Tape #87

All of side 1; 1 to 175 of Side 2

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

Eleventh Meeting, November 14, 1969

Minutes

Members Present: Representative Wallace P. Carson, Jr., Chairman
Representative Harl H. Haas
Mr. Thomas H. Denney, Asst. Atty. Gen.
(Representing Attorney General Lee Johnson)

Members Absent: Senator Kenneth A. Jernstedt

Staff Present: Mr. Donald L. Paillette, Project Director

Reporter : Professor George M. Platt, University of Oregon School of Law

Agenda: Criminal Homicide; P.D. No. 1; August 1969. (Article 10)

The meeting was called to order at 9:45 a.m. by Chairman Carson in Room 315, Capitol Building, Salem, Oregon.

CRIMINAL HOMICIDE; P.D. NO. 1; AUGUST 1969.

Section 1. Criminal homicide.

Professor Platt advised that this section alerts one to the fact that there are no degrees of murder in the draft and that there will be a new crime (one that exists now but in different language) of criminally negligent homicide. There will be three branches of homicide--murder, manslaughter or criminally negligent homicide.

Professor Platt explained that the definition of "human being" set out in subsection (3) eliminates the abortion law from the operation of this Article. The Model Penal Code treats this offense elsewhere as a less serious offense and he understood this was to be the approach taken by the Commission, also. Professor Platt did not believe there was any conflict between the Homicide Article and the abortion provision.

Professor Platt suggested deleting the words "the crime of" in subsection (1) of section 1 so that the subsection will read:

"A person commits criminal homicide if he causes...."

There was no objection and Professor Platt will make this amendment when Preliminary Draft No. 2 of the Article is drawn up.

Section 2. Murder.

Professor Platt explained that this section reflects a major change in the felony-murder doctrine and, secondly, abolishes the degrees of murder. These are the two substantial changes from existing law. Death resulting from rape, robbery, arson and kidnapping is defined presently as first degree felony-murder in Oregon. Second degree felony-murder is death resulting from any other felony. The draft provisions will eliminate the second degree provisions entirely but the concept of first degree felony-murder is retained in that subsection (1) (c) of section 2 provides that criminal homicide constitutes murder if the death occurs when a person is committing the crime of first degree burglary, escape, kidnapping, rape, arson, sodomy, or robbery in any degree. Professor Platt pointed out that this listing of crimes in the first degree is somewhat arbitrary on his part since he is not certain that all of the crimes listed will be broken down by degrees. It is the intent, however, to reach the forcible, very dangerous kind of crimes. Some adjustment in the draft may be necessary if there is not a degree breakdown in each crime but, he noted, this is a technical matter which can be handled by the staff later if the Commission agrees with the substance of the proposed draft.

Professor Platt drew attention to a typographical error in paragraph (c) of section 2 (1): Line six of the paragraph should read "course of and in furtherance..." rather than "course of an in furtherance...."

Professor Platt continued his explanation of section 2 by calling attention to the defense set out in subsection (2). This defense may be utilized by a person when a death ensues while he is committing one of the violent crimes listed in subsection (1) (c). This is a very limited defense, he noted, and follows the New York Revised Penal Law. The draft provides that a defendant may raise this affirmative defense if he committed the crime with others, if someone else was the cause of the death, if he was not armed with a dangerous or deadly weapon, if he had no reasonable ground to believe any other participant was armed with such a weapon and if he had no reasonable ground to believe that any other participant planned to kill anyone. The MPC differs in that it provides that murder consists of the reckless killing of another with "extreme indifference to the value of human life". "Such recklessness and indifference are presumed" if the death results from one of the forcible felonies--"robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape." This presumption is rebuttable by the defendant but the MPC does not specify the aspects of what he must show in order to have a successful defense. Professor Platt observed that in this respect the MPC defense is more flexible and, he assumed, somewhat broader than that proposed in the Homicide Draft.

Professor Platt anticipated that anyone raising this type of defense to a charge of murder would be looked on with a good deal of disbelief by most jurors and, therefore, he did not believe that this kind of a defense would be raised successfully very often. He did feel, however, that it should be a part of the homicide, and certainly the murder, statute because the outer limits of the mens rea requirements have been approached with respect to murder in the felony-murder doctrine. In effect, there is strict liability when one who sets out to commit a lesser felony, with no mens rea, with no intent to kill anyone, winds up as a murderer. He admitted that under the draft provisions, most cases will end up this same way but noted there will be a door through which the very unusual defendant will be able to escape the felony-murder charge. This would not mean that the defendant would escape the underlying felony nor would it mean that he could not be charged with a lesser homicide.

