Tapes #53, 54, 55, 56 and 57

#53, 54, 55, 56 - Both Sides
#57 - All of Side 1 and 1 to 93 of Side 2

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee on Grading and Sentencing

April 4 and 5, 1970

A G E N D A

OREGON CRIMINAL LAW REVISION COMMISSION
315 Capitol Building
Salem, Oregon

Subcommittee on Grading and Sentencing

First Meeting, April 4 and 5, 1970

Minutes

April 4, 1970

Members Present: Senator Anthony Yturri, Chairman
Judge James M. Burns
Senator John D. Burns
Representative Wallace P. Carson, Jr.

Excused: Attorney General Lee Johnson

Staff Present: Mr. Donald L. Paillette, Project Director
Professor George Platt, Reporter

Agenda: April 4, 1970

CLASSES OF OFFENSES
Preliminary Draft No. 1; February 1970

April 5, 1970

AUTHORIZED DISPOSITION OF OFFENDERS
Preliminary Draft No. 1; March 1970

AUTHORITY OF COURT IN SENTENCING
Preliminary Draft No. 1; April 1970

GRADING OF CRIMES

The meeting was called to order by the Chairman, Senator Anthony Yturri, at 4:00 p.m.

Classes of Offenses; Preliminary Draft No. 1; February 1970

Mr. Paillette explained that during the early stages of the criminal code revision project Professor Courtney Arthur of the Willamette University College of Law had worked on a draft entitled "Classes of crimes" which, according to the plan at that time, was to

have been a part of the Preliminary Article. Portions of the Article on Classes of Offenses under consideration at today's meeting were taken from that draft.

Section 1. Offenses; definition. Section 2. Crimes; definition. Section 1 defining "offenses" was not included in Professor Arthur's draft but Mr. Paillette said it appeared to be an appropriate term to define in view of the fact that the criminal code would also include the noncriminal offense of a "violation" and it was desirable to draw some distinction between the terms. In reply to a question by Judge Burns, he outlined that a violation would be an offense but not a crime and the only punishment for a violation would be a fine.

Judge Burns commented that section 1 would affect city or county ordinances in terms of classification and under the terminology of this draft, if a city ordinance carried only a fine as its penalty, it would be a violation.

Chairman Yturri noted that section 1 said an offense was "either a crime or a violation" and asked how an offense would be termed if both a fine and imprisonment were authorized. Mr. Paillette replied that the offense would be a crime in that circumstance. If only a fine were imposed following conviction of such an offense, it would still be a crime because imprisonment was authorized under the statute and conviction, therefore, would be for a crime even though imprisonment was not imposed.

Professor Platt observed that the problem of designating municipal ordinance violations as crimes had caused a great deal of trouble. Most cities had an automatic imprisonment penalty section and it generally applied to all their ordinance violations. Normally the municipalities exacted only fines and the result was that the courts had been trying to decide whether these ordinance violations were in fact crimes. In actuality, he said, offenses in this category were crimes because they were subject to the general imprisonment penalty section.

Judge Burns said the problem Professor Platt was discussing should be solved by a procedural statute in the evidence code because this was one of the important ramifications of a "conviction" and the law was not clear on that point.

Professor Platt pointed out that another problem would be created by enactment of the new criminal code when cities discovered that there was no crime for some specific offense which was included under the old code. They might then enact an ordinance which might well be contrary to the policy of the state on criminal law. An example, he said, would be the crime called "shoplifting" which was not in the new

code but was instead covered by the general theft statute. He asked if it would be possible to include a statute in the criminal code which would preclude cities from enacting ordinances which were contrary to the state policy, an example being a city ordinance dealing with shoplifting when the state crime was "theft."

Representative Carson noted that the motor vehicle code said that cities could not enact ordinances in conflict with that code. This, however, lead to a further problem of whether it should be enforced by the city or by the state.

Professor Platt expressed the view that cities should not be permitted to keep operating in any way they wanted with respect to the criminal law when the Commission, at the behest of the legislature, was going to such great lengths to enact a workable criminal code at the state level.

Mr. Paillette commented that there were two chapters in ORS specifically giving cities and home rule counties authority to enact ordinances.

Professor Platt suggested that one way to resolve the problem was in the definition of "crimes" in this code. He suggested that a crime be defined specifically and that anything else be a violation. If that were done, he said, cities, in view of the state law, would have a difficult time saying that an offense was not a crime when it carried a six months jail sentence.

Mr. Paillette remarked that how an offense was defined became important when considered in conjunction with certain occupational statutes which said that a person could not become a member of that occupation or profession if he had been convicted of a crime. He was of the opinion that crimes should be recognized for what they were and when a person was sent to jail, even a city jail, it was senseless to say that he had not been convicted of a crime.

Judge Burns said he was not so sure that what the offense was called was important so long as the peripheral consequences -- impeachment and being able to qualify for certain jobs -- were adequately covered. He was of the opinion that it was an undesirable rule of evidence in the Oregon law which allowed impeachment for all kinds of crime. For a vast host of criminal conduct, he said, impeachment was nothing more than an inadequate way of arriving at the truth in a given controversy at trial. He was convinced that if someone were put in jail, his offense should be considered a crime.

Senator Burns said his objection to calling violation of a municipal ordinance a crime when it carried a jail sentence was that many municipalities had judges untrained in the law and sometimes

people were put in jail by municipal judges and justices of the peace when they would not have been convicted had they been tried in a situation where due process was strictly enforced.

Chairman Yturri commented that the criminal code would presumably cover all crimes against the state and suggested that the problem which was being discussed might be solved by changing the evidentiary code, when the procedural revision was undertaken, to say that for purposes of impeachment, only those crimes defined in the criminal code could be crimes under municipal ordinances. Professor Platt said an opportunity was presented to be even more precise by pinning the proscription down to, for example, Class B and Class C misdemeanors. Mr. Paillette pointed out that the criminal code would not contain every crime against the state; there would be many crimes remaining in other statutes throughout the 990 sections of ORS. The code recognized that fact, however, made allowance for it and attempted to bring the 990 sections within the framework of the basic terminology of the criminal code.

Judge Burns noted that section 2 said that a crime was an offense "defined by any statute of this state" but did not include the language of section 1 which said "any law of this state or by any law or ordinance of a political subdivision of this state." The sections, he said, should be consistent throughout with respect to this language, whether the definition referred to an offense, a crime or a violation.

Chairman Yturri agreed that if sections 1 and 2 were enacted as drafted, it would be clear that violation of a city ordinance would constitute an offense; however, with the phrase relating to an ordinance of a political subdivision omitted from section 2, violation of an ordinance carrying an imprisonment penalty would be an offense but not a crime.

To resolve the problem of including county and municipal ordinances in section 2, Judge Burns suggested that section 2 be revised to read: "A crime is an offense for which a sentence of imprisonment is authorized." Since section 1 defened an "offense" as including "any law or ordinance of a political subdivision of this state," municipal ordinances as well as state laws would thereby be included in the definition of "crimes" in section 2. This suggestion was subsequently adopted. See page 16 of these minutes. However, the subcommittee first had to decide whether to approve the policy of including city and county ordinances in the definition of "crimes."

Senator Burns posed the following hypothetical situation: Assuming that the evidence code had been amended to provide that one could be impeached in a civil or criminal case only for a specified

classification of misdemeanor or felony, a person was then convicted under a city ordinance for a crime that was identical to a Class A misdemeanor in the criminal code. At trial, an attempt was made to impeach the defendant and the argument was made that the crime charged was identical to the Class A misdemeanor, the only difference being that he was charged under a city ordinance. The statute would not draw a distinction between the two, he said, and he asked what the court would do in such a situation.

Representative Carson suggested that when the evidence code was revised, Senator Burns' question could be answered by inserting a statement that the crime charged must be a violation of the state statute.

Chairman Yturri advised that in spelling out the impeachment rules, the code could go beyond the title of the offense and require that the conduct itself be considered in determining whether or not conviction of that offense could be used for impeachment. It could spell out that even though imprisonment was authorized, there could be no impeachment by reason of that provision.

Senator Burns said his objection to including city ordinances in section 2 was that the deliberation and consideration given to the passage of a legislative Act was of a much higher level than that given the passage of a municipal ordinance. In other words, he said, he had more trust in the wisdom of the legislature to make certain conduct a crime than in that of a city council having this power.

Judge Burns commented that Senator Burns' objection was actually concerned with another area which needed correction in Oregon and that was giving justices of the peace and municipal courts the authority to put people in jail as a result of procedures conducted by persons not legally trained. Representative Carson said the question also involved city councils and county commissions who enacted bad laws. The answer, he said, was one which he did not necessarily recommend but the problem could be solved by including a statement in ORS chapter 144 that for purposes of impeachment, cities and counties were required to charge under specific ORS sections which could be set forth therein. If that were done, a city or county could not use an ordinance for conviction unless it was a violation of a specific ORS section.

Professor Platt commented that there was a provision in the Oregon Constitution which had specific reference to the power of cities with respect to criminal law and that provision would have to be considered in conjunction with Representative Carson's suggestion.

Mr. Paillette suggested that the subcommittee consider the balance of this Article before deciding whether to amend sections 1 and 2 and the members agreed.

Section 3. Felonies; definition. Professor Platt suggested that a cross reference to section 9 be included in section 3 to simplify the use of the statutes following enactment inasmuch as the two sections were so far separated. Chairman Yturri said this would be considered when section 9 was being discussed. See page 12 of these minutes for adoption of this amendment.

Section 4. Felonies; classification. Mr. Paillette explained that section 4 used the classification system in the Michigan code. The additional category of unclassified felonies in subsection (d), as well as unclassified misdemeanors in section 6 (d), was derived from the Connecticut code. Unclassified felonies, he said, provided a way to label some of the felonies outside the basic criminal code. He suggested that subsection (2) of section 4 be amended in the second line by inserting "except murder under section ___" after "code." It was advisable, he said, to treat murder as a special case and this would be accomplished by keeping it separated from the other felonies.

