed the false statement to be immaterial. This is in accord with a legislative trend exemplified by California and New York. This would subject some persons to criminal liability for making what they felt to be inconsequential false statements to public officials.

In 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

Subsections (1) and (2) are derived from Michigan Revised Criminal Code section 4935 and Model Penal Code section 241.1.

Subsection (3) is taken from New York Revised Penal Law section 210.35.

C. Relationship to Existing Law

State v. Craig, 94 Or 302, 303, 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." (At 691, 695).

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

"Perjury cannot be committed in a judicial proceeding absolutely void for want of jurisdiction. But where the Court, before whom the oath of a witness is taken, has jurisdiction of the subject matter and of the parties, and the testimony given is material to the inquiry then before the court, false swearing is perjury, though the proceedings may be so irregular or erroneous as to require a reversal on appeal....it would be most unreasonable to require that all proceedings of a court, in which a witness testified falsely, should be in strict conformity to law before the witness could be proceeded against for perjury." (At 567, 568).

Model Penal Code commentary states:

"The guiding principle is that when the community commands or authorizes certain statements to be made with special formality or on notice of special sanction, the seriousness of the demand for honesty is sufficiently evident to warrant application of criminal sanctions. Upon this principle it makes little difference what formula is employed to set this seal of special importance on the declaration." (Tent. Draft #6, p. 127 (1957)).

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 (2) 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.

No Oregon cases dealing with the issue of perjury predicated upon testimony inadmissible under the rules of evidence were found.

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.

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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.

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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.

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Section 6. Perjury and false swearing; retraction. (1) It is a defense to a prosecution for perjury or false swearing committed in an official proceeding that the defendant retracted his false statement:

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

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

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

(2) "Official proceeding", as used in this section, means a proceeding before any judicial, legislative or administrative body or officer, wherein sworn statements are received, and includes any referee, hearing examiner, commissioner, notary or other person taking sworn statements in connection with such proceedings. Statements made in separate stages of the same trial or administrative proceeding shall be considered to have been made in the course of the same proceeding.

COMMENTARY - 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." At 574.

Model Penal Code section 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 #6, p. 129 (1957)).

In accord with this view is Brannen v. State, 94 Fla 656, 114 S 429, 431 (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 SW2d 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 SW2d 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 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 6, 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 under the following conditions:

(1) To qualify for the defense of retraction, subsection (1) (a) requires that the retraction be "complete and voluntary." In determining its voluntariness, it is not sufficient if the actor is frightened into retracting by the imminent exposure of his falsehood, or if the retraction is prompted by external compulsion, persuasion or promise of

some valuable consideration. The retraction must be complete. The actor cannot rely on a retraction defense where he has corrected only part of a false statement, leaving a remaining portion uncorrected; and

(2) The retraction is made during the course of the same official proceeding in which the false statement was made. Subsection (2) defines "official proceeding" and makes it clear that separate stages of the same trial or administrative hearing are to be considered part of the same "official proceeding"; and

(3) The retraction is made before the subject matter of the proceeding wherein the false statement was made is submitted to the ultimate trier of fact. Once the issues framed by the proceedings have been submitted to the ultimate trier of fact, a party cannot effectively retract, even though there may be subsequent proceedings involving the same subject matter.

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

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

TEXT OF REVISIONS OF OTHER STATES

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.

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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 continuous 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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PERJURY AND RELATED OFFENSES

Text of New York Revised Penal Law:

Sec. 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.

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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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Section 7. Perjury and false swearing;
corroboration required. In any prosecution for
perjury or false swearing, falsity of a statement
may not be established solely through contradiction
by the testimony of a single witness.

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COMMENTARY - PERJURY AND FALSE SWEARING;

CORROBORATION REQUIRED

A. Summary

In most criminal prosecutions the degree of proof necessary to convict is the traditional "reasonable doubt" standard. An historical exception to this rule is the perjury case. Since the age of Blackstone, perjury has been declared not capable of proof on the uncorroborated testimony of a single witness, "because there is then but one oath against another." U. S. v. Wood, 39 US 430, 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 criminal law revision 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 "falsity of a statement" used in the proposed section refers to its objective falsity. The corroboration rule is inapplicable to the burden of proving other elements of the crime.

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."

The Commission believes 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.

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)).

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

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

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

The Commission believes that no logical grounds exist for the retention of this distinction. The element of materiality is the factor that distinguishes perjury from false swearing. Materiality goes to the quality of the testimony, while the corroboration rule concerns itself with the quantum of proof required to convict. The 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.

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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.

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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.

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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.

