Tape No. 71

Both sides

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

Seventh Meeting, April 15, 1969

Minutes

Members Present: Judge James M. Burns, Chairman
Representative David G. Frost
Mr. Frank D. Knight

Staff: Mr. Donald L. Paillette, Project Director
Mr. Roger D. Wallingford, Research Counsel

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

The meeting was called to order by Chairman Burns at 6:00 P.M., Room 421 Capitol Building, Salem.

Inchoate Crimes, P.D. No. 1; March 1969 (Article 6)

Professor Platt explained that since Inchoate Crimes was a new topic and some of the terms used, such as incomplete conduct, complete conduct, substantive crimes, and inchoate crimes, are somewhat difficult to pin down, he thought it might help to use a visual aid along with the verbal explanation. He provided this by drawing a chart on the blackboard setting out the actor's conduct from the innocent stage to the completed crime stage with the intervening stage of attempt and the acts of preparation. He stated that the farther you go away from the identifiable, substantive crime, the closer you get to innocent conduct, the more difficulties arise philosophically because you begin to punish for thoughts without important acts. Possession of burglar's tools, for instance, in large measure is punishment for thought because the actor has gotten the tools together and is now thinking in terms of crime but is not doing anything that can definitely be identified as an attempt to steal.

The other two important inchoate crimes involved are solicitation and conspiracy. They are somewhat alike; it has been said that solicitation is an attempt to conspire. If, for instance, one solicits, commands and encourages another to steal, he commits the crime of solicitation; when and if the other person agrees, then the crime becomes conspiracy as well. Solicitation, followed by the attempt to get the agreement, followed by the agreement, is a conspiracy. Here, again, the movement is away from the more identifiable act and toward the verbal act (what the conspirators agree to), leaning heavily toward punishing guilty thoughts, which goes contrary to the old concepts of mens rea. Although the draft did not deal with this, Professor Platt pointed out that even closer to innocent conduct is the crime of vagrancy, a substantive crime but still inchoate conduct.

Professor Platt advised that the important part of the subcommittee's job is to decide how far the line should be moved back from the final, identifiable, substantive crime toward the innocent conduct which may be called vagrancy. It is necessary to identify the point distinguishing between the conduct of mere preparation and the criminal conduct which rises to the crime of attempt.

Section 1. Attempt; Definition.

The draft begins with the problem of defining an "attempt" and Professor Platt advised that the thrust of the MPC is to speak in term of the dangerousness of the personality of the person, to draft a statute to enable the person to be identified rather than his act--the act is secondary. In order to accomplish this, the MPC uses the approach reflected in the proposed draft which speaks in terms of "purposely engages in conduct which constitutes such crime by performing or omitting to perform an act which constitutes a substantial ste

Professor Platt noted that the commentary reflected the Californi approach in order to include as legislative history certain kinds of conduct which would not be held inadequate, within law, of constitutir what a substantial step is, corroborating the intent of the person performing the act to eventually commit the crime toward which he is aiming. He noted that the MPC includes these steps within the draft. (See Inchoate Crimes, P.D. No. 1, p. 3.)

Chairman Burns assumed that if one or more of the characteristics listed accompanied the attempt it would be enough to make it a jury question.

Professor Platt agreed that this was right.

Representative Frost felt that one place where the draft gets away from some of the codes of other states is in making the crime of omission a part of attempt. He asked what kind of conduct this would cover.

Professor Platt cited the example of a woman allowing her child starve to death in an attic. She consciously did this, thus intentionally killing the child by an act of omission--failing to feed it and care for it. This conduct would be covered by the draft provision. There are lots of crimes, he said, committed by omissions, intentional allowing harm to occur where the individual is under a duty and could prevent it.

Chairman Burns had a drafting question on section 1 and referred to the language "...performing or omitting to perform an act which constitutes a substantial step...". He suggested amending the section so that it would read "...performing or omitting to perform an act which performance or omission constitutes a substantial step...". He thought that with the present wording someone could contend it was

the act which constitutes a substantial step and therefore if the actor omitted its performance, it could not be a crime. Chairman Burns understood the thrust of the section to be that the performance or the omission, in and of itself, was the substantial step aimed at.

Chairman Burns stated that he, also, had been concerned about what omissions would be substantial steps. He found it hard to think of any.

Representative Frost thought that the New York language perhaps covered this better by stating, "...engages in conduct which tends to effect the commission of such crime."

Professor Platt thought that "conduct" means the person is doing something and thought it probably would not include omitting to do something. He noted, also, that under the draft the conduct or omission of conduct must be purposeful—intentional conduct, with the highest _mens rea_ element.

Mr. Knight referred to section 1, the language, "...when he purposely engages in conduct which would constitute such crime...". He thought that if this language were related back to the crime of attempt, it would be all right but if it referred to the crime attempted then you would be back in the situation where you are drawn right up to the last possible act before the commission of the offense.