Judge Burns asked what felonies would be picked up in the "unclassified" category in subsection (d) and was told by Mr. Paillette that a number of the 990 sections in ORS carried imprisonment penalties and these would be covered by the "unclassified felonies" category.

Professor Platt asked if it would be possible for the legislature to enact a special law creating a felony outside the criminal code and imposing a prison sentence under subsection (d). Senator Burns replied that this was entirely possible because the legislature would in effect be amending the criminal code. Professor Platt said that in that event he would suggest that subsection (d) be deleted. A policy had been adopted, he said, of having the code control the nature of a law violation, and by including the "unclassified felony" category that decision was being reversed. He indicated that he had earlier suggested that the code be written so that it would control in all situations by saying that if no level of culpability were provided in the regulatory offenses outside the criminal code, no imprisonment could be imposed for violation of that particular provision. In effect, subsection (d) would say that there could be any number of felonies outside this classification scheme so long as the offense was placed outside the criminal code.

Mr. Paillette explained that subsection (d) was included for the purpose of recognizing that felonies existed in ORS outside the criminal code and that they were not going to be amended at this time. In the absence of a classification such as that contained in

subsection (d), he said, the Commission would be obliged to amend every statute in ORS that carried any kind of a penalty. Professor Platt said he would prefer to place a statement in this section relating to the penalty sections at the time of enactment of this code to preclude the legislature from proliferating and enacting further statutes of that kind.

Chairman Yturri was doubtful that the Commission could foresee every circumstance which might arise to the extent that they should foreclose the legislature from acting in the future. Mr. Paillette explained that the intent was to give the legislature some guidelines so that if future legislatures wanted to enact laws dealing with some type of offense not now covered, they could gear that legislation into the criminal code and use the same classification system used in the code.

Chairman Yturri expressed approval of subsection (d) but Professor Platt was not convinced. Senator Burns commented that another way of handling this problem would be to pass a separate section making all the felonies outside the criminal code, for example, Class C felonies or Class A misdemeanors.

After further discussion, Senator Burns moved that subsection (2) of section 4 be amended in accordance with the suggestion made by Mr. Paillette:

> "The particular classification of each felony defined in this code, except murder under section ___, is expressly designated in the section defining the crime. . . . "

The motion carried.

Section 5. Misdemeanors; definition. Senator Burns noted that section 5 spoke in terms of a maximum sentence of not more than one year and omitted the reference, used in the existing code, to a term in the penitentiary or OCI. Perhaps in the future, he said, offenders would be sent to OCI for less than a year to take advantage of the vocational facilities there, and he asked if the penitentiary and OCI criteria should be included in both the felony and misdemeanor definitions. Mr. Paillette replied that this subject was treated in the Article on Disposition of Offenders and Senator Burns' questions would be answered there.

Section 6. Misdemeanors; classification. Mr. Paillette explained that misdemeanors were classified in the same manner as felonies. With respect to subsection (2), he said he had concluded that the last sentence was unworkable. When the offense was defined by statute but did not include a penalty, there was no way of knowing

what penalty should be attached. The first sentence in subsection (2) was all right, he said, because in that instance the express penalty was provided by statute which offered a point of reference so it could be determined whether it would fit into Class A, B or C. Therefore, instead of calling the offense in the second sentence an unclassified misdemeanor, it should either be called the lowest grade of misdemeanor -- Class C -- or be called a violation in order to provide some point of reference for the kind of punishment authorized. However, if it were called a violation and there was nothing in the statute which said what kind of a fine should be levied, the statute was back in the same position of having no reference point. In effect, then, all that was left was a Class C misdemeanor.

Judge Burns asked if this provision would have an effect on either present or future 990 penalty provisions in ORS and received an affirmative reply from Mr. Paillette who further explained that the section would mean that if the legislature had not specified the penalty for any given offense, this code would say that the offense was a Class C misdemeanor.

Judge Burns then moved that the last line of subsection (2) of section 6 be amended to read: "shall be considered a Class C misdemeanor." Chairman Yturri suggested that the two sentences in subsection (2) be separated into subparagraphs for the purpose of clarity and others agreed that the first sentence should be subparagraph (a) and the second subparagraph (b). Judge Burns included this further revision in his motion. The motion carried.

Section 7. Violations; definition. Mr. Paillette noted that section 7 retained the same definition of "violation" as that drafted by Professor Arthur. The only question he had was whether there was anything in section 7 which was inconsistent with section 6. He thought "No sentence of imprisonment is authorized", as used in section 7, might be inconsistent with the amended subsection (2) of section 6 which said " . . . as to the penalty authorized upon conviction . . . " Others agreed that there was a conflict between the two and it would be necessary to redraft subsection (1) of section 7.

Chairman Yturri indicated that the problem was that the definition of "crime" said that imprisonment or a fine must be authorized. When a statute authorized no penalty or fine, it was then inconsistent with that definition to say that violation of that statute was a crime. Senator Burns said that in that event it could only be a violation. If the statute carried no prescription for imprisonment, it was inconsistent with section 2 to say it was a misdemeanor as did subsection (2) (b) of the revised section 6. Mr. Paillette said that the offense described under section 6 (2) (b) could not be called a violation because of the provisions of section 7

of the Article on Authorized Disposition of Offenders relating to fines for violations. Subsection (2) of that section read:

> "In the case of a violation defined outside this Code, the amount of the fine shall be fixed as provided in the statute defining the offense."

In view of this provision, Mr. Paillette said it was imperative to call the offense something specific so it could be brought into the penalty range. There would be no penalty provision if it were called a violation under section 6 (2) (b) whereas a Class C misdemeanor did carry a specific penalty.

Judge Burns said he was not happy with the language in subsection (2) of section 7 concerning fine and forfeiture. He was not convinced that the draft should say that when a forfeiture was involved, the offense was a violation. Assuming, however, that this approach was adopted, it could be accomplished by amending section 7 to read:

> "An offense is a violation if it is so designated in the statute defining the offense or if the offense is punishable only by a fine, forfeiture or other civil penalty. Conviction of a violation does not result in any disability or legal disadvantage based on conviction of a crime."

Senator Burns approved the concept of Judge Burns' suggestion but was critical of the phrase "legal disadvantage." Judge Burns agreed and said he objected to "other civil penalty" because it was an invitation to make up some other kind of punishment for a minor infraction. He was in favor of simply saying that the offense was a violation if the punishment was a fine.

If the forfeiture and civil penalty aspects of this section were eliminated, Chairman Yturri asked, would the section then mean that for a violation there could be no provision for forfeiture or a civil remedy. Judge Burns said that a forfeiture statute could easily be added if necessary.

Representative Carson was of the opinion that if the section were to read that a violation was punishable only by a fine, it would not necessarily preclude a forfeiture or other civil penalty. Judge Burns agreed that the statute should say that where the offense was punishable only by a fine or where the statute designated that the offense was a violation, in those two circumstances it would be a violation.

Mr. Paillette urged that some allowance be made for forfeiture. Some of the regulatory sections, he said, provided for forfeiture of, for example, a license. Chairman Yturri agreed and said that if the

statute referred only to a fine, the offense would not even be a violation when a forfeiture was involved. He suggested that the section read "fine, forfeiture, fine and forfeiture."

Judge Burns said he was concerned with the phrase "other civil penalty" but Chairman Yturri said that as far as he could see the civil penalty neither added nor detracted from the meaning of the section.

After further discussion, Judge Burns suggested section 7 be amended to read:

> "An offense is a violation if it is so designated in the statute defining the offense or if the offense is punishable only by a fine, forfeiture, fine and forfeiture, or other civil penalty. Conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime."

Senator Burns moved adoption of the above language and the motion carried unanimously.

Section 8. Violations; classification. With respect to subsection (1) of section 8 Chairman Yturri suggested that because section 7 referred to penalties which included more than just a sentence, section 8 should read "because of the provisions of section 7" rather than "because of the express sentence provided." Mr. Paillette said that if a forfeiture were ordered, it would be part of the sentence. Judge Burns suggested that "punishment" might be a better word than "sentence." He said he did not want to make it necessary to include a definition of "sentence" and thought it was incongruous for a judge to say, "I sentence you to a forfeiture."

Mr. Paillette suggested that the second sentence of subsection (1) be amended to read:

> "Any offense defined outside this code which is punishable as provided in section 7 of this Article shall be considered a violation."

Professor Platt said that crime and punishment were related but questioned whether violation and punishment went together. Mr. Paillette replied he had been unable to think of a better word than "punishment" and expressed the view that when a man was sentenced to pay a fine, that was a punishment. Judge Burns and Chairman Yturri agreed and said the language proposed by Mr. Paillette was an improvement over the section as drafted.

Judge Burns proposed to delete "considered" from the last line of section 8 (1). Senator Burns noted that this phraseology was used in

earlier sections, i.e., sections 4 and 6, and the committee agreed that in order to be consistent "considered" should be retained.

Judge Burns then moved that the last sentence of section 8 (1) be amended in accordance with Mr. Paillette's suggestion:

> "Any offense defined outside this code which is punishable as provided in section 7 of this Article shall be considered a violation."

The motion carried.

Section 9. Crimes; classification determined by punishment. Mr. Paillette explained that section 9 was the indictable misdemeanor section which had been approved earlier by Subcommittee No. 3.

Senator Burns pointed out that the legislature had recently changed some of the sentencing provisions with respect to the place to which a person was sent after conviction, and those under judgment orders were sent to the Corrections Division. He suggested that section 9 should say "punishable by commitment to the Oregon State Corrections Division." The Corrections Division, he said, envisioned the day when a defendant committed to their custody would be placed immediately in a work release program.