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(Law
(ORS
(476.740
(476.990 (6)
(165.545
(161.310
(
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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" or "nuisances." An example of the latter type of statute is ORS 161.310 which reads:

161.310. "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.

The proposed section will provide law enforcement agencies with increased protection from unjustified harassment and interference with official duties.

B. Derivation

Section 8 is derived, with substantial structural change, from Michigan Revised Criminal Code section 4535.

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."

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.

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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

Legislation prohibiting impersonation of public officials is found in most American penal codes.

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

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.

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

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

The purpose of the 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 impersonations.

The section does not provide coverage for alleged membership in private organizations. The criminal code has accumulated a number of these special interest statutes over the years, but the Commission recommends their repeal. The Commission takes the position that the public interest does not demand criminal sanctions for false personation of membership in private organizations. If 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.

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

"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., 17 F2d 923 (CA 6 Ohio)).

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."

The cases have held that (1) it is not necessary to a charge for criminal personation that the party impersonated actually exists, or (2) that a third party relied upon the impersonation, or (3) that the "act" done in furtherance of the impersonation would have been authorized if done by the officer impersonated.

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, 276 F2d 96 (7th Circ, Ind 1960), 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." At 98.

Levine v. U. S., 104 App DC 281, 261 F2d 477, held:

"[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."

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.

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

18 USC s. 912 (1948): Whoever falsely assumes or pretends to be an officer or employe 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.

18 USC s. 913 (1948): Whoever falsely represents himself to be an officer, agent, or employe 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.

There are a number of existing Oregon statutes prohibiting impersonation and misrepresentation of membership in private organizations. All such statutes applicable to impersonation of public officials and police officers would be repealed by the proposed section. Those statutes prohibiting pretense of membership in private organizations would, of course, also be repealed.

ORS 165.215: Obtaining money or property by falsely impersonating another. Covered by section on theft by deception.

ORS 165.310: Using unauthorized misrepresentation to solicit membership in a society. Recommend repeal.

ORS 165.315: Nonmember of organization obtaining aid by representing membership. Covered by section on theft by deception.

ORS 165.320: Mailability of letters containing misrepresentations regarding societies. Recommend repeal.

ORS 165.325: Creation of society having name or purpose similar to that of existing body. Recommend repeal.

ORS 165.330: Organization of corporation to violate ORS 165.310 to 165.325. Recommend repeal.

ORS 165.335: Circulating signs or rituals of fraternal society without authority. Recommend repeal.

ORS 165.340: Pretending to be member or agent of religious or charitable society. Recommend repeal.

ORS 165.345: Misrepresenting present or past membership in the Armed Forces. Recommend repeal. Misrepresentation of present membership covered under federal law.

ORS 165.350: Wearing uniform of armed services when not a member. Recommend repeal. Covered by federal law.

ORS 165.352: Unlawful wearing of uniform or insignia indicating membership in organized militia. Recommend repeal.

ORS 165.355: Unlawfully wearing discharge emblem. Recommend repeal.

ORS 162.540: Assuming to be magistrate or peace officer and requiring assistance. Recommend repeal.

ORS 162.550: Disguising oneself with intent to obstruct execution of law or hinder officer. Recommend repeal. Covered by section on obstructing governmental administration.

ORS 162.570: Wearing of stars and badges. Recommend repeal.

ORS 162.580: Sales of badges without permit. Recommend repeal.

ORS 194.310: Impersonation of notary or Commissioner of Deeds. Recommend repeal.

ORS 33.010 (f): Assuming to be an attorney. Recommend retention of this statute. Attorney is not within definition of "public servant."

ORS 462.520: Falsely using name of racing official as source of information in commission of touting. Recommend amendment to cover only those racing officials not defined as "public servants."

ORS 618.290: Impersonation of state sealer or his deputies. Recommend repeal.

ORS 474.170: Obtaining drug unlawfully by use of a false name or misrepresentation. Will be repealed by Article on Narcotics and Dangerous Drugs.

ORS 399.155: Unlawful wearing of uniform or insignia of organized militia. Recommend repeal.

ORS 181.140: Wearing Oregon State Police uniforms by other persons. Recommend repeal.

ORS 206.350: Wearing Multnomah County Sheriff's Department uniforms. Recommend repeal.

ORS 649.030: Unauthorized use of a registered insignia. Recommend repeal.

ORS 672.340: False impersonation of professional engineer or former professional engineer of a like or different name. Recommend retention of statute. Professional engineer is not a "public servant."

The only reported Oregon case found is State v. Renick, 33 Or 584, 56 P 275 (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."

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.

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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.

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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.

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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.

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