Professor Platt thought the phrase "substantial step" would qualify the statement presented by Mr. Knight because you would not be drawn that close to the commission of the act. The purposeful element takes away the negligence element, he said, and the "substantial step" moves it back from the old "last parts of an act" doctrine, back past things like the "close proximity" doctrine, etc. The proposed approach will allow the police to intervene earlier than under some of the older, more strict doctrines where the cases insist that the conduct be much closer to the substantive crime. What the actor does has been more important than what the person's personality is and what his intent is. Professor Platt contended that to reach the dangerousness of the person it is necessary to get him earlier than is possible under the old doctrines.

Mr. Knight observed that as a practical matter the attempt, even under the draft, would have to have gone far enough for the prosecution to pick out a specific object. He must be able to prove purpose.

Mr. Knight again referred to the wording, "engages in conduct which would constitute such crime" and asked if this referred to the crime of attempt or if it referred to the substantive crime, the ultimate crime.

Professor Platt replied that a person would be guilty of an attempt to commit a crime [theft] when he engages in conduct which constitutes

such crime [theft]; "such crime" refers back to "crime" and "crime" is the ultimate goal following the phrase "an attempt".

Mr. Paillette noted that when the draft was being written some of the culpability terms were still in subcommittee and advised that "conduct" has now been defined in the preliminary draft on Culpability as follows: "'Conduct' means an act or omission and its accompanying mental state." He asked Professor Platt if it would run contrary to what was intended if section 1 were amended by deleting the language, "which would constitute such crime by performing or omitting to perform an act" so that the section would read: "A person is guilty of an attempt to commit a crime when he intentionally engages in conduct which constitutes a substantial step toward commission of the crime."

Representative Frost thought this amendment would take care of his concern about "omissions" also. He stated that he liked the wording contained in the Illinois code which reads: "A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense."

Professor Platt felt this would restrict the breadth of the crime of attempt because it gets into the old, common law problem of what is a specific intent crime and what is a general intent and for this reason the MPC very purposely avoids the "specific intent", "general intent" nomenclature. He also noted that "specific intent" was not one of the terms of culpability.

Mr. Paillette advised that the definition of "culpable mental state" contained in the Culpability Draft was: "'Culpable mental state' means intentionally, knowingly, recklessly or with criminal negligence...".

Representative Frost stated that as a practical matter the prosecutor would have to almost prove the crime first and then reason back from it to prove the attempt.

Professor Platt answered that this is presently true.

Mr. Paillette thought that the type of acts that must be proved to prove attempt would be much easier on a prosecutor than it is presently.

Representative Frost was of the opinion that the lack of a "specific intent" requirement would make it much easier for the prosecution.

Representative Frost moved to delete the language, "which would constitute such crime by performing or omitting to perform an act" appearing in section 1. Chairman Burns seconded the motion and it carried unanimously.

Chairman Burns asked the members' opinion on having the commentary reflect legislative intent regarding the various kinds of conduct which could constitute a "substantial step" rather than placing this in the section itself.

Mr. Knight thought placing the information in the commentary would be consistent with what has been done in other drafts and would keep the actual statutes from becoming over-lengthy.

Professor Platt felt that placing the kinds of conduct constituting a "substantial step" in the commentary gave the statute a little more flexibility and if the court wanted to develop a little law to add to the list in the commentary, it may do so.

Mr. Paillette recalled that the same method was used in the Arson Draft; the commentary is very explicit.

Section 2. Attempt--Impossibility not a defense.

Professor Platt stated that this section reflects what he now believes to be the law of Oregon and the law generally and makes no substantial change.

Professor Platt cited some "empty pocket" cases and the old defense was that you cannot steal from an empty pocket; therefore, you cannot be guilty of an attempt to steal from something that is a factual impossibility. Professor Platt advised that though the Oregon law that factual impossibility is no defense seems settled by the Elliott case, he could find no Oregon decision dealing with legal impossibility. This type of situation would arise where the actor attempted to bribe someone he thought was a juror but who, in fact, was not a member of the jury. While this has some aspects of factual impossibility, it is viewed as a legal impossibility since the status of juror is not there.

Mr. Knight said that in a sense Oregon does have impossibility as a defense--when you talk of assault in relation to an attempt at battery. As an example--in assault with a dangerous weapon the gun has to be loaded.

Professor Platt replied that there clearly can be an attempted assault with intent to kill and cited State v. Wilson where the court held that if assault can be readily and reasonably identified as a substantive crime, then there can be an attempt to commit assault with a deadly weapon.

Mr. Knight contended that the Commission had gotten way away from Wilson in that assault is now defined as battery--the completed act.

Mr. Paillette did not feel that the proposed draft was incompatible with the Assault Draft; there will be attempted assault as defined under the Assault Draft.

Professor Platt asked if the proposed definition of assault was the "putting in fear".

Mr. Knight replied that it was not; it is the completed act, the battery.