Professor Platt pointed out that the draft commentary relates that the old degree system is one of the metaphysical aspects of homicide no longer serving a function. The difference between first and second degree murder is very artificial in that the cases in Oregon, and the cases generally throughout the country, indicate that any premeditation, any instant in time before the death act, is long enough to fall within the premeditated, first degree murder doctrine. The difference between this and reckless homicide is very difficult for juries to deal with, he said, and for practical standards and for determining what factors make some murders more serious than others, is also a sort of mythical exercise. He referred to the cases cited on page 8 of the draft commentary to illustrate this point. Professor Platt contended that the elimination of the degrees does not ease the way in which the more dangerous conduct will be dealth with but it does give the court authority to decide what penalty should be applied, based on the dangerousness of the person convicted of murder.

Representative Haas understood the present penalty for first degree murder is life but asked the penalty for second degree.

Professor Platt replied that in first degree murder the penalty is automatically a life sentence; in second degree murder the penalty may be anything up to 25 years.

Representative Haas observed that everything presently classed as second degree murder will be included under section 2 of the draft as murder. The court, therefore, is actually being given the opportunity to enhance the penalty for those engaging in conduct now thought of as second degree murder.

Professor Platt agreed, adding that the technical distinction of the crime would not be looked at; rather attention is focused on the defendant--his personality, background, history, etc. After the defendant is convicted, the sentencing authority is given great flexibility. Murder would be one of only three or four first degree felonies in the code, he said.

Mr. Paillette noted that the top penalty in the MPC is 20 years, except that it provides life imprisonment for murder--in fact, the MPC contains an option for capital punishment, depending on the state.

Professor Platt commented that no longer having capital punishment is another reason for ending the degree difference in Oregon. Historically, the reason degree murder really started was to allow the jury to extend sympathy to someone they did not want to execute.

Mr. Paillette observed that this would have an effect when the grading for penalties is done. The thinking has been that when classifying felonies and grading offenses within the categories of A, B and C, the Model Sentencing Act and the ABA Minimum Standards approach would be followed. In the Model Sentencing Act murder is the one crime punishable by life imprisonment; the maximum for most offenses under their code is 30 years. Michigan, which followed the Model Sentencing Act technique in their grading, went to 20 years as their maximum. The thinking so far has been that, generally, Oregon's maximum penalty for a Class A felony will be 20 years imprisonment, except for murder. Under the present law murder is the only crime that carries, in effect, a mandatory minimum sentence.

Representative Haas presumed Oregon would move away from that if the proposed draft were adopted.

Professor Platt agreed that the proposed draft provisions implicitly require flexibility in sentencing.

Mr. Paillette did not think there were any big obstacles in this regard but he did not want the subcommittee members to fall into a trap by grading the section too severely because it does bring in what is now thought of as second degree murder. If it is provided that murder is punishable by life imprisonment, it would be enhancing the penalty for offenses now classed as second degree.

Chairman Carson observed that, on the other hand, care must be taken not to lean too far toward leniency or support for the new provisions will be lost, particularly in light of a case like that of Brudos.

Professor Platt referred to subsection (2) of section 2, the defense to felony-murder, pointing out that it is an affirmative defense. This means that the defendant has the burden of introducing the issue and proving it by a preponderance of the evidence. Putting the burden on the defendant to any extent is unusual and the MPC does not do this under its presumption formula. Professor Platt said he used this provision because the defense is so unusual and because there is liklihood of reaction against liberalization in this particular area. He could see no reason why the burden should not be placed upon the defendant because it is a subjective kind of a defense that no one will know as well as the defendant. It will certainly establish for a very few people a kind of defense that did not exist previously. Another option, Professor Platt explained, would be the MPC approach. It is basically a little different from the proposed approach but it would also open up the felony-murder doctrine thus getting away from the old, strict liability concept. A third option would be to retain the old felony-murder rigidity of more or less strict liability. He did not, of course, favor this approach.

Mr. Denney observed that the proposed provision was taken from New York which similarly puts the burden of establishing a defense to felony-murder on the defendant. He asked if there were any New York cases where the constitutionality of this was considered. He admitted that there had been a Supreme Court case upholding Oregon's old law regarding the burden of proof in insanity (putting the burden on the defendant and requiring proof beyond a reasonable doubt), but he pointed out that this was a 1952 decision. He thought a good defense lawyer would insert the constitutional issue.