Judge Burns said that there would hopefully be a time when Oregon would have regional facilities which would essentially be the equivalent of the present county jails and those facilities would be at least partly under the supervision of the Corrections Division. When that point was reached, he indicated he would hate to see a situation develop where everybody sent there would have to be a felon and where misdemeanants would be excluded.

Judge Burns further stated that the Corrections Division was presently placing some offenders directly in OCI rather than taking them initially to the penitentiary as had been done in the past. Judges now signed the orders instructing the sheriff to take the prisoner directly to the Correctional Institution even though the orders still read that he was committed to the custody of the Corrections Division.

Judge Burns noted that ORS 137.124 relating to commitment of a defendant to the Corrections Division read:

> "If the court imposes a sentence of imprisonment upon conviction of a felony, it shall not designate the penal or correctional institution in which the defendant is to be confined but shall commit the defendant to the legal and physical custody of the Corrections Division."

Mr. Paillette pointed out that at the time section 9 was drafted by Professor Arthur, he had no way of knowing the proposed code's eventual penalty structure or grading system. He suggested that subsection (1) be amended to read:

> "When a crime punishable as a felony is also punishable by imprisonment for a maximum term of one year . . . "

Mr. Paillette explained that if the crime were punishable as a felony, the code would say what the maximum term of the indeterminate sentence of imprisonment would be and ORS 137.124, which would be amended by the Article on Authority of Court in Sentencing if the staff proposal were approved, would tell the court that the offender was to be sent to the custody of the Corrections Division.

After further discussion, Senator Burns moved that subsection (1) of section 9 be amended to read:

> "When a crime punishable as a felony is also punishable by imprisonment for a maximum term of one year or by a fine, the crime shall be classed as a misdemeanor if the court imposes a punishment other than imprisonment under ORS 137.124."

The motion carried.

Professor Platt then proposed to begin section 3 with the phrase, "Except as provided in section 9 of this Article,". The subcommittee agreed and adopted this amendment by unanimous consent.

Mr. Paillette explained that the purpose of subsection (2) of section 9 was to continue the "indictable misdemeanor" type of felony. The offense would be a felony until one of the events listed in the subparagraphs of subsection (2) occurred, in which case it would become a misdemeanor for all purposes. The only departure from existing law, he said, was contained in subparagraph (g) and he noted that "the" should be inserted before "defendant" in that subparagraph.

Judge Burns said he wanted to be certain that the subsection was exhaustive and covered all contingencies. He asked if it would cover a situation where the court imposed a forfeiture. Chairman Yturri suggested that the language inserted in section 7 might also be appropriate here, i.e., "imposes a fine, forfeiture, fine and forfeiture." Mr. Paillette suggested that the subcommittee reserve revision of this section until the subsequent sections had been considered. Subsection (2), he said, attempted to provide for implementation of the indictable misdemeanor and he thought it would be unwise to get into the position of saying that there was going to be a "felony-violation" type of offense.

Tape 2 of this meeting begins here:

Judge Burns asked what would happen under section 9 if the judge imposed a sentence, suspended execution and placed the defendant on probation. Mr. Paillette replied that the crime would be a felony in that situation.

Judge Burns commented that frequently one of the aspects judges considered in imposing sentence was that as a result of what he did, the offender was going to be a felon for the rest of his life. He said it was important that the code be written so that all courts would know exactly whether the offender was or was not a felony when he walked out of the courtroom. Mr. Paillette commented that this was precisely the intent of section 9.

Senator Burns said that if this was what was intended, the commentary should show that under subparagraph (f) when the court granted probation following imposition of sentence and suspension of execution and the offender was thereafter discharged without serving a sentence, the crime was a felony. He noted that the proposed statute was silent with respect to suspension of execution of sentence.

Judge Burns observed that he was uncertain whether section 9 covered the situation where the judge granted probation but imposed a term in the county jail as a condition of probation. Under the present statute, ORS 137.540, the offender could be sent to the county jail as a condition of probation for not more than a year or no more than 1/2 the maximum term prescribed for that offense, whichever was lesser. It should be clear, he contended, that section 9 applied where probation was granted and the offender was sentenced to a term in the county jail for a year or less.

Mr. Paillette pointed out that this practice had been severely criticized by the National Council on Crime and Delinquency as being inconsistent. Judge Burns explained that its purpose was to have some sentence available to the judge which fell short of total confinement. It was, he said, a useful tool for the courts and was used most frequently in work release situations where the offender was not separated totally from the community but instead was given, for instance, six months in the county jail on work release. Senator Burns commented that the NCCD report overlooked the fact that if the judge did not have this procedure available to him, the defendant would in many cases be sent to the penitentiary.

Chairman Yturri asked if a county jail was a correctional facility as used in subsection (2) (c) of section 9 and was told by Mr. Paillette that the Article on Escape defined the term "correctional facility" and included a county jail for purposes of that Article.

He said the intent was that a county jail would also be included within "correctional facility" as used in this Article on Classes of Offenses. When Professor Arthur drafted this language, he said, he had in mind that in the future, facilities other than a county jail might be developed for confinement, and the term was intended to cover that possibility.

The subcommittee discussed various methods of amending subsection (2) of section 9 to encompass the situation where the court granted probation to a defendant and imposed a term in the county jail as a condition of probation. It was finally determined that Mr. Paillette would add a new subparagraph to subsection (2) to cover this circumstance. Judge Burns suggested the following:

> "Upon granting probation, the court requires, as a condition of probation, confinement in a correctional facility other than the penitentiary or the Oregon State Correctional Institution."

Chairman Yturri commented that another way to accomplish the same thing would be to refer to ORS 137.540. Senator Burns asked if ORS 137.540 would be retained and Mr. Paillette replied that his recommendation was to do so.

Judge Burns observed that subparagraph (e) of subsection (2) omitted the instance in which the court granted probation and made the defendant serve time as a condition of probation. The court might want him to spend six months in the county jail as a condition of probation and at the same time be able to tell him that he was not being convicted of a felony and to declare the offense a misdemeanor at that time. Subparagraph (e) was silent with respect to such a condition of probation, he said. Mr. Paillette noted that under the language of the proposed statute, that would be a condition of probation and would not be an imposition of sentence; in other words, if the court placed him on probation, it was not imposing sentence.

Judge Burns asked why "without imposition of sentence" was necessary in subparagraph (e) and said he thought the provision would be less confusing if that phrase were omitted. After further discussion, the subcommittee agreed to amend subparagraph (e) to read:

> " . . . either at the time of granting probation, upon suspension of imposition of sentence, or . . . "

The amended language was intended to exclude a suspension of execution of sentence. See page 16 of these minutes for final adoption of this amendment.

Judge Burns then questioned the meaning of the last clause of subparagraph (e), i.e., "on application of defendant or his probation officer thereafter." He asked if it referred to a situation such as one where the defendant was sentenced to two years and placed on probation with suspension of imposition of sentence. Sometime after that, the probation officer came into court and asked the judge to declare the offense to be a misdemeanor. Judge Burns noted that if the defendant spent two years on probation and successfully completed his probation, the offense would be a misdemeanor no matter what the judge said and this would be true under present law as well as under this draft. He said the only thing he could see which might be achieved by subparagraph (e) would be in a situation where the judge had designated the offense to be a misdemeanor and placed the defendant on probation; the probationer violated the terms of his probation; the court would thereafter be limited to imposition of a misdemeanor penalty if probation were revoked.

Mr. Paillette commented that this provision was derived from the 1963 amendment to section 17 of the California Penal Code and the intent was that the court would not be punishing the individual for what he did on probation but rather for the crime he had committed. In effect, the provision was to require the court to elect at the time of imposition of sentence whether the man was guilty of a felony or of a misdemeanor.

Senator Burns noted that the ABA Standards said specifically that an individual should not be punished for the offenses leading to revocation of parole. Both he and Judge Burns expressed disagreement with this approach. Judge Burns said that the theory behind probation was that the judge could say, "I won't put you in the penitentiary this time but will give you a chance. If you behave, your only punishment will be to check in once a month with your parole officer, make your reports, etc., but if you misbehave, you will be brought back and punished." Senator Burns contended that this practice was not abused and the judges should have that degree of latitude. In addition, it served as a deterrent to further crime. Chairman Yturri concurred with this view and said he could not see where subparagraph (e) served a useful purpose.

Judge Burns said that perhaps this was not the proper time to bring this subject up but he was hopeful that the Commission would seriously consider a procedure whereby the defendant, having successfully served a term of probation for certain offenses, could go into court, withdraw his plea of guilty, enter a plea of not guilty and have the charge dismissed. This was done in some states, he said, and he believed it to be an excellent program which rewarded the offender for good conduct on probation by wiping out his conviction.

With respect to subsection (e) Mr. Paillette said that when a man was convicted, the judge had the advantage of a presentence investigation and knew a great deal about him so far as his prior record, the nature of the crime, etc. were concerned. The judge should therefore have a fairly good idea as to whether he deserved felony treatment and the man should be told right then what his status was and the matter should not be left hanging over his head. If he was given probation without a determination as to the type of offense, he was being punished for what he did after committing the crime rather than for the crime in the event he was brought back before the court. This system of forcing the judge to make an election had been in effect in California since 1963 and apparently worked well.

Senator Burns outlined that in many cases the judge looked at all the information concerning the defendant and decided to put him on probation and give him a chance to prove himself. If he failed on probation, it was a continuing offense and the judge should have latitude rather than being forced in the first instance. Chairman Yturri commented that he was not being punished for something he did on probation. He advocated that the judge should have continuing latitude and control over the defendant. This course, he said, offered an added benefit in that the judge would have an opportunity to determine whether he had judged the defendant correctly initially. Judge Burns commented that the provision would be very rarely used in any event and others agreed.

After further discussion, Senator Burns moved to amend subsection (2) (e) of section 9 to read:

> "The court declares the offense to be a misdemeanor, either at the time of granting probation, upon suspension of imposition of sentence, or on application of defendant or his probation officer thereafter."