Representative Frost asked if, as a policy decision, it was desired to get away from the factual impossibility situation. He pointed out that the black magic example cited in the commentary (where the actor makes a doll and repeatedly stabs it with pins believing that the intended victim thereby will be killed) did not harm society and that was what was being looked at. He did not feel that ineffectiveness could be classed as a criminal act.

Professor Platt recognized the policy argument and admitted there was strong support of it in the cases; however, he pointed out that it was the older, classical view of the law and the MPC turns away from the emphasis on the act and looks toward the person's personality and what he wants to do. If he shoots into an empty bed believing it occupied by the intended victim, his personality with his purpose is just as dangerous as if the intended victim had been in the bed because the actor is going to try again.

Representative Frost thought the fallacy was that no one could know that the actor was going to try again.

Professor Platt pointed out that the only reason it is not a crime is fortuity, someone was lucky he was not in the bed. The person who evidenced the anti-social conduct goes free until he is successful. He thought that the police should be allowed to intervene earlier, before the actor is successful.

Representative Frost still contended that the actor would not have done anything.

Professor Platt replied that the actor had tried. If this conduct was not to be punished, he said, there would be no need for the crime of attempt.

Mr. Knight suggested that the subcommittee vote on each section as discussion was completed.

Chairman Burns asked if there was objection to section 1 as amended or to section 2 as drafted. There being no objection, the sections were held approved.

Section 3. Attempt--Renunciation a defense.

Professor Platt advised that this will, in a sense, reverse majority rule, although not in Oregon's jurisdiction because he could find no law on it here. The classic rule is that renunciation is no defense; that once the actor has taken a substantial step strongly corroborative of the purpose of committing a crime, he has committed a crime and it is therefore complete and there is no going back. In a sense, the draft will allow the actor to excuse his criminal conduct if he has not yet committed the substantive crime. As a way to encourage the person bent on the course of criminal conduct, prior to the time he completes the criminal goal, he may renounce his goal if he does it in a manner that shows he obviously is not just postponing it; if he does it voluntarily (he is not interfered with or frustrated by the police); and if he avoids commission of the crime.

Professor Platt referred to subsection (b) of section 3 and said he believed the proof provisions consistent with his earlier stands because the defense is so subjective. He thought that if there should be an exception to the burden of proof anywhere, here is where he would make the exception. He stressed the point that he had not changed his position regarding the burden of proof on the question of sanity.

Representative Frost understood that for the defense of renunciation to be raised there must be a total avoidance of the crime and he assumed this was the reason the word "reasonably" did not appear between "everything" and "necessary" in the phrase, "...doing everything necessary to prevent the commission of the attempted crime." He understood that if a chain of events were started over which the initiator has no control, he could not claim renunciation.

Professor Platt agreed that this statement was correct. He noted, however, that there is a real distinction in the way in which "abandonment" is used in respect to the offense of conspiracy because it will be possible to abandon the conspiracy without being excused from conviction but it will start the running of the statute of limitation and a couple of other technical defenses. Abandonment will not excuse the conspirator unless the renunciation for conspiracy is the same kind as that in section 3--prevents the conspiracy from succeeding.

Chairman Burns recalled that when affirmative defenses were placed in previous drafts the term "affirmative defense" was not used because it was inconsistent with the proposed terminology in the MPC.

Professor Platt replied that the affirmative defense now is a production burden; that is, the defendant or the state has the burden of producing the evidence and then the burden is shifted as to persuasion to the other party.

Mr. Knight recalled that "affirmative defense" had previously been discussed in relation to another draft and had been defined as where the defendant only has the burden of injecting the issue and where the state then has the burden of proving beyond a reasonable doubt. He did not think this definition applied to section 3 as he felt the section referred to what is presently thought of as an affirmative defense.

Representative Frost moved the adoption of section 3 as drafted. The motion carried unanimously.

Section 4. Solicitation--Definition.

As Professor Platt read the Oregon statutes, there is no general solicitation provision in the statutes. Section 4 of the draft defines this crime and creates the crime in Oregon for the first time. Where the crime of solicitation does not exist by virtue of statute or common law, the states have dubbed it in the law of attempt. Professor Platt felt this practice was a bad mixing of concepts as the crime of solicitation would not necessarily constitute the crime of attempt as here. Asking someone to set fire to a barn would be solicitation but it would not have risen, as yet, to the crime of attempt. If the person solicited to set fire to the barn agrees to do this, it becomes the crime of conspiracy. If the person solicited gets to the point of lighting the match before being stopped, the solicitor is guilty on grounds of complicity, of aiding and abetting in the setting of the fire.

Mr. Knight referred to the case of State v. Taylor and asked if this was not held to be an "aiding and abetting" thing.