Professor Platt said there had been a continuing discussion on this very thing, beginning with the consideration of the Responsibility Article. He felt there was something to be said in regard to the point raised by Mr. Denney and recalled that he had argued very strenuously that the burden of proof in an insanity defense ought not to be with the defendant to any extent. His viewpoint, however, was not that held by the majority of the Commission. He did not think there was any way to say this view is constitutionally required, at least from the present stature of Leland v. Oregon. He pointed out that alibi, which traditionally has been placed on the defendant to prove, has been successfully challenged so that the affirmative defense area is an area of doubtful constutional validity. Professor Platt said he was reluctant to place the burden by a preponderance on a defendant at any point; however, he acknowledged writing this defense in in a couple of drafts. The Inchoate Crimes Article places the burden on the defendant with respect to renunciation. In those sections he felt there would be less chance of a constitutional challenge because of the particular factual pattern and the place it arises in the trial.

Mr. Paillette thought a distinction could be drawn between the defense set out in the proposed draft and that provided in the Inchoate Crimes Article and the Responsibility Article, in that many of the factors in the former defense are going to be particularly within the knowledge of the defendant. It did not seem that it would be imposing any great hardship on the defendant to require that he establish things that only he, himself, would be in a position to know.

Professor Platt said that the doctrine of "proof beyond a reasonable doubt" is an interesting one in that there is no Federal, constitutional basis for it. It is not part of the Bill of Rights and there has never been a United States Supreme Court decision on it except "around the edges" in Leland v. Oregon. It is a state doctrine, by case law, usually, and in Oregon by statute and case law, arising out of traditional concepts of due process.

Chairman Carson asked if all were satisfied that the forcible crimes listed in subsection (1) (c) of section 2 pretty well picked up the crimes to which it is desired to attach the felony-murder rule.

Representative Haas had a question in regard to the language "Was not armed with a deadly weapon or any instrument...of a sort not ordinarily carried in public places by law abiding persons..." contained in subsection (2) (c). He asked what this added to the section.

Professor Platt asked Mr. Paillette to read the definition of "deadly weapon" in that perhaps some of the language in subsection (c) might not be needed.

Mr. Paillette referred to the General Definitions Draft, P.D. No. 2, and read:

> "'Deadly weapon' means any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury.
>
> "'Dangerous weapon' means any instrument, article or substance which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury."

Professor Platt then suggested amending subsection (2) (c) to read: "Was not armed with a dangerous or deadly weapon."

Chairman Carson wondered if a fist could not then be called a dangerous weapon. He noted there is a difference between "deadly" and "dangerous".

Representative Haas did not think a fist would fall into this area unless the person were a prize fighter.

Professor Platt thought the definition read by Mr. Paillette was about as good as could be drafted and felt some room must be allowed for court discretion.

Mr. Paillette said that even if a person had a club in his pocket he would not be prevented from invoking the defense set out in subsection (2) of section 2, assuming that he did not use the club. It would not be a "dangerous weapon" until the "circumstances in which it is used" made it such.

Professor Platt referred to subsection (2) (d) and noted the defendant must also show that there was "no reasonable ground [for him] to believe that any other participant was armed with such a weapon...." Therefore, he asked, if someone were carrying a club in his pocket would he be considered "armed".

Representative Haas thought that if a defendant had a billy in his back pocket but did not use it, he would still fall within the felony-murder section because he would have been "armed".

Professor Platt supposed this would be within the purview and would still further narrow the defense. The rationale being that the defendant should not be armed with a "deadly" weapon in that if he has it, he might use it. If he is so armed, he disqualifies himself from the limited defense. Professor Platt felt this was perfectly within the purpose of the subsection.

Chairman Carson agreed with this purpose and asked if it was desired to extend this same reasoning to a "dangerous" weapon. A "deadly" weapon, he said, is identifiable; it is inherently a weapon; that is its purpose. A "dangerous" weapon, on the other hand, could be an ash tray.

Mr. Paillette agreed but thought subsection (2) (c), as drafted, would further narrow the defense because it is not possible to define all the myriad of different instruments which might be used as a weapon.

Professor Platt suspected this was why the MPC took its approach--simply saying it is a rebuttable presumption and leaving it to the courts and the jury to determine what is to be a successful defense. New York lists the requisites necessary to invoke

the defense. When it becomes specific, the defense becomes narrower. It would be possible, he continued, for the courts to pretty well invalidate the whole policy by taking a restricted view of the listings.

Mr. Paillette commented that there would be certain kinds of weapons that by their nature would fall within the definition of a "deadly weapon"--a gun, for example.