Motion carried.

Section 2. Chairman Yturri pointed out that sections 1 and 2 should be made consistent in so far as the reference to city ordinances was concerned.

Judge Burns moved that section 2 be revised by deleting "defined by any statute of this state." Motion carried. Voting no: Senator Burns.

Judge Burns moved that the Article on Classes of Offenses be approved as amended. Motion carried unanimously. Voting: Judge Burns, Senator Burns, Representative Carson, Chairman Yturri.

The meeting was recessed at 7:15 p.m.

April 5, 1970

Members Present: Senator Anthony Yturri, Chairman
Judge James M. Burns
Senator John D. Burns
Representative Wallace P. Carson, Jr.
Attorney General Lee Johnson

Staff Present: Mr. Donald L. Paillette, Project Director
Professor George Platt, Reporter

Agenda: AUTHORIZED DISPOSITION OF OFFENDERS
Preliminary Draft No. 1; March 1970

AUTHORITY OF COURT IN SENTENCING
Preliminary Draft No. 1; April 1970

GRADING OF CRIMES

The meeting was reconvened by the Chairman, Senator Anthony Yturri, at 8:30 a.m.

Authorized Disposition of Offenders; Preliminary Draft No. 1; March 1970

Sections 1 and 2. Amending ORS 137.010. Section 2, Mr. Paillette explained, set up a range of penalties by amendment to ORS 137.010. The options available to the court set forth in subsection (2) incorporated existing law in subparagraphs (a), (b) and (c), he said, while subparagraph (d), "Discharge of the defendant," was new to Oregon law.

In reply to a question by Senator Burns regarding subsection (2), Mr. Paillette advised that a suspended sentence without probation would be similar to what some codes called a "conditional discharge." Representative Carson noted that the judge could impose a suspended sentence without probation but asked if it were possible to impose probation without a suspended sentence. Judge Burns replied that ORS 137.510 said that the court may suspend imposition or execution of sentence and may also place the defendant on probation so that most courts now believed that they must suspend imposition or impose sentence and suspend execution in order to have the power to grant probation. He said it did no harm to have subsection (2) worded in the alternative.

Senator Burns asked if the provision was creating a new category of probation without a sentence. Judge Burns said that under existing law if a court merely placed an individual on probation without

suspending imposition of sentence, the court would still have the power to impose a sentence in the event the person violated his parole. As a practical matter, however, even though the judge did not actually utter the words, "I suspend imposition of sentence," the district attorney included those words on the order signed by the judge.

Representative Carson said he agreed with Senator Burns that subsection (2) was creating a third category of placing a defendant on probation without imposing a sentence and this was not the intent.

One thing which the subcommittee might want to achieve, Judge Burns said, was a practice sometimes followed in courts at the present time which was to suspend imposition of sentence, place the offender on probation and fine him. He said he was not certain that the court actually had the authority to suspend a jail or penitentiary sentence, place the offender on probation and at the same time require him to pay a fine.

Mr. Paillette commented that under ORS 137.540 the court could impose probation plus a fine without necessarily suspending sentence. In other words, the court under existing law could suspend the sentence without placing the man on probation which was in effect a form of court probation. This practice, he said, was analagous to what some of the other codes called "conditional discharge" where the defendant was released by the court under certain conditions and not placed on probation but the court still had a "string" on him. Another way of handling these cases was for the court to impose sentence, suspend execution and release the defendant. Subsection (2) of section 2 attempted to say that if the court did not suspend imposition or execution without probation or if it did not place him on probation, the phrase "or place the defendant on probation" was intended to include the sentence as part of the probation but the suspension of sentence did not necessarily include probation.

Judge Burns again pointed out that under ORS 137.510 the court could not place a defendant on probation unless the judge also suspended imposition or execution of sentence. Mr. Paillette agreed and advised that subsection (2) was attempting to say that if the court did not suspend imposition or execution of sentence or did not place the defendant on probation -- in other words, if the judge did none of the things he was authorized to do under ORS 137.510 -- then the court was required to elect one of the four options listed in the subparagraphs.

Senator Burns observed that if subsection (2) were to be consistent with ORS 137.510, it would do no violence to the provision to delete "or place the defendant on probation" because it followed that one of the options available to the court was placing the defendant on probation inasmuch as suspending the imposition or execution of sentence was a condition under ORS 137.510 precedent to granting probation and the two provisions should be considered

together. Unless that phrase were deleted, he said, a new category was being created whereby a defendant could be placed on probation without either imposing or suspending execution of sentence. Judge Burns added that when the court suspended imposition conditionally and placed the offender on probation, it retained the power to impose sentence later if he violated the terms of his probation.

Mr. Paillette commented that the third alternative -- placing the defendant on probation -- would be controlled by ORS 137.510 and implicit in probation was the suspended sentence.

Senator Burns moved to delete "or place the defendant on probation" in subsection (2) of section 2. Motion carried.

Representative Carson questioned the accuracy of the terminology of revoking a suspended sentence in subsection (2). Judge Burns said he had a question mark beside this language because it purported to give power to a court after revocation of a suspended sentence to then impose a term of imprisonment. For example, if the court imposed a suspended sentence with conditions and the individual violated the conditions and was brought back before the court, the court could revoke the suspension but could not impose another sentence; it could only execute the sentence previously imposed. It was necessary, he said, to distinguish between suspension of execution of sentence and suspension of probation. Judge Burns was of the opinion that the problem arose in subsection (2) because it was stated negatively. He suggested it might be less complicated if stated in the affirmative: "When a person is convicted of an offense, the court shall impose: (a), (b), (c) or (d)."

Mr. Paillette advised that subsection (2) was structured in this manner because it did not direct the court in the first instance to send the offender to jail. Under Judge Burns' proposal, it implied that he should go to jail unless there was a good reason not to. The Model Penal Code, he said, as well as other codes adopted the approach that the defendant should be placed on probation unless there was good reason to send him to jail.

Mr. Johnson suggested that ORS 137.510 be included as a part of section 2 inasmuch as the two sections were so closely related. Judge Burns concurred with this suggestion and stated that the intent was unclear unless the two sections were read conjunctively and it complicated understanding the two when the reader had to go back and forth to read them. Chairman Yturri agreed that ORS 137.510 belonged, by reason of its content, with section 2.

Mr. Paillette indicated he was trying to avoid rewriting statutes which already accomplished what most of the new codes recommended and ORS 137.510 fell into this category.

Mr. Johnson then moved that section 2 be redrafted to incorporate ORS 137.510 and suggested that the ORS section be clarified when it was rewritten. Motion carried.

Chairman Yturri advised that section 1 would have to be revised to provide for the repeal of ORS 137.510.

Judge Burns remarked that with the incorporation of ORS 137.510 in section 2, the statute would then tell the judge precisely what he should do when a defendant had been convicted. He should elect one of the following alternatives: Suspension, probation, sentence, fine or any mixture thereof. Senator Burns added that ORS 137.010 related to the duty of the court whereas ORS 137.510 related to the power of the court and section 2 of the draft was directly related to both areas.

Mr. Paillette said that if ORS chapter 137 was to be retained with portions lifted out and placed in an earlier part of the code, the Commission should consider what should be done with the balance of the statutes compiled adjacent to and as part of the suspended sentence and probation sections of that chapter. He asked if the members wanted to leave the rest of them the way they were, recognizing that if they were not changed, those sections would remain in the same place when the code was compiled following the 1971 legislative session.

Judge Burns said he anticipated that in the procedural revision a number of changes would be made in ORS chapter 137. For a period of two years, therefore, the provisions of ORS 137.510 would be a few pages ahead of the adjacent sections in the present code. Legislative counsel, he said, would undoubtedly include some reference to the revision such as "ORS 137.510 repealed. See ORS 137.010."

Mr. Paillette said he thought the better way to handle the situation would be to incorporate ORS 137.510 by reference within section 2. Senator Burns indicated that the example of the Michigan code should be followed which would ultimately result in eliminating ORS chapter 137 completely by transferring those sections to the appropriate Articles in the criminal code. Judge Burns expressed agreement.

With respect to subsection (3) of section 2 Mr. Paillette explained that it was a clarification and codification of existing case law but was not intended to limit the court in ancillary dispositions.

When a judge said, "I sentence you to be discharged," Judge Burns asked if this disposition of the case would mean that no punishment was imposed and there was no further liability on the part of the defendant. Mr. Paillette replied affirmatively.

Chairman Yturri asked if the offense would become a misdemeanor when the defendant was discharged and Mr. Paillette said it would be a misdemeanor if the court so declared. In theory, Judge Burns said, it would be possible for the court to discharge a defendant on a felony charge but it would be an unlikely occurrence. Mr. Paillette noted that page 8 of the Article on Authority of the Court in Sentencing set out the criteria for discharge of a defendant.

Section 3. Sentence of imprisonment for felonies; ordinary terms. Mr. Paillette explained that section 3 contained the maximum terms for an indeterminate sentence and the court would fix the maximum within these prescribed limitations. The sentences set forth followed the Michigan approach, he said, except that subsection (4) was derived from the Connecticut code. Mr. Johnson inquired what was meant by an "indeterminate sentence" and was told by Mr. Paillette that the term referred to the indeterminate sentence described in ORS 137.120.

Senator Burns asked Judge Burns if he believed that a judge should have the authority to sentence a defendant to a fixed number of years rather than imposing an indeterminate sentence and leaving the actual length of sentence up to the board of parole and probation. Judge Burns replied that he had mixed emotions with respect to this problem. It would make the judge's job much easier, he said, if the Washington and California system were inaugurated whereby the judge would say that the defendant was to be confined and the board would thereafter fix the minimum and maximum sentences. However, when a judge was given adequate presentence information, he said he was not convinced that the parole board had any more knowledge of the individual than did the judge and therefore was probably not able to make any more accurate determination with respect to the length of time he should be confined.