Professor Platt answered that the Court did not say this although he felt this should have been the basis on which the case was decided. Here, again, he said, the Court was faced with the practical necessity of making solicitation criminal. It wanted to reach what the solicitor had done and the only way it could be done was to make it part of the law of attempt. This practice has been criticized by the MPC and by Perkins in his text as a very artificial way to make solicitation a crime when it is not identified as solicitation itself.

Chairman Burns asked what degree of proof is needed to make a jury question on solicitation. He asked if it would be enough to have the person solicited testify.

Professor Platt said this would be enough and admitted that this was a criticism because it is felt that it is too easy to fake this type of case. He noted that the word of one person may be enough to convict in other places in criminal law--conspiracy, for instance.

Mr. Paillette asked how it was anticipated the crime of solicitation would be graded when penalties were inserted.

Professor Platt replied that this was taken care of in all three crimes (attempt, solicitation and conspiracy) by having the penalty be the same as the crime attempted, solicited or conspired. He pointed out that this is a change from the Oregon law.

Representative Frost thought two basic policy questions were involved in the crime of solicitation: first, should there be a crime of solicitation, itself; secondly, if it is desired, should it be for all crimes or only for felonies. He asked if soliciting for a misdemeanor is really criminal, socially reprehensible conduct. He observed that California and New York limit this conduct to a felony.

Mr. Knight observed that anytime a minor asks someone to buy a beer for him he will be guilty of soliciting.

Professor Platt wondered if this conduct should not be reached; should not the person causing the other person to commit the crime be reached. He will not be punished more than whatever the penalty for the misdemeanor is.

Representative Frost felt the free will of the solicitee would also be involved before anything really socially harmful would be done. Under the draft if the solicitor asks someone to buy him a sixpack and the person solicited says no, a crime has still been committed by the solicitor.

Mr. Paillette understood that the penalty would not be based on the crime the solicitor would have committed had the act been completed but rather on the crime the solicitee would have committed had the act been completed. For instance, "minor in possession" is a misdemeanor but with a different penalty than "furnishing liquor to a minor"; is the minor who solicits the furnisher going to be subject to the penalty for "furnishing liquor to a minor"?

Professor Platt advised that the MPC has commentary which is responsive to this point. The MPC points out that one of the reasons for defining solicitation as a crime is because it is so allied to the crime of conspiracy. If the solicitor gains the agreement of the solicitee it results in a much more serious kind of crime because more people are involved and whenever there is a group it is more dangerous. The agreement results in a conspiracy and it is the intent of the draft to repress the person creating the conspiracy.

Chairman Burns referred to the Michigan Draft (Sec. 1010 (6)) and noted the penalty for criminal solicitation is down-graded one level as follows:

"(a) Class A felony if the offense solicitated is first degree murder.

"(b) Class B felony if the offense solicited is a Class A felony.

"(c) Class C felony if the offense solicited is a Class B felony..."

Mr. Paillette felt the sentencing judge would do this anyway, as a practical matter.

Professor Platt stated that there is another problem that should be thought about: solicitation runs into the first amendment problem, too. He noted that very likely students on the various campuses are daily committing what would be the crime of solicitation. He felt this irresponsible conduct should be reached. He noted that the solicitation must be concrete; this is one of the definite restrictions and the definition in section 4 contains the language, "..causing another to engage in specific conduct constituting a crime".

Representative Frost asked what would be done if someone wore a button reading "Smoke Pot". Would he be guilty of soliciting?

Professor Platt thought such conduct might come close to being solicitation; he thought a prosecutor might be able to cause a lot of trouble on something like this if he chose to.

Representative Frost moved to delete section 4.

Chairman Burns suggested that before taking a vote on section 4, perhaps it would be wise to consider section 5--Renunciation.

Professor Platt felt it contained the same concept as that contained in section 4 and if section 4 were to be deleted, all material relating to solicitation should be deleted.

Chairman Burns felt there could be some horrible first amendment problems created if, for instance, you prosecuted a student for wearing a "Smoke Pot" button, but, on the other hand, he was reluctant to see the whole thing thrown out.

Professor Platt was of the opinion that in light of the definition of attempt, sections 4 and 5 were needed because in Oregon solicitation to commit murder or solicitation to arson would not constitute attempt under the now adopted definition. He did not feel that under the adopted definition that in the Taylor case there would have been a substantial step.

Chairman Burns asked if solicitation would be a lesser included.

Professor Platt replied that there were provisions in the later sections for this. It is not possible to convict for more than one of the inchoate crimes for the same course of conduct. It is possible

to have a solicitation, conspiracy and attempt all out of the same transaction and it is possible to prosecute on all three of the charges but it is necessary to elect just one on which to convict. If the crime is completed, it is possible to prosecute for the conspiracy to the crime as well as for the crime, but it is not possible to convict for the conspiracy because it merges with the offense for which the person is convicted.