Chairman Carson was not concerned about the defense for the person carrying a gun but he was concerned about substituting the word "dangerous" for the language "any instrument, article or substance" in subsection (2) (c). He wondered if this amendment would not wipe out the defense entirely.

Mr. Paillette did not think this would be the result of the proposed amendment. He thought the use of the term "dangerous weapon" rather than the draft language would ease the burden on the defendant trying to invoke the defense. As drafted, the defendant will have to prove he did not have "any instrument, article or substance..." on him, whereas the definition of a "dangerous weapon" means "any instrument, article or substance which under the circumstances in which it is used...." It would go a step farther by requiring a use or threatened use of the weapon. The same reasoning, he continued, is followed in the Article on Robbery. It is not first degree robbery to be armed with a "dangerous weapon" but it is first degree if the weapon is used or attempted to be used. It is first degree robbery if the actor is merely armed with a "deadly weapon".

Professor Platt was not troubled about the use of the term "dangerous weapon" even though it is quite broad in scope. It is difficult, he said, to be too sympathetic with the defendant who is raising this defense because an innocent member of society has been killed in the process of something the defendant has helped initiate--robbery, rape, etc.

Representative Haas drew attention to the language "of a sort not ordinarily carried in public places by law abiding persons" found in subsection (2) (c) and asked if this could not, in essence, create a double standard because the standard applied in Portland might be very differenct from that applied to the person tried in Prineville.

Professor Platt agreed that this might be very possible and favored taking all this language out so that paragraph (c) would simply read: "Was not armed with a dangerous or deadly weapon." He noted, however, that there still could be this problem in that

it would depend upon how various places defined a "dangerous weapon". It was his opinion that the Court of Appeals or the Supreme Court would have to deal with this problem of variation.

Representative Haas moved to amend paragraph (c), subsection (2) of section 2 by deleting the language following the word "weapon" and before the semicolon and inserting the words "dangerous or" before the word "deadly". The paragraph would then read:

"(c) Was not armed with a dangerous or deadly weapon; and"

The motion carried unanimously.

Professor Platt explained that subsection (3) of section 2 provides a defense to a charge of murder with respect to the causing or aiding of suicide without the use of duress or deception. The defense is different from that in subsection (2) in that it is a straight defense--it must be introduced by the defendant but the burden remains with the state. One who helps another commit suicide through duress or deception is guilty of murder. One who kills the person who wants to die is guilty of murder, probably under reckless homicide. If there is no element of duress or deception in the aid given (i.e., the giving of pills subsequently used by the person to kill himself), the defendant would not be guilty of murder if he successfully makes out his factual defense. This represents the current law and reflects the MPC. The situation in Oregon, he said, is unclear because this type of case is so unusual. The only Oregon case found dealing with the general subject of suicide is not useful because the facts in State v. Bouse, 199 Or 676, 264 P2d 800 (1953), indicate that the defendant himself actually killed his wife although he claimed she sought his aid and that it was pursuant to a suicide pact. It is not the kind of case subsection (3) is meant to cover because the defendant was the agent causing the death.

Chairman Carson drew attention to paragraph (d) of subsection (2) and suggested deleting the language ",instrument, article or substance", in view of the amendment approved in paragraph (c).

Mr. Paillette commented that it might be preferable to use the exact language approved in paragraph (c).

Representative Haas moved to amend paragraph (d), subsection (2) of section 2 by deleting the word "such" following the word "with", inserting "dangerous or deadly weapon" after "a" and before "weapon" and deleting ",instrument, article or substance". The paragraph would read:

"(d) Had no reasonable ground to believe that any other participant was armed with a dangerous or deadly weapon; and"

The motion carried unanimously.

Mr. Paillette advised that a section on defenses will be inserted in the Preliminary Article. An "affirmative defense" will be defined as a defense where the defendant must raise the issue and must establish the defense by a preponderance of the evidence. Whenever the term "affirmative defense" is used, it will then have this meaning. If the defense is to be just a straight defense it will mean that the defendant must still raise the issue but the burden will remain with the state to disprove it.

Professor Platt added that the amount of evidence the defendant must put in before he gets an instruction on it is case law. The MPC felt this flexibility was needed.

Mr. Paillette noted that the defendant does not have to do much now. For example, in self defense there is a recent Oregon case (1962) which says if there is any evidence, it is required to go to the jury, whether it is raised by the defendant or not. If there is anything in the trial that would support an instruction on self defense, the defendant is entitled to it. The Article on Justification, he said, goes into some of these problems and all of the Justification defenses are treated as straight defenses.