Chairman Yturri expressed the view that in every case which came before a judge the factual situation was entirely different. The judge was aware of the background of the defendant, he had a pre-sentence report and he could and should treat each defendant in the manner he believed to be best suited to that individual. When the final determination on sentencing was left to the board of parole and probation, he said, the judge to some extent was shirking his duty and responsibility.

Senator Burns said he once held the same opinion as did the Chairman but a case in which he was involved sometime ago had caused him to change his position. In that case a man was convicted of assault with a dangerous weapon and received a one year sentence to OCI. The institution found that he was psychotic but was nevertheless compelled to release him at the expiration of his one year term. He

subsequently committed murder but had he been committed under an indeterminate sentence where the institution could have kept him and treated him for a longer period, that murder might well have been averted.

That was an isolated case, Chairman Yturri observed. The parole and probation authorities were not infallible, he said, and were as subject to error as any other human being. Disparity in sentencing would not be entirely cured by passing sentencing authority on to them.

Representative Carson was of the opinion that disparity in sentencing was aggravated when 94 separate judges were imposing different sentences. The parole board would be in a position to be somewhat more consistent. For example, if two men received 15 year maximum indeterminate sentences, they would both appear before the same parole board and they would at least have a better chance of being treated equally than they would have by being sentenced for similar crimes by two judges with differing outlooks and opinions.

Chairman Yturri remarked that the parole board did not have the training and background for making these determinations that the judges had. Professor Platt said he agreed with the Chairman and was concerned about the assumption that parole and probation personnel were more capable than judges of making these determinations. He said experience had shown that this was not always true.

Chairman Yturri commented that parole boards were composed primarily of laymen and he would rather place his trust in a judge who was steeped in a background and training of objectivity. He added that if there were one or two members of a parole board who were not entirely competent, they would be acting upon every case which came before them whereas there were 94 judges and if a few of them imposed unfair sentences, the margin of error would still be smaller than that of the parole board. It was better to err where one or two judges were concerned than to err on the side of one or two members of the parole board who would be acting upon each and every case. This system, he said, would only compound the error.

Mr. Johnson was concerned that offenders be treated uniformly throughout the state and where two men were found guilty of the same crime under similar circumstances, he opposed a system whereby one judge imposed a two year sentence and the other five. If they went before the parole board, he said, at least they would be accorded uniform treatment.

Professor Platt commented that one of the reasons for the disparity of treatment at the present time was the tremendous range of sentences permitted under existing law. Even under the draft being

considered, he believed the range too broad and the maximums too high. Penal studies showed that sentences were too long in the normal cases, he said, and this was one of the reasons for nonuniformity of treatment on a large scale. Chairman Yturri agreed that if the maximum terms in section 3 were shorter, he would have less objection to imposition of a maximum sentence in each and every case.

Senator Burns said he favored the indeterminate sentence and parole board approach for the reason he had cited earlier, for the reason that it reduced disparity of sentencing and also for the reason that the judges in Multnomah County were more and more frequently using the three judge panel system in making determinations with respect to a sentence. This practice, he said, had proved to be highly satisfactory and beneficial in the consideration and treatment of defendants.

Judge Burns pointed out that all the schemes proposed by the Model Penal Code, the ABA and the Model Sentencing Act as well as the draft under consideration assumed that sentencing power would continue to repose in the trial judge. Mr. Paillette concurred and noted that section 3 would simply impose a legislative maximum beyond which the judge could not go.

Chairman Yturri said that if this subcommittee adopted the California or Washington approach, it would eliminate the need for a presentence investigation. Judge Burns disagreed with this statement. Current figures revealed, he said, that approximately 60 percent of the defendants were placed on probation and the judge would therefore need some background information on the defendant before making a determination as to whether he should be paroled.

Professor Platt commented that one of the reasons the correctional systems were not working in the United States was because of the repressive attitudes of a society which demanded long terms of incarceration. In Europe, he said, a term of one or two years was unusually long. Statistics showed that the most successful treatment, so far as recidivism was concerned, was probation and those who were sent to prison usually returned because of the hardening effects of prison life. He urged that the subcommittee deemphasize the long terms and emphasize returning offenders to society through probation. He believed this determination, however, should be a judicial judgment rather than a judgment by a parole board.

Chairman Yturri said that one other factor which should be considered was the deterrent factor involved in sentences. If people realized that when they committed a given crime they were going to be sentenced to a specific number of years, he asked what effect that factor would have upon the incidence of crime. Professor Platt said he believed it would have little or no effect.

Judge Burns commented that society was not generally aware of how the correctional system was working at the present time. The parole board in Oregon, he said, exercised a tremendous amount of control and the control was greatest on those who received the heavier sentences.

Chairman Yturri asked how the members felt with respect to the penalties set forth in section 3, assuming the subcommittee approved the indeterminate sentence approach.

Mr. Johnson said he would tend to agree with Professor Platt that the sentences were too harsh.

Judge Burns said he would not go any higher than the maximums provided but another factor which should be taken into consideration was the fact that the average time served by a person sentenced to life imprisonment was 11 years. The terms in section 3, he said, were maximum terms and those sentenced to those maximums would not in all probability be incarcerated for that period of time.

Senator Burns expressed approval of the maximum terms in section 3. He outlined that the correctional people contended that when an individual was sent to OCI to enroll in a vocational program, he should be given enough time to receive sufficient training to enable him, hopefully, to achieve rehabilitation. They claimed that this could not be accomplished in less than a year.

Judge Burns said that traditionally inmates had served 1/3 of their sentence and that was why he had, until recently, not sent anyone to OCI for less than three years. However, the new parole board was getting away from the 1/3 philosophy and trying to individualize sentences which, he said, was all to the good. When their program was fully developed, he would be able to sentence a person to OCI for two years with the caveat that he remain there for at least one year to take advantage of the training and educational programs.

Chairman Yturri asked if it would be relevant to consider the cost that would result under the proposed system of indeterminate sentences. He said his guess would be that the cost would be considerably greater than under the present system.

Tape 3 of this meeting begins here:

Mr. Johnson commented that adoption of the indeterminate sentence was a major policy decision which would have to be made by the full Commission. The question would again have to be debated at that time, he said, and suggested that an alternative draft be prepared for presentation to the Commission. Chairman Yturri advocated that the subcommittee should go to the Commission with a specific recommendation.

Senator Burns moved to amend section 3 to provide that the trial court would impose the maximum sentence in each case and the time served would be determined ultimately by the parole and probation authorities. This motion was later withdrawn.

Mr. Johnson read the California statute which adopted the approach outlined by Senator Burns' motion.

Judge Burns commented that the scheme set forth in the draft contemplated a different approach whereby the length of sentence was fixed by the court within the applicable limits. If the subcommittee was going to adopt the board-fixed term, the members might also want to provide for a different type of classification and different maximums.

Mr. Johnson said that as he understood the California system, if a man were convicted of a Class B felony, the court would decide whether to impose probation, suspend sentence or sentence him to an indeterminate sentence not to exceed ten years. If the latter course were chosen, the board would fix the actual term of imprisonment.

Chairman Yturri asked if the board would at that point say that the man's sentence was for, say, seven years or if they would merely accept him at the institution and act at some later time. Judge Burns replied that in California the board, after studying the individual for 90 or 120 days, would bring him in, hold a hearing and set the minimum and maximum terms of his sentence. Where there was a diagnostic center, they would put him through that center before the case came before the board.

Chairman Yturri next asked what would happen if this approach were adopted and the Ways and Means Committee refused to provide money to implement the system. Senator Burns commented that the amount of money the 1969 legislature gave to the Corrections Division would indicate that the state was committed toward this kind of approach.

Professor Platt pointed out that the Commission, when considering the Responsibility Article, had decided that it did not want psychiatrists making decisions as to whether a person should be found not guilty by reason of insanity because they felt the psychiatric profession had not yet arrived at the point where they were accurate in making those decisions; in other words, the Commission preferred to rely on the experience of the judge. He suggested this was analagous to the situation where the prisoner was sent before the parole board composed, perhaps, of a psychiatrist, psychiatric social worker, sociologist, correctional specialist and maybe a lawyer where the focus was on the "soft sciences."

What was wrong, Mr. Paillette asked, with placing confidence in the judges who were trained in recognizing weaknesses in their own as well as other professions. The recommendations of the ABA, the Model Penal Code and the Model Sentencing Act were all in agreement that some judicial control over sentencing should be retained.

Mr. Johnson commented that all three were written primarily by people who were judicially oriented. Senator Burns remarked that all of the writers observed that what contributed most to recidivism was the disparity in sentencing. Mr. Paillette replied that a great amount of that disparity would be corrected by the revised criminal code.

Judge Burns pointed out that the principal complaint inside the prisons was not so much disparity of sentencing as it was disparity of parole. In his opinion it was a mistake to say that the disparity problem would be solved by transferring sentencing authority from a judge to a parole board. Mr. Paillette added that the California type of indeterminate sentence sometimes resulted in even longer sentences.

Mr. Johnson restated his contention that an alternative draft should be submitted to the Commission along with the proposed draft before the subcommittee. He offered assistance to Mr. Paillette by members of his staff in drafting the alternative proposal but it was finally determined that Mr. Paillette would do the drafting himself.

Chairman Yturri then asked for a vote of those who favored adoption of the California system with respect to the indeterminate sentence.

Judge Burns said he had mixed feelings on the subject but bearing in mind the side consequences, he would not be in favor of adopting the California system at this time in Oregon.

Mr. Paillette said that the subcommittee in making this decision should not minimize the effect of what the Commission had accomplished to date. One of the reasons for the disparity of sentences was the great proliferation of crimes and different statutes for similar offenses bearing completely arbitrary and contrary maximum sentences. Many of these problems had been taken care of by the Commission because they had eliminated at least 1/3 of the statutory crimes existing in seven chapters of ORS today. In addition, Oregon was currently doing most of the things that the sentencing experts recommended.