Mr. Paillette pointed out in respect to attempted arson, that the Arson Draft contemplated the repealing of ORS 164.090, which covers an attempt to burn property, with the understanding that this kind of conduct would be picked up as an attempt. Part of the language in the statute, he said, would be covered by the Arson Draft but certainly not all of it would be covered without the solicitation sections. He read from ORS 164.090:

> "Any person who wilfully and maliciously or wantonly attempts to set fire to or to burn or to aid, counsel or procure the burning of any dwelling house, building or property....is guilty of arson...".

Mr. Paillette advised that the statute provided for a three year maximum penalty and indicated that with the language "counsel or procure", it would be difficult to show that this was a substantial step toward arson.

Mr. Knight felt there may be some questions about solicitation but he thought that if it were to be deleted, it should be done by the Commission rather than by the subcommittee.

The motion by Representative Frost to delete section 4 was defeated. (Frost voting "aye", Burns and Knight voting "no".)

Representative Frost moved to limit section 4 to the solicitation for the commission of a felony.

Chairman Burns indicated he felt that this, again, was something for the Commission to take up. He suggested sending it to the Commission with the recommendation that they consider limiting the solicitation to felonies or not. He thought that, personally, he would want to go down the list of crimes to determine what kind of conduct would and would not be covered by limiting the section to felonies.

Representative Frost stated that if the policy were to be placed before the whole Commission, he would withdraw his motion.

Mr. Paillette suggested a grammatical change in section 4--the deletion of the language "purpose of causing" and the insertion of the language "intent to cause". He noted that "intentionally" or "with intent" is used as one of the culpability states.

Representative Frost excused from the meeting.

Professor Platt noted that this change would have to be made all the way through the draft and asked if this policy had been adopted by the Commission.

Mr. Paillette advised that the Commission had not adopted this but that it had been approved in subcommittee.

Mr. Knight observed that in regard to solicitation and the problems involving the first amendment, that with the language "...with the intent to cause another to engage in specific conduct..." in the section a prosecutor would have to show and a jury would have to be convinced that a person had advocated such conduct and was not just puffing and making noise--that he had actually intended a crime be committed. He felt there would be protection against anybody who says something being charged with the commission of a crime.

Professor Platt had no objection to the grammatical change suggested by Mr. Paillette and since there were no objections by the subcommittee members, Chairman Burns requested that Professor Platt make the changes.

Chairman Burns announced that unless there were objections, section 4 would be considered adopted as amended and with an alternate approach to be drafted limiting its provisions to solicitation for the commission of a felony. There were no objections and this approach was adopted. (Rep. Frost not present.)

Section 5. Solicitation--Renunciation a defense.

The members had no questions regarding section 5.

Representative Frost now present.

Section 6. Conspiracy--Definition.

This section covers the third inchoate crime, conspiracy. Professor Platt advised that the present definition in Oregon is quite sketchy. The conspiracy section contained in the MPC covers about three pages and Professor Platt broke this down into five or six shorter sections in the proposed draft. He noted that in this section, again, the emphasis is on the individual. Under present drafts of most classic or traditional conspiracy statutes, conspiracy occurs when two people or more agree to commit a crime. This has been construed to mean that there has to be two people who are culpable, who have the mens rea to want to do the crime. If, in fact, one of the individuals is an innocent agent or immature or insane or for some reason cannot commit the crime, in Oregon and in many states under the old type of statute, the person who proposed the conspiracy

cannot be convicted. The MPC holds that when one person agrees with another to commit a crime, whether or not that other person is guilty or capable of culpability is immaterial; it is no defense with respect to the person who proposed the criminal conduct and who does have the mens rea of the conspiracy.

Representative Frost referred to subsection (a), the language, "agrees with such other person or persons that one or more of them will engage in conduct...." and cited an instance where one person says to another, "I think I'll knock off the bank on the corner" and the other person says, "Okay". The first person then walks off and holds up the bank. Has there been a conspiracy?

Professor Platt said there would be no conspiracy in this case unless the second person purposely engaged in the conduct for the purpose of committing the crime.

Representative Frost thought perhaps the language "with the purpose of promoting or facilitating its commission" appearing in section 6 subsection (a) would take care of the problem.

Professor Platt commented that closely allied to the problem raised by Representative Frost is: What is the facilitation of the crime of conspiracy? Under the draft provisions, for instance, the person selling a gun used in committing a crime is not guilty of conspiracy because his purpose is not to facilitate crime. He has certainly been helpful in that if the gun had not been sold to the actor, he might not have committed a crime. If a storekeeper goes out and says to someone, "Why don't you go out and make whisky and I'll sell you the sugar", he is guilty of solicitation. If he agrees to furnish sugar in return for half of the whisky made, he is guilty of conspiracy because he then has the purpose to facilitate the crime--to take part in it and to share the profits. He is not guilty of a crime if he merely sells sugar at a regular rate to those persons making whisky even though he has knowledge of the use to which the sugar is being put as he would not have the required intent.

Chairman Burns pointed out that if the storekeeper raised or lowered his price for the sugar or in any way aided those making the whisky, he would be guilty of criminal conduct because of the language "...or facilitating its commission" contained in the section.