Professor Platt directed attention to subsection (1) (b) of section 2 and read: "...criminal homicide constitutes murder when...(b) It is committed recklessly under circumstances manifesting extreme indifference to the value of human life." This is one of those phrases, he said, that will have to be construed as this is all the definition given.

Representative Haas asked if this would not bring negligent homicide into the provision.

Professor Platt did not think so as the level of culpability of criminal negligence will be clearly defined as different from recklessness. These are the patterns followed from the MPC which now exist in another Article of the proposed code.

Mr. Paillette noted that the definition of "recklessness" is very close to what is thought of as "gross negligence" now. "Recklessness" is defined as the conscious disregard of a known risk.

Professor Platt added that the Oregon cases do not define "recklessness" in this way; they speak mostly in terms of tort negligence. One of the improvements, he said, that the General Definitions Article will make in criminal negligence is to show that it is a much higher level than mere gross negligence in a tort sense but that it is definitely lower than recklessness, as defined. There will still be a variable factor in applying a given fact situation and a jury will still have flexibility in deciding how a defendant will be treated.

Professor Platt advised that the language in subsection (1) (b) is a MPC phrase and is broad. He admitted that it is not the choice of most other new codes but he thought it was good and cited the following hypothetical situation to illustrate the difference between homicide committed intentionally, knowingly or recklessly with extreme indifference to the value of human life:

> The defendant intentionally wants to kill A and to do this places a bomb in A's home and plans to wait until A is in the home to detonate the bomb. A walks into his home with B and the defendant sees B walk in with A. If he blows up the house and kills both A and B, he has intentionally murdered A and knowingly murdered B.
>
> The defendant plans to kill A in the same fashion as outlined above. B has gone into the house previously and has not been seen by the defendant, yet the defendant is consciously aware that someone will be in the house (perhaps it is a motel room). If he blows up the house and kills A and B, not knowing for a certainty that he is going to kill B, the defendant has intentionally murdered A and in killing B has committed a reckless homicide with the indifference standard.

This would be covered under the "murder two" branch of Oregon las now.

Mr. Paillette noted that this same kind of standard is used in section 3, Assault in the first degree, Assault and Related Offenses, T.D. No. 1. This reads:

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

Mr. Paillette recalled that originally the draft had used the language "extreme indifference" (which he favored) but this

terminology was changed to "gross indifference" because it was felt there would be some case authority to help the courts construe the meaning of the term "gross".

Chairman Carson favored retention of the adjective "extreme" in subsection (1) (b) but noted it should be "flagged" to show the fact of the inconsistency with respect to the Assault Article.

Professor Platt favored giving the courts a new term to work with rather than retaining the old one with all of the tort connotations attached to it.

Representative Haas asked where the conduct of the fellow who shoots across a highway would fall.

Professor Platt replied that it would be reckless murder, within subsection (1) (b) of section 2, manslaughter or criminal negligence, depending upon the facts of the case. If, for instance, someone shoots across a highway in a commercially developed area, it would be more like reckless murder with extreme indifference to the value of human life than where someone shoots across a seldom used road. In the latter instance, it might not be homicide at all, even though someone is killed. Here, again, the jury with a broad definition is given some discretion in that based upon how it feels about the defendant and based upon the facts, it can put the charge in any one of three slots.

Mr. Paillette asked Professor Platt if it was his feeling that murder committed under any of the paragraphs, (a), (b) or (c) of subsection (1), could be punished by life imprisonment.

Professor Platt replied that it would be possible. Whatever the first degree felony penalty is determined to be, it was his intent that it apply to all of these cases. This reflects MPC policy and, he thought, the general policy of the newer codes. The choice given, he continued, is to reduce conduct coming within paragraph (b) to a charge of manslaughter because manslaughter is defined as criminal homicide committed recklessly--without any of the adjectives referring to extreme indifference.

Section 3. Manslaughter.

Professor Platt advised that, over-all, some substantial changes are being made by the provisions proposed in section 3. Manslaughter is voluntary or involuntary within the present Oregon system. Presently the most well known manslaughter is the reduction of murder to manslaughter because the act was a result of "a sudden heat of passion caused by a provocation

apparently sufficient to make the passion irresistible". This is the old, traditional common law defense to get a charge of murder reduced to manslaughter. The draft provisions expand this to get away from the old, reasonable man concepts, from the purely objective defense, to allow the jury to consider the physical and mental characteristics of the defendant. This would be a much more subjective application in that words would be sufficient provocation. There is still an objective aspect in that "the reasonableness of such explanation or excuse shall be determined from the standpoint of a person in the actor's situation under the circumstances as he believes them to be".