Representative Carson agreed with Mr. Paillette that many of the problems had been corrected by the revised criminal code and he had serious doubt that the state was ready financially to make the step

contemplated by the California approach. He indicated he would, however, like to see the proposal which Mr. Johnson was championing.

Even though he still favored it, Senator Burns withdrew his motion to adopt the indeterminate sentence approach in use in California. He moved that Mr. Paillette draft an alternative section 3 based on the California system which could be presented to the full Commission at the time the subcommittee's recommendations were considered. It would be helpful, he said, to ask the Legislative Fiscal Committee and the Corrections Division to develop a cost impact analysis and he volunteered to obtain this information for the Commission. Motion carried.

The subcommittee then discussed the proper way to proceed beyond this point and decided to go ahead as if the draft had been approved.

Professor Platt suggested lowering the maximum sentences in the draft so that there would be room for arbitration when the public began demanding higher penalties. Chairman Yturri said he would not compromise by going higher than the maximum terms set forth in the draft. Murder, of course, was not included in this section but would be treated separately and would carry life imprisonment.

Mr. Paillette commented that when the death penalty was repealed, the assumption on the part of the public was that they would be secure in the knowledge that the person who committed murder would be given a life sentence. Professor Platt said he would favor giving the court authority to make that determination based on the individual rather than imposing an automatic life sentence.

After further discussion, Senator Burns moved approval of section 3 and the motion carried.

Section 4. Sentence of imprisonment for misdemeanors. Senator Burns moved that section 4 be approved and the motion carried.

Section 5. Fines for felonies. Mr. Paillette explained that sections 5 and 6 established a table of fines which attempted to correlate the kinds of fines that could be imposed with the kinds of imprisonment. He called attention to page 11 of the draft which quoted some of the statistics from Judge Beckett's Oregon Law Review article dealing with classification of penalties and penalty types according to the alternative uses of fine and imprisonment. One of the points he made in that article was that it was impossible under present law to determine legislative intent by looking at the fine imposed for any given crime. Section 5, he said, adopted what Judge Beckett called an "equivalency concept" designed to equate the imprisonment maximum with the fine maximum.

Senator Burns said he favored the federal system where the judge had a great deal of latitude with respect to the fine and in many cases would impose a much higher fine than that proposed by section 5. Judge Burns commented that federal crimes of the type Senator Burns was discussing were mainly concerned with tax cases which were really in a class by themselves. Senator Burns thought section 5 might be too rigidly structured. When the Article on Business and Commercial Frauds was discussed in subcommittee, he said, there was much discussion about the imposition of fines as the penalty and some of those crimes would be Class C felonies or Class A misdemeanors. He was under the impression that the subcommittee was contemplating heavier fines than those in sections 5 and 6.

Judge Burns thought it would be advisable to include in section 5 the criteria set forth on page 117 of the ABA Standards Relating to Sentencing Alternatives and Procedures which said that in determining whether to impose a fine and its amount, the court should consider the financial resources of the defendant, the ability of the defendant to pay, his other obligations, etc. He was of the opinion that it would be useful for the legislature to specifically instruct the judge what he should consider in imposing a fine so that there would be legislatively established guidelines for him to follow. Chairman Yturri said he saw no necessity for a judge to be instructed in this manner. Judge Burns commented that a prime example of the need for better instructions to judges was the armed robbery statute which imposed a penalty of life unless there were "extenuating circumstances." This latter phrase, he said, was impossible to interpret uniformly and resulted in great disparity in sentencing among the judges.

Mr. Paillette pointed out that the criteria to which Judge Burns referred was set out on page 17 of the Article on Authority of Court in Sentencing. He said he had considered drafting a section entitled "Criteria for imposition of fines" but there were so many questions involved that he had decided to present the information in the commentary and see what the subcommittee wanted to do. Some of the problems to be resolved, he said, were whether to authorize installment payments, whether or not a fine would interfere with the defendant's ability to make restitution, etc.

Judge Burns stated that some of the courts presently used installment payments for fines. He asked if this draft contemplated that if the defendant did not pay the fine, he would be sent to jail and received a negative reply from Mr. Paillette. Chairman Yturri expressed the view that if the offender was unable to pay the fine, the judge should be authorized to determine whether he should serve time in jail in lieu thereof and Professor Platt observed that this problem would be alleviated if fines were based on the individual's ability to pay.

Mr. Johnson said he had serious doubt that a fine in a felony case was appropriate at any time unless the defendant had profited by his crime. Fines in such cases, he said, merely became a method of letting the offender "off the hook" and in effect applied a double standard of justice. Senator Burns noted that the ABA would also severely restrict fines in felony cases.

Mr. Johnson moved that section 5 be redrafted to provide that the court may impose a fine in a felony case without a dollar limit and to spell out the criteria as to when a fine could be imposed. The criteria would include, among others, the person's ability to pay, and a fine would only be used in those cases where he had profited by his crime. He explained that in his view a fine was not an appropriate sanction in a criminal case. This motion was subsequently withdrawn.

Mr. Paillette called attention to page 18 of the commentary to the Article on Authority of Court in Sentencing which set forth the approaches recommended by the ABA, the Model Penal Code and the Model Sentencing Act. He noted that of the three the ABA adopted the most restrictive view toward fines for felony cases.

Senator Burns asked Judge Burns how many times he had imposed a fine on a felon for commission of arson, burglary, rape, robbery, or manslaughter and was told that in certain instances he had required the defendant to make restitution payments in, for example, an arson case, but a fine in a felony case was almost never imposed.

Senator Burns commented that the majority of fines for felonies would be included under subsection (2) of section 5 and Mr. Paillette observed that most of the corporate type offenses would fall under that subsection where the fine was fixed by a regulatory statute outside the criminal code. Senator Burns said it was "hollow thunder" to say a Class A felony would carry a $10,000 fine when it was unlikely that the provision would ever be used. He said he was inclined toward adoption of Mr. Johnson's motion to give the court authority to impose a fine without setting a statutory limitation.

Judge Burns asked Mr. Johnson if he believed it was all right for a judge to impose a fine of $100,000. Mr. Johnson said it would be reasonable in a robbery case where the defendant had stolen $100,000. Judge Burns replied that in that situation the money should be returned to the victim and Chairman Yturri agreed that the defendant could not be permitted to use the stolen money to pay his fine.

Mr. Johnson then withdrew his motion and moved that the Article contain a section setting forth the criteria governing imposition of fines in felony cases with the criteria to follow the standards suggested by the ABA.

Judge Burns called attention to section 1501 of the Michigan Revised Criminal Code set forth on page 30 of the Article on Authority of Court in Sentencing which contained the guidelines suggested by Mr. Johnson's motion. He said he had no objection to including guidelines and criteria in the statute but he was not in favor of deleting the maximum dollar amounts.

Mr. Johnson then restated his motion that, subject to appropriate internal corrections, the subcommittee adopt section 1501 of the Michigan Revised Criminal Code with the following additions from section 2.7 of the ABA Standards:

(1) In determining whether to impose a fine and its amount, the court should consider financial resources of the defendant and the burden that payment of a fine would impose, with due regard to his other other obligations; and

(2) The ability of the defendant to pay a fine on an installment basis or on other conditions to be fixed by the court.

Judge Burns asked what kind of fines could be imposed on corporations if this motion were adopted and was told by Senator Burns that the fines would have to be contained in the statute defining the crime. Mr. Paillette pointed out that both New York and Michigan had a separate schedule of fines for corporations. The New York statute, section 80.10, was set forth on page 29 of the Article on Authority of Court in Sentencing and the Michigan statute was identical thereto.

Mr. Johnson suggested that vote first be taken on his motion and the question of corporate fines be considered separately.

Judge Burns asked if Mr. Johnson's motion would apply to all felonies committed by individuals and received an affirmative reply.

Vote was then taken on the motion and it carried.

Senator Burns said he did not see where provision was made for the court to retain the authority to assess costs or reparation and Mr. Paillette replied that this authority was contained in ORS chapter 137 and he was not recommending that those statutes be disturbed although they should be discussed. He expressed the view that ORS 137.150 imposing imprisonment until a fine was satisfied should be repealed. He called attention to pages 31 and 32 of the Article on Authority of Court in Sentencing which set out the Michigan statutes dealing with costs, method of payment of fines and costs and the consequences of nonpayment.

After a brief discussion, Senator Burns moved to adopt sections 1525, 1530 and 1535 of the Michigan Revised Criminal Code and to repeal ORS 137.150. The motion carried.

Corporate fines. With respect to fines for corporations, Mr. Johnson suggested the subcommittee adopt section 80.10 of the New York Revised Penal Law subject to amendment of the amounts.

Chairman Yturri asked if reference should be made to Class A, Class B, etc. in the corporate fine structure proposed by Mr. Johnson. He expressed the view that the upper limits in the New York code were inadequate for corporations and Mr. Johnson agreed that a $5,000 fine against a large corporation was an insignificant penalty. Mr. Paillette pointed out that the maximum fine would be controlled by the specific statute defining the offense. Mr. Johnson suggested that the subcommittee look at the actual crimes which would be implicated and prescribe a penalty for each one. Senator Burns commented that the crimes in the criminal code which would be involved were contained in the Article on Business and Commercial Frauds. Chairman Yturri advised that banking, securities and the Blue Sky laws would also be affected. He said that the subcommittee was not in a position to say that there did not exist a possible set of circumstances under which a corporation could be guilty of a felony and this contingency should be covered by statute.

Mr. Johnson suggested that subsection (a) of section 80.10 of the New York code be increased to $50,000. Judge Burns pointed out that the court could impose a higher amount under subsection (e) which permitted a fine up to double the amount of the corporation's gain from the commission of the offense.