Professor Platt added that while the storekeeper is facilitating the making of the whisky by keeping up the sale, it is not his own, personal purpose, really, to commit the crime of making whisky, so he has not really agreed with the intent.

Professor Platt remarked that section 6, except for the shifting from the bilateral necessity of having two people with the requisite culpability to the emphasis on the single person, does not open up all the prblems he felt would be opened up later in section 9, joinder, severance and venue in conspiracy prosecutions.

Chairman Burns asked if the draft essentially did away with the "overt act" requirement.

Professor Platt replied that it did. Presently the statute requires an overt act but, he added, under the case law it can be practically any inconsequential act. He felt the essential act had already taken place--the agreement. It is concrete and easy to identify and he felt it was enough. The MPC in minor offenses of conspiracy (in the third degree felony and the misdemeanor category) requires an overt act.

Chairman Burns asked about the conspiracy to commit the crime of driving while intoxicated; could a bartender be prosecuted under this statute.

Professor Platt thought the important element would be the purpose or intent of committing the crime of drunken driving and he felt it would be pretty hard to prove that a bartender really purposely wanted the person to be arrested for drunken driving; he might facilitate the drunken driving and the homicide that would follow, but it is not his purpose. He asked if it was the desire of the subcommittee to follow New York's lead and to have a crime of criminal facilitation to cover this type of conduct.

It was not the desire of the members to go so far as to cover this conduct by statute.

Representative Frost referred to section 6, subsection (a), to the language "agrees with such other person" and asked if this requires some mutuality of agreement; does it require capacity on the part of one of those agreeing.

Professor Platt answered that the word "agreement" is in there and he supposed there could not be an agreement unless there were two people. It is not a contract term, he said, and noted this becomes clear in section 12 which points out that incapacity of the one agreed with is no defense to the person who actually has the culpability. This is implicit in section 6. He went on to explain that if one of the conspirators is insane he cannot be convicted of conspiracy because he is irresponsible; if he is under fourteen years of age he is not mature and cannot be held guilty of the crime of conspiracy; however, the one agreeing with the fourteen year old, the one who has the capacity, may be reached by the crime of conspiracy even though there is only one, in the technical sense, legal conspirator.

Section 7. Scope of conspiratorial relationship.
Section 8. Conspiracy with multiple criminal objectives.

Professor Platt stated that this is an attempt to identify by statute that which has previously been existent in case law only. It is a complicated situation designed to recognize the great burden on the prosecution in showing the intricacies of a conspiracy or several conspiracies which may be related so that the jury can be given the big picture of the particular, little defendant in that conspiracy. Here, again, there is very careful balancing necessary because the defendant, much to his harm, may become swept up in the large prosecution that the state has put on. Sections 7 and 8 set out the scope of the relationship and limits some of the broader conspiracy holdings. For instance, if A conspires with B and A knows that B is going to conspire with C and D (he may not know C and D but knows two more people will be involved) then A has conspired with C and D. If C and D go out and conspire to commit a crime, then the relationship to conspire with A is broken as A did not know that C and D would attempt to conspire with others. This is the balancing effect of the section; it is an attempt to give the defendant a fair shake. If larger numbers of conspiracies are allowed to be joined and prosecuted to show the defendant's relationship, Professor Platt felt there ought to be an end to the defendant's conspiratorial relationship and that is what the draft attempts to do. A lot of the problems are in the admissibility of hearsay evidence and admissions of parties not actually in court. This is an acceptable principle in the law of conspiracy and the draft does not change that; it allows the present status to stand on the hearsay evidence rule exceptions on conspiracy. It does affect it, however, by stopping the chain conspiracy somewhere down the line--past what the defendant can reasonably assume his co-conspirator is going to do.

Professor Platt advised that section 8 reflects what is now current case law and, again, there is no law in Oregon on most of this. Conspiracy to rob a bank includes the obtaining of a gun by breaking into a store and the stealing of a car to be used to get away within the one conspiracy.

Representative Frost felt that on the theory of social justice of the person as discussed earlier, it would be consistent to convict the individual involved in multiple crimes with multiple sentences. He felt that under the provisions of section 8 it was being held that the defendant was no more a threat to society if he commits fifty burglaries as a result of one conspiracy than he is if he committed just one.

Professor Platt pointed out that the defendant can be reached by routes other than conspiracy if the defendant does actually burglarize the store, i.e., committing a substantive crime.

Representative Frost noted that if the defendant planned to attempt to burglarize fifty stores he would be punished no more heavily than the man who plans to burglarize only one store. He agreed with this theory but he felt it was inconsistent with Professor Platt's earlier expressions.

Chairman Burns asked what the draft provisions would do with the conspiracy to conceal. He recalled a case where either from a statute of limitations or some other point the conspirators could not be prosecuted for the original conspiracy so the statute of limitation was extended by including a conspiracy to conceal the commission of the crime and to prevent apprehension.