Representative Haas remarked that this is somewhat like the California situation where a defendant may not be able to prove an insanity defense but he can prove diminished responsibility.

Professor Platt agreed that it was somewhat the same idea, adding that that provision is in the Responsibility Article. However, the provision outlined in subsection (2) of section 3 of the Homicide Draft is not the mental disease or defect situation which causes the defendant to perceive things differently. It simply allows the jury to take into consideration the physical and mental aspects of the particular defendant charged.

Professor Platt noted that the term "recklessly" used in subsection (1) of section 3 is defined in terms of a conscious risk creation of a substantial and unjustifiable nature. The risk disregarded must be one that involves a gross deviation from the standard of conduct that a law abiding person would otherwise observe in the actor's situation. The risk taken results in the homicide.

He explained that subsection (3) covers the third branch of manslaughter which is where "a person intentionally causes or aids another person to commit suicide". If the person uses deception or duress, however, it is murder.

Representative Haas expressed concern about the language "the reasonableness of such explanation...shall be determined from the standpoint of a person in the actor's situation" found in subsection (2). Presently, he said, the defendant is judged by the standard of a reasonably prudent man under the same or similar circumstances. He understood that under the subsection's provisions the defendant would be judged by a standard determined not necessarily by a reasonably prudent man but by the particular defendant and by his standards.

Professor Platt replied that the standard applied would not be what was reasonable for the defendant. When the explanation gets to the point of "reasonableness", it is not what is reasonable

as seen by the defendant but whether or not the explanation is reasonable to anybody, taking into account the physical and mental characteristics of the defendant. It is at this point, he continued, that the defense switches from the subjective into the area of objectivity again. It is a finer attempt at subjective defense and, he thought, justifiably so because when a defendant does not have the mens rea for murder, he ought not to be punished for murder because he was mistaken from the viewpoint of a reasonable and prudent man. Professor Platt stressed the fact that the test does not impose the defendant's moral views. The provisions of subsection (2) of section 3 would allow a charge of murder to be reduced to manslaughter if the jury believes the defendant's explanation. Heretofore the type of evidence permitted by this provision was not allowed because it was not within the old provocation doctrine. It has been pointed out correctly, he said, that one of the conceptual difficulties with the old "reasonable man test" is that "reasonable" men do not kill.

Mr. Denney drew attention to subsection (2) of section 3, to the language "...under the influence of extreme mental or emotional disturbance...." He noted that this was quite a departure from the old "heat of passion" idea of voluntary manslaughter. It seemed to him that a defendant could be provoked by something that caused him "extreme mental or emotional disturbance for which there is a reasonable explanation or excuse" from his standpoint and he could deliberate and premeditate for some time before going out and killing under the influence of this disturbance. He wondered if this provision would not make all homicides manslaughter.

Professor Platt said the subsection went to this very issue and would allow a "cooling time" if, in fact, an extreme upset still resulted. He again stressed that the explanation or excuse must be reasonable within the minds of the jury. The draft concept would allow the jury to consider the defendant's physical and emotional characteristics even if he thought about committing the crime for a week. Obviously, the excuse is goin to be less reasonable to the jury if the defendant deliberated about the act for a week.

Mr. Paillette asked if the provisions of subsection (2) of section 3 would have allowed the defense to Jack Ruby or Sirhan Sirhan.

Professor Platt replied that Jack Ruby's attorneys could very well have raised this defense, although he did not think it would have been successful. He felt that the defense of diminished responsibility would have been more successful because Ruby was reacting from mental disease or defect. He admitted in regard to Sirhan Sirhan that the defenses were related but he felt if this defendant were to make any grounds, it would be on the diminished responsibility rule rather than on provisions as outlined in subsection (2).

Professor Platt emphasized that it must be remembered that the proposed provisions are a standard; it does not mean that this is what juries will do. The intent of the draft is to allow the jury to hear everything that is relevant--which is not allowed now because the old, inflexible provocation doctrine is now employed. He did not think it would make a real difference in 99% of the cases but he felt it would be of worth to the 1% where the defense would be responsive to the cases. This is the sort of humanistic attitude he felt the Commission must keep in mind.

Mr. Paillette stated that he could imagine hypothetical cases where the defense proposed in subsection (2) would be advisable; for example, a case where a father of a ten year old girl who has been kidnapped and raped kills an arrested suspect while he is being brought into the courtroom. On the other hand, he could conjure up situations much like that of Sirhan Sirhan where the defendant could have an extremely good argument that he was under the influence of "extreme mental or emotional disturbance" for which he had a reasonable explanation.