Mr. Johnson moved to adopt section 80.10 of the New York Revised Penal Law with the maximum amounts fixed at $50,000 for a felony of any grade, $5,000 for a Class A misdemeanor, $2,500 for a Class B misdemeanor and $1,000 for a Class C misdemeanor. The motion carried.

Section 6. Fines for misdemeanors. Mr. Johnson suggested section 6 be reworded along the lines of section 5 so it would be clear it applied to misdemeanors committed by individuals rather than those committed by corporations and also to incorporate the criteria adopted earlier for determining fines. Mr. Paillette explained that the criteria would be included in the Article on Authority of Court in Sentencing rather than the Article under consideration and would apply to fines for both misdemeanors and felonies.

Senator Burns moved that section 6 be approved as drafted and the motion carried.

Section 7. Fines for violations. Senator Burns moved approval of section 7. Motion carried.

Authority of Court in Sentencing; Preliminary Draft No. 1; April 1970

Section 1. Mr. Paillette commented that the subcommittee would probably prefer to postpone approval of section 1 until the balance of the Article had been considered and the members agreed.

Section 2. Amending ORS 137.075. Report to court and to convicted persons. Section 2, Mr. Paillette explained, referred to the diagnostic examination conducted by the Corrections Division. The language deleted in subsection (1) was taken out because ORS 137.115 would be repealed by this draft, but the immunities should be retained for the purposes of this Article. Those immunities, he said, extended not only to the defendant but also to those testifying or giving statements in connection with the diagnostic examinations and were included in the new language appearing in subsections (3), (4) and (5). They retained the provisions of ORS 137.115 which referred to sex offenders and if the subcommittee approved this Article, sex offenders would be treated no differently than other offenders except that they could be a class of "dangerous offenders" under section 6 of this Article.

Senator Burns commented that ORS 137.075 was passed by the 1967 legislature but the idea of establishing a diagnostic center had later been abandoned because of lack of funds. He asked if the courts were currently receiving reports of diagnostic examinations. Judge Burns replied that as far as he was aware the Corrections Division had made a diagnostic work-up in only one or two instances.

Mr. Paillette advised that the draft would not necessarily use the diagnostic facility although it did not prohibit its use. He said he did not want to disturb the diagnostic provisions by repealing the sex offender statutes referred to in ORS 137.075. He recommended that the immunities in the sex offender statutes be retained for purposes of the diagnostic examination.

Judge Burns suggested that before approving section 2, the entire draft be considered and the subcommittee agreed.

Section 3. Amending ORS 137.124. Commitment of defendant to Corrections Division; place of confinement; transfer of inmates. Mr. Paillette read the explanation of subsection (4) set forth on page 5 of the draft and further explained that the present statutes containing misdemeanor penalties said that the court was to sentence the defendant to a term in the county jail. Since this statement would not be included in the revised criminal code, it was necessary to give the court guidelines as to where to send misdemeanants who were sentenced to imprisonment and that was the reason for the amendment to ORS 137.124.

Section 4. Reduction of Class B or C felony to misdemeanor; authority of court. Mr. Paillette explained that section 4 placed some specific limitations on the indictable misdemeanor treatment of offenders.

Representative Carson commented that he preferred "the court finds" to the phrase "is of the opinion" as used in section 4. Mr. Paillette answered that "finds" implied a procedural finding incorporated into the record. Representative Carson and Senator Burns commented that in view of Mr. Paillette's statement, "finds" would be appropriate in section 4.

Judge Burns said that if a man were convicted of a burglary which was normally a Class C felony but the judge under section 4 reduced the charge to a Class A misdemeanor, on the record it would still look like a Class C felony. He asked if a Class A misdemeanor would be entered in the judgment order in that circumstance and, if so, whether this would present mechanical problems when the name of the crime was not changed; it would still be a conviction for burglary. Mr. Paillette commented that section 4 related to and tied in with the power of the court under section 9 of the Article on Classes of Offenses. Section 4 said that the court was limited to reducing a Class A or Class B felony only to a Class A misdemeanor. This meant that even though the defendant was convicted of a felony, the effect on his record would be conviction for a misdemeanor.

Mr. Johnson questioned whether it was wise to give the courts so much discretion, particularly when section 4 was considered in relation to a narcotics or drug violation. Judge Burns said he was inclined to agree with Mr. Johnson and asked whether enough breadth had not been granted in section 9 of the Article on Classes of Offenses. Mr. Paillette replied that in his opinion it was necessary to give some guidelines for the use of the indictable misdemeanor treatment which were not contained in section 9.

Senator Burns declared that section 4 was going far beyond section 9 because it included a Class B felony which was not an indictable misdemeanor under existing law. Mr. Paillette denied that the draft was going beyond existing law and maintained it did not go nearly so far as did the recommendation of the Model Penal Code in giving the court broad discretion in declaring any felony, other than murder, a misdemeanor. In existing statutes, he said, indictable misdemeanors applied to all kinds of felonies. The staff's research had indicated that there were at least 65 indictable misdemeanors in the present criminal statutes. Some of them carried maximums of ten years in the penitentiary. If section 4 were limited to Class C felonies, he said, there would be a number of crimes that past legislatures had labeled as indictable misdemeanors which could not be so treated under this draft.

Judge Burns was of the opinion that the legislature would not approve a penalty of less than ten years for narcotics offenses and since the proposed statute classified buyers, sellers and users all together, the legislature would not approve a five year maximum for the statute because it included the dope peddler.

Senator Burns objected to giving the courts power to treat all Class B felonies as Class A misdemeanors and Chairman Yturri suggested that the draft spell out that section 4 would apply to Class B felonies if the statute making the conduct a crime provided that it could also be treated as an indictable misdemeanor. He said he would not approve, for example, of reducing a burglary charge to a misdemeanor. Mr. Johnson agreed with Senator Burns that section 4 conferred too much uncontrolled authority on the court.

Judge Burns asked if it was the plan of the subcommittee to go through each crime and single out the ones which were to carry the indictable misdemeanor option. Mr. Johnson thought this would be the best way to handle the situation. Mr. Paillette commented that this course would be unnecessary if section 4 were approved. Professor Platt remarked that what section 4 was attempting to accomplish was a method of fitting the penalty to the offender rather than having the penalty locked into the crime.

Senator Burns indicated that in effect section 4 would mean that first and second degree forgery would be classified the same because, assuming that these crimes would be classified as Class B and Class C felonies, both could be reduced to Class A misdemeanors. He contended that a clear division should be made between a Class C and a Class B felony. The broadest range of serious felonies, he said, would fall into the category of Class B felonies and would include burglary, robbery, forgery in the first degree, and many others. To tell the judge that he could make those crimes a misdemeanor was, in his view, simply not right.

Chairman Yturri called attention to the quotation from the Model Penal Code commentary cited on page 6 of the draft:

> "However carefully offenses are defined, it is inevitable that cases will arise where a conviction and a disposition in accordance with the Code will seem unduly harsh to those responsible for its administration."

Senator Burns said that the judge had many remedies available to him and this section was concerned with whether the defendant was going to be branded as a felon or a misdemeanant. He said that burglary would be a Class B felony and if someone went into another's home and threatened the occupant's life, that crime should not be reduced to a misdemeanor. Mr. Paillette suggested that if the subcommittee felt that the crime was so heinous, it should be classified as a Class A felony; it would not then fall under the provisions of section 4. If the indeterminate sentence were adopted, the length of sentence would make little difference anyway because the ultimate sentence would be imposed by the parole board.

The subcommittee recessed for lunch at this point and reconvened at 1:00 p.m. with the same persons in attendance as had been present for the morning session.

Following a brief discussion, Senator Burns suggested that the subcommittee leave section 4 and return to it after the crimes had been graded. Representative Carson indicated that how he voted on grading of the crimes would depend to a great extent on whether Class B and Class C felonies were included in this section.

Representative Carson then moved that Class B felonies be eliminated from section 4. Motion carried. Voting for the motion: Senator Burns, Representative Carson, Mr. Johnson. Voting no: Judge Burns, Chairman Yturri.

Judge Burns gave notice that he reserved the right to present his views on section 4 to the full Commission.

Section 5. Criteria for discharge of defendant. Mr. Paillette explained that section 5 provided for an unconditional discharge in cases where the court believed that the defendant had learned his lesson and did not wish to maintain a "string" on him. In view of the action just taken in section 4, he said, the subcommittee might want to limit the authority of the court under this section also.

Senator Burns suggested that subsection (1) should say "discharge the defendant" rather than "unconditionally discharge" him. Representative Carson agreed and commented that "discharge" by definition was "unconditional" inasmuch as there was no provision for a conditional discharge.

Senator Burns then moved to delete "unconditionally" from subsection (1) and the motion carried.

Representative Carson commented that with respect to the practice of justice of the peace courts finding people guilty and imposing no sentence, thus blocking appeal rights, this section would do a great service to the little people of Oregon by preventing that kind of miscarriage of justice.

Mr. Paillette pointed out that subsections (4) and (5) of section 5 drew a distinction between a plea of guilty and being found guilty. These provisions, he said, would clear the record and get the defendant out of the judicial system.

Representative Carson pointed out that the reference to ORS 137.510 in subsection (1) would have to be corrected inasmuch as the subcommittee had merged that statute with ORS 137.010. He also noted that there was a reference to ORS 137.510 on page 9 of the commentary which should be corrected.

Representative Carson then asked why "proper" had been used in subsection (1) (b) rather than "useful" and was told by Mr. Paillette that this was the language used in the Michigan and New York codes.

Representative Carson moved to add "and B" after "Class A" in subsection (1) (a). The motion carried. Voting for the motion: Senator Burns, Representative Carson, Mr. Johnson. Voting no: Judge Burns, Chairman Yturri.