Professor Platt answered that the draft provisions would overrule this type of situation. It would be stopped by defining the duration of the conspiracy and he read from section 11 of the draft: "For the purpose of application of....[the statute of limitations]: (a) conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object are committed or the agreement that they be committed is abandoned....".

Mr. Knight stated that he did not see where section 8 was actually necessary.

Professor Platt felt it was needed because, otherwise, there is trouble when the prosecutor brings conspiracy in multiple counts for the same course of conduct. This, he said, has happened. He noted, also, that the draft reflects the present status in the Oregon Municipal Courts--that the course of conduct is one conspiracy and not a series of conspiracies; the criminal conduct, although a series of violations of the same statute, is not a series of conspiracies to violate the same statute.

Section 9. Joinder, severance and venue in conspiracy prosecutions.

Professor Platt explained that this was the procedural aspect of the new law of conspiracy and was essential to a complete definition of the crime. Here, again, is the attempt to balance the interest of the state when faced with the complicated conspiracy and the bad condition the defendant can be in if he is one of forty or more little fish in the big net the state has thrown around. The defendant, he said, tends to get lost in all this and the jury tends to lump all the co-defendants as "birds of a feather". At the same time, he observed, the state has to have the authority, because of the nature of the crime, to have joinder which is much more liberal than the usual kind and to have continuance of the hearsay exceptions on evidence. The draft does not restrict the hearsay rule except that it does try to balance out the joinder provisions as between the state and the defendant. If the court feels it is fair to give a severance, it may do so and this provides a built-in flexibility to the system.

Mr. Knight referred to subsection (2) of section 9, to the language, "...the court shall order a severance...", and suggested perhaps the wording should be, "...the court may order a severance...".

Professor Platt agreed that perhaps "may" would be a better word because the provision is discretionary all the way.

Chairman Burns advised that he had some questions regarding subsection (1) of section 9. As he read the section, if A and B conspire they can be prosecuted jointly and, also, if A and B conspire and C and D conspire, all four can be prosecuted together provided the conspiracies "are so related that they constitute different aspects of a scheme...". He asked if this was not a substantial enlargement of the present federal law of conspiracy.

Professor Platt admitted that it may be but stated that it has a balancing factor built in. For example, the important thing here would be the hearsay evidence, perhaps, of the C and D conspiracy. The state may not use against A and B the hearsay evidence from C and D's conspiracy.

Chairman Burns asked how this would be kept out and Professor Platt replied that it would be up to the court and admitted this was a very difficult thing to manage in this kind of case.

Mr. Knight noted that under the recent cases of the Supreme Court it has been held that two defendants cannot be tried jointly if the prosecution uses separate confessions against each defendant because the jury is not competent to segregate the confessions.

Professor Platt pointed out that these cases were not conspiracy cases.

Chairman Burns noted that he was not aware that presently the state can jointly prosecute A,B,C and D unless there is an allegation in the indictment that all of the defendants were members of the same conspiracy. Subsectinn (b), he thought, would permit prosecution of A and B, C and D, even though A and B's conspiracy was different from C and D's conspiracy.

Professor Platt replied that this might be answered in the example of the Bruno case. Three groups of people were involved: the New York importers of the dope; the New York wholesalers who distributed to retailers; the retailers, one group in Texas and one group in Louisiana. Each retail group had salesmen who pushed the dope in their local communities. The government convicted them all, eighty-five defendants, including the smugglers and the salesmen on the other end. The MPC holds this is too broad a power for the prosecution as it lumps together too many people who really did not conspire with each other. By definition, then, the MPC would show that the smugglers knew that the wholesalers would have retailers;

therefore, the smugglers could be said to have conspired all the way. The retailers could not be said to have the purpose, when buying from the wholesalers, to conspire with a particular smuggler's group. The point being that not everybody has the same purpose of conspiracy within the huge group. The MPC would tend to limit the conspiracy purpose but in the Bruno case the same result might be reached by saying smugglers and wholesalers are conspiring with each other but not with the retailers. The retailers are conspiring with the wholesalers and it is the same course of criminal conduct but in a different aspect; therefore, it is a separate conspiracy but they may be tried together because the jury cannot be shown the whole picture unless they are tried jointly. The draft then says that the hearsay evidence of the retailers cannot be used against the wholesalers or the smugglers and vice versa, the rights of hearsay evidence and admissions cannot be enlarged by simply enlarging the joinder.

Chairman Burns pointed out that the very vice of the conspiracy prosecution is that this evidence comes in. He advised that the conspiracy case is almost impossible to defend even though it is known that some innocent or very small "fish" have been caught in the prosecutor's net. It is held that the way to do this is to try all the defendants together but give the judge power to sever. He noted, however, that there has not been a severance in Portland for over twenty-five years.