Chairman Carson observed, however, that this is where the jury would insert its value system.

Professor Platt repeated his contention that the subsection's provisions actually require that the explanation or excuse be reasonable. The jury is allowed to listen to the defendant's "nutty characteristics" and if in fact his explanation makes sense, the charge of murder may be reduced to manslaughter. If, on the other hand, his explanation does not appeal to the juror sitting in the box, his act will be murder. There still exists the same broad necessity for the jury or other factfinder to determine what is reasonable in each particular situation and this is intentional. The provision, however, does insert, at the very outset, subjectivity that does not now exist generally in the old "heat of passion-provocation" formula.

Mr. Paillette commented that what troubled him about the subsection was that except for the felony-murder cases, most people who murder other people do so for a reason. Except where a murder is committed by a hired gun or where there is a contract situation, there are not many murders where the killer does not have some compelling reason for committing murder.

Chairman Carson contended that the jury is not being asked if the defendant believed he acted reasonably. The question being asked is: Given particular, specified circumstances, does the jury, in its mind, find the activity reasonable for a person with these characteristics.

Mr. Paillette recalled that under the defense of diminished responsibility (Responsibility, T.D. No. 1), it is required that the defendant give notice if he is going to bring in expert witnesses in his behalf. Under the provisions of the proposed section on manslaughter, however, a defendant could bring in psychiatrists or psychologists without notice.

Chairman Carson noted that here, again, the testimony would be as to what is reasonable from the viewpoint of the jury. It is not a question of testifying as to what the defendant thought at the time of the act or whether or not he thought it was reasonable.

Professor Platt admitted that it was conceivable that a psychiatrist or psychologist might be requested to testify. He had not considered the question raised by Mr. Paillette as to a notice requirement for the state when the defendant plans to bring in expert testimony.

Representative Haas asked where the burden of proof would be and Professor Platt replied that it would be with the state beyond a reasonable doubt. Representative Haas then indicated he believed the defense in subsection (2) of section 3 would be utilized in every murder case.

Chairman Carson asked if there was not now the element of manslaughter in almost all criminal homicide cases.

Representative Haas commented, however, that the test applied is that of a reasonable, prudent man.

Professor Platt thought that the expert most likely to be brought in by the provision would be the medical expert. He had no objection to inserting a notice requirement into the draft, needed whenever the defendant utilizes expert testimony. This would be in line with what has been done already in another Article and would give the Commission a choice to consider.

Mr. Paillette commented that assuming a case called for experts, the defense is going to be very close to that of diminished responsibility. Professor Platt agreed with this statement. Mr. Paillette asked Professor Platt if he had found very many Oregon cases on provocation.

Professor Platt did not think that he had. As he recalled, the cases he did see held the traditional, restricted view of the provocation doctrine. No cases were cited in the draft commentary. Professor Platt admitted that the proposed draft clearly would change the Oregon law. He advised that the policy in the new codes

follows the MPC--the California Draft contained this as does New York. Michigan's code follows this approach, although using a little different language. It is recognized in the new codes as the "course of the future".

Section 4. Criminally negligent homicide.

Professor Platt reported there is a definition of "criminal negligence" elsewhere in the code (General Principles of Criminal Liability--Culpability, P.D. No. 4). It is an inadvertent creation of a substantial, unjustifiable risk as contrasted with the advertent creation as under recklessness.

Section 4 incorporates the automobile homicide statute and there will be a difference worked because of this in that Professor Platt anticipated this section being graded as a third degree felony. It is classed as such in the MPC. Presently, under ORS 163.091, the offense is an indictable misdemeanor, punishable upon conviction "by imprisonment in the county jail for not more than one year, or in the state penitentiary for not more than three years, or by a fine not to exceed $2,500, or by both such fine and imprisonment." Professor Platt acknowledged there would be concern about ever getting a jury to convict for the offense if it is to be strictly a penitentiary offense but in answer to this concern he quoted from the MPC, T.D. No. 9, pp. 53-54, 55:

> "If the evidence does not make out a case of negligence, as [criminal] negligence is defined in Section 2.02, we see no reason for creating liability for homicide, as distinguished from any traffic offense that is involved. If the evidence suffices to establish [criminal negligence, then]...the offense is in our view too serious for proper treatment as a misdemeanor." (See Draft Commentary, p. 27, for a more complete citation of the MPC Commentary.)

Professor Platt stated that what it comes down to is that if the conduct is criminal negligence, it is a felony; if it is not criminal negligence, then it is strictly reckless driving.