Professor Platt pointed out that this is under the federal rule which has such a large, unending chain in the purpose to conspire. If, in fact, there was an end to the conspiracy by definition, the judge might have better grounds and feel more secure about granting severances.

Chairman Burns asked what was meant to be accomplished by the language in subsection (b), "Neither the liability of any defendant nor the admissibility against him...shall be enlarged by such joinder."

Professor Platt replied that this was the restriction on the hearsay evidence.

Mr. Knight was of the opinion that when you begin thinking of a conspiracy, to a certain extent, you are thinking of organized crime. He asked if there had ever been a time in the State of Oregon where the state has really gone at organized crime in a conspiracy fashion. He recalled that the vice trials held in Portland attempted to reach a number at one time and the state lost every one of them.

Chairman Burns noted that there had been a number of conspiracy indictments in the vice investigation but, he said, there were a number of reasons why it did not come to very much and he did not think the fact that there were conspiracy indictments was a significant factor.

Chairman Burns indicated he was very reluctant to enlarge the present federal law of conspiracy but agreed that if the state ever got into the Mafia-type situation that this type of provision would probably be needed.

Professor Platt indicated that Oregon had not reached this point as yet but he felt that sooner or later, as the area grows, there will be infiltration of organized crime.

Replying to Chairman Burns, Professor Platt explained that subsection (3) of section 9, venue, is designed to reflect hauling the defendant across the state to try him with people with whom he never had the purpose to conspire.

Chairman Burns referred to the language in subsection (3), "No defendant shall be charged with a conspiracy..." and asked if it should not be "No defendant shall be tried...".

Professor Platt agreed that there might not be any reason to say "charged".

Mr. Knight suggested putting the language of subsection (3) in a more positive way--rather than saying, "No defendant shall be charged..." to say, "Venue shall be in any county in which the conspiracy was entered into or in which an overt act venue shall lie...".

Mr. Paillette observed that from the standpoint of the overall revision, it was anticipated that the substantive code would be presented to the Legislature before anything is done on procedure. In connection with this, assuming that the draft provisions will be accepted, he wondered if the subcommittee wanted to examine the present joinder provisions under ORS 136.060 and perhaps write in a rider to amend ORS 136.060 at the time the substantive code is presented. He advised that ORS 136.060 provides that: "When two or more defendants are jointly indicted for a felony, any defendant requiring it shall be tried separately;".and this would include a conspiracy. Mr. Paillette was not certain that this problem would have to be taken care of at this stage, but he did feel it was something that should be kept in mind by the subcommittee.

Chairman Burns felt the commentary shoud take note of this probler so that it would not be overlooked.

Mr. Knight moved that subsection (3) of section 9 be amended to read: "Venue shall lie in the county in which the conspiracy is entered into or in any county in which an overt act pursuant to such conspiracy was done by him or by a person with whom he conspired."

There being no objection, Chairman Burns announced the motion would be adopted.

Section 10. Conspiracy--Renunciation of criminal purpose.

Representative Frost referred to the language contained in line three of section 10, "thwarted the success of the conspiracy", and understood that this was getting away from the actual thwarting of the commission of the crime for which the conspiracy originally was established.

Professor Platt replied that this was not the intent of the language. "Thwarted the success of the conspiracy," he said, means that whatever the conspiracy set out to do, it cannot do.

Representative Frost agreed that from reading the commentary this was what was intended by the draft provision but it was his opinion that the section did not make this clear.

Professor Platt suggested that perhaps subsection (1) could be made more acceptable by saying "thwarted the commission of the crime or crimes which was/were the object of the conspiracy".

Representative Frost agreed this would be acceptable.

Mr. Knight understood that if one conspirator backed out of the conspiracy he would have to stop the commission of the crime before he had a successful defense.

Professor Platt agreed that this was so but also noted that the defendant might get the statute of limitations running with respect to himself. He would still be guilty of conspiracy but if he leaves the conspiracy, this is abandonment. There is a difference between abandonment and renunciation. Abandonment, in this case, is a partial defense but it will not excuse the defendant from what has already transpired. If, in fact, the conspiracy and the object of the conspiracy is ended, there is no crime at all.

Mr. Knight cited an instance where one of the conspirators leaves the conspiracy and goes to the police but the police cannot stop the commission of the crime for which the conspiracy was established and asked how this would be covered.

Professor Platt replied that this renunciation would not do the defendant any good because the success of the conspiracy had not been thwarted. It would, however, show abandonment on the part of the defendant and would start the statute of limitations running as set out in section 11 of the draft. The defendant would still be guilty of what had transpired up to this point but would not be guilty of subsequent crimes committed by his cohorts.

It was decided by the subcommittee to postpone consideration of sectinns 11 through 14 of the draft until the next subcommittee meeting which will be scheduled in approximately three weeks on a Tuesday evening.

The meeting was adjourned at 8:30 p.m.

Maxine Bartruff, Clerk
Criminal Law Revision Commissic