Mr. Paillette commented that the experience in Oregon has been consistent with the MPC comment in that it has been very difficult to get negligent homicide convictions. He related that the Oregon Traffic Safety Committee in a report containing a survey of Oregon cases on negligent homicide revealed that the conviction rate is very low--in fact, the prosecution rate is also very low. As a practical matter, then, the possibility of an enhanced penalty in this area would not have a significant impact on existing law.

Representative Haas asked the definition of criminal negligence.

Professor Platt referred to the definition contained in the Culpability Draft, P.D. No. 4:

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

This is almost the exact MPC definition and that used by Michigan, New York, Illinois and Wisconsin.

Chairman Carson recalled a bill relating to homicide by vehicle being passed by the House during the last legislative session.

Mr. Paillette advised that this was HB 1562. It was considered by the House Highway Committee and by the House Judiciary Committee. The Judiciary Committee quite thoroughly amended the bill and it was then passed by the House, receiving 44 favorable votes and 8 negative votes (with 7 members excused, 1 member absent). The bill was sent to the Senate Judiciary Committee which failed to report it out.

Professor Platt commented that the provisions of HB 1562 really amounted to the misdemeanor-manslaughter doctrine. Any violation of a traffic ordinance which resulted in the death of another person would have been brought within the purview of negligent homicide. The proposed draft, he continued, is opposed to this kind of a reaction and does away with the old misdemeanor-manslaughter rule in the sense that under the Homicide Article the act constituting the misdemeanor is what is looked at. Its degree of violence and its relationship to the resulting death are considered. The old, unlawful act doctrine has come into disrepute because it was applied so arbitrarily to potentially produce absolute liability for any misdemeanor act resulting in a death. Professor Platt explained that in a sense, the draft does not do away with misdemeanor-manslaughter, it simply changes the focus of how the act is considered. It is not strict liability--the state must show the act resulting in death was reckless or criminally negligent.

Representative Haas posed a situation where an operator of a vehicle causes the death of another person while driving under the influence but is acquitted of criminally negligent homicide. Would this be the end of the case?

Professor Platt replied that if the defendant could convince a jury that what he did in the car was not criminal negligence, he could be guilty of driving while intoxicated or of reckless driving but not of the harm that results in death. On the other hand, the intoxicated driver can conceivably be guilty of murder--recklessly manifesting extreme indifference to human life. Homicide in the automobile, he continued, is just like a homicide resulting from a misdemeanor. It should be looked at in the light of recklessness and negligence.

Subcommittee vote on each section of Criminal Homicide Draft:

Section 1. Criminal homicide.

Representative Haas moved the approval of section 1 as amended. The motion carried unanimously. (Amendment set out on page 1 of these minutes.)

Section 2. Murder.

Representative Haas moved the approval of section 2 as amended and this motion, also, carried unanimously. (Amendments set out on pages 9-10 of these minutes.)

Section 3. Manslaughter.

Chairman Carson temporarily relinquished his chairmanship to Representative Haas. Representative Carson then moved the adoption of section 3 as drafted.

Representative Haas and Mr. Paillette still expressed concern about the provisions in this section.

Professor Platt recalled that previously where there was doubt the subcommittee on Inchoate Crimes and other subcommittees have sent the sections along with their caveat to the Commission for consideration. The subcommittees were not sure of certain sections but felt the issues involved were important enough to warrant a Commission decision on them.

Representative Carson included this suggestion in his motion to adopt section 3 as drafted. The motion carried with Representative Haas voting "no".

Representative Haas again expressed his belief that the defense provision in section 3 would be utilized in every murder case. He was also concerned about the kind of instructions the court would give the jury in respect to the provision.

Mr. Paillette also expressed concern about the section's provisions, noting that the jury will function within the framework of the instructions given by the court. The instructions given by the court under the proposed section, he said, will be far different and will be much more expansive than those given now under the provocation doctrine.

Mr. Paillette wondered if there was a desire to discuss the advisability of requiring a notice provision with respect to expert testimony.

Chairman Carson thought this should be brought to the Commission for discussion when the draft is considered as well as the conflict brought about by the use of the term "extreme" rather than "gross" in section 2.

Section 4. Criminally negligent homicide.

Representative Haas moved the adoption of section 4, as drafted, and the motion carried unanimously.

Future Subcommittee Meeting Date:

In that the subcommittee is pretty well caught up with its work and in that there will be a two-day Commission meeting on December 12 and 13, it was decided to have no meeting of Subcommittee No. 2 during the month of December.

The meeting was adjourned at 12 noon.

Respectfully submitted,

Maxine Bartruff, Clerk
Criminal Law Revision Commission