Tape 4 of this meeting begins here:

Senator Burns moved to approve section 5 as amended and the motion carried.

Section 6. Criteria for sentencing of dangerous offenders. Mr. Paillette explained that section 6 was almost identical to the Model Sentencing Act except for subsection (3). The Model Sentencing Act, he said, empowered the court to increase the sentence substantially more than did this draft which would enable the court to add another ten years onto a sentence under certain circumstances. The net effect, however, would not be as great proportionately under this section as under the Model Sentencing Act.

Mr. Johnson commented that in light of section 6, he might be willing to reduce the maximum terms which the subcommittee had approved for felonies.

Senator Burns pointed out that to all intents and purposes this draft did away with the habitual criminal act because the enhanced penalty provision only applied when serious injury was caused or if the crime endangered the life or safety of another or if he participated in organized crime. If the person were just an habitual criminal and had independently committed numerous other felonies, there would be no enhanced penalty provisions. Likewise, he said, the draft would do away with the enhanced penalty provisions for sexual offenders. He said he would have to give considerable thought to adopting a proposal which would completely abolish the habitual criminal concept.

Mr. Paillette acknowledged that Senator Burns was absolutely right in stating that the draft contained no arbitrary enhanced penalty for repeated criminal conduct. In addition, the maximum would be 30 years, and the court could not impose a life sentence for dangerous offenders.

Senator Burns said that what bothered him was that a defendant with six prior felony convictions and an abysmal record which indicated he was an habitual offender would not be covered under this draft when he was convicted of additional felonies. He could only be sentenced for the crime charged and not treated as an habitual offender.

Mr. Johnson asked Senator Burns if he was concerned about the person who was convicted several times of writing bad checks or the one who was a professional shoplifter. Senator Burns answered that he was not concerned about that type of criminal but he did worry about the habitual nonviolent burglar, robber and sex offender.

Representative Carson pointed out that the sex offender would be covered under section 6 because he would be one who caused or attempted to cause serious physical injury to another and Mr. Paillette agreed.

Representative Carson asked Mr. Paillette why he had deleted the habitual criminal concept from this draft and was told that he had incorporated what he believed was a reasonable approach suggested by the Model Sentencing Act. Habitual offenders, he said, were not inadvertently omitted.

Mr. Johnson asked if it would solve any problems to delete from subsection (1) the phrase "in which he caused or attempted to cause serious physical injury to another." If the court then believed that the one who had committed a felony possessed a dangerous propensity toward criminal activity, he could be sentenced to 30 years.

Judge Burns pointed out that "severe personality disorder" was a very nebulous term. Mr. Johnson then suggested that the subsection be amended to read:

> " . . . is being sentenced for a felony or has been in the past convicted of a felony in which he caused or attempted to cause serious physical injury to another . . . "

Judge Burns asked what crimes were comprehended within the language of subsection (1) of section 6 and was told by Mr. Paillette that it would cover such crimes as forcible rape, forcible sodomy and first degree assault. He pointed out that the previous conviction referred to under subsection (2) did not have to be for a dangerous crime.

Despite the weaknesses in the psychiatric profession, Mr. Johnson said there was some stage at which society should be able to exercise extraordinary custody over an individual. If he had committed a felony during his criminal career and had endangered someone's life and the court found, based on a psychiatric examination, that he had a personality disorder, the judge should be able to impose an enhanced penalty.

Mr. Johnson moved that a subsection be added to section 6 which would read:

> "The defendant is being sentenced for a crime that seriously endangered the life or safety of another or is being sentenced for a felony and has been previously convicted of one or more felonies that seriously endangered the life or safety of another and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity."

Senator Burns commented that Mr. Johnson's motion captured the essence of what he was striving for in this section but he thought the language might better be handled within the framework of the section as drafted.

Mr. Johnson restated his motion to amend subsection (2) to read as stated in his earlier motion rather than to add another subsection to section 6. No vote was taken on this motion.

Mr. Paillette noted that the Model Sentencing Act used the phrase "serious bodily harm" and he had changed it to "serious physical injury" because that term was defined in the General Definitions.

Judge Burns expressed the view that "seriously endangered the life or safety of another" was a phrase which was more easily applied than was "attempted to cause serious physical injury to another" as used in subsection (1).

Representative Carson said that Mr. Johnson's proposal would not apply to the habitual "second story man" who committed burglary after burglary but did not endanger anyone's life. Mr. Johnson agreed and said he would prefer to treat him separately because he was not convinced that such an individual should be treated as an habitual criminal. Representative Carson said he thought of an habitual criminal as one who just couldn't stay away from crime and was therefore confined for the good of society. He pointed out that under Mr. Johnson's motion if a man committed a felony which seriously endangered the life of another, was convicted, served his time and then several years later committed another felony which endangered no one, he would be subject to the enhanced penalty. He was not convinced that this was either right or just.

Mr. Paillette pointed out that the draft contained a built-in enhancement penalty for the first felony which endangered the life of another because of the classification of the crime itself.

Senator Burns said he could foresee a great many problems and one of them was that the offender's first felony conviction might have been a conviction in another state.

Judge Burns stated that rape would not qualify under the definition of "serious physical injury" and would not, therefore, fall under the provisions of subsection (1). He said the subsection would cover crimes such as assault with a dangerous weapon and assault with intent to kill. He noted that the language of subsection (1) was vague and it was almost impossible to identify the types of crimes which would bring a defendant under that subsection. The courts, he said, would be in a dilemma if this subsection were adopted.

Mr. Johnson asked if Judge Burns would be in favor of embodying the standard of "endangering the life or safety of another" in subsection (1). Judge Burns replied that a court could more nearly tell whether a given crime fitted into that standard than was possible with the "caused or attempted to cause serious physical injury" standard.

Chairman Yturri asked Judge Burns if he would accept subsection (1) if it read, " . . . in which he endangered or attempted to endanger the life or safety of another . . . " Judge Burns thought it might be even better to place in the section the specific crime to which the provision referred, i.e., rape, armed robbery, first degree arson, etc. This approach, he said, would reduce the uncertainty of the application of the section. He thought the number of crimes concerned was probably not very large.

With respect to the last clause of subsection (1) relating to a "severe personality disorder," Judge Burns said reports by psychiatrists and reports from the State Hospital were generally of little assistance to judges and the language of that clause was even less susceptible of objective measurement than was the language of ORS 137.111, the indeterminate sentence for sex offenders, which said "rendering the person a menace to the health or safety of others."

Senator Burns said perhaps Judge Burns' suggestion to list the specific crimes in this section could be achieved in a way which would create fewer problems by completely rephrasing subsection (1) to state: "The court may sentence a defendant to an indeterminate sentence of up to ten years more than the maximum for the principal crime in the following instances:". The crimes could then be listed and the clause pertaining to a personality disorder could be deleted.

Chairman Yturri suggested that another alternative would be to delete section 6 and retain the habitual criminal act. Mr. Paillette commented that Michigan had deleted both the habitual criminal act and the sex recidivist act and included nothing in their place. He also pointed out that the drafters of the Model Sentencing Act felt that the clause "severe personality disorder indicating a propensity toward criminal activity" was meaningful language and was workable from the standpoint of both the psychiatrists and the judges because it focused on the danger potential of each individual defendant and required the judge to accept outside assistance. Judge Burns commented that when a psychiatrist said a person was a sociopath, what he meant was that he had broken the law because that was the reason he was being examined. In his opinion, he said, most psychiatric definitions were virtually useless.

Senator Burns expressed the view that the latitude in the present habitual criminal act was preferable to section 6. Section 6, he said, was even more stringent than the habitual criminal act because it permitted enhancement of the penalty after a first conviction. He suggested that a provision be included which would say that a court may consider enhanced penalty provisions if the defendant had three or more prior felony convictions and the last one was less than seven or five years before the commission of the instant offense. If this were done, the court would

then have the option to sentence him to ten years above the maximum for the crime charged. Chairman Yturri commented that it would be even simpler to retain the present habitual criminal act and reduce the penalty from life to the penalties provided in section 6. Mr. Paillette advised that the habitual criminal act did not give the public as much protection against the first or second offender who was a dangerous individual as did the draft proposal taken from the Model Sentencing Act. Senator Burns agreed this was true but added that if the indeterminate sentence was approved, the protection of the public rested with the parole board who presumably would not release an offender so long as he constituted a menace to society.

Mr. Johnson said he would be in favor of including the endangering concept in subsection (1) and also retaining the personality disorder clause. He agreed it imposed a difficult standard but there would be occasions where the opinions of the psychiatrists would be clear-cut and in those instances, this would be a useful provision.

Judge Burns said that if the crimes to which subsection (1) would be applicable were listed therein, he would not object to the retention of the clause relating to a severe personality disorder.

Senator Burns asked Judge Burns if he would include manslaughter in the list of crimes in subsection (1) inasmuch as that crime might carry only a ten year maximum. The person could be a real menace and the judge might want to enhance the penalty. Judge Burns said he thought manslaughter should be omitted from the list. He proposed to list the following crimes: Serious assault cases, armed robbery, first degree arson, rape in the first degree, sodomy in the first degree and first degree kidnapping. In other words, he said, it would cover the violent crimes which were committed intentionally.

Representative Carson suggested that it might be simpler just to say "Class A felonies" rather than listing the individual crimes. With Representative Carson's objective in mind, Mr. Paillette proposed that this section be flagged and after the crimes had been graded, the crimes could be checked against the grading system and it might be possible to simply use the term "Class A felony" as suggested by Representative Carson.

Senator Burns asked if the proposal being discussed contemplated that the severe personality disorder standard would be conjunctive with the crimes included under subsection (1) and received an affirmative reply.

Judge Burns commented that subsection (2) would cover crimes where the defendant endangered another even though he did so unintentionally. Mr. Johnson said it seemed unduly harsh to include in section 6 what amounted to reckless conduct only because that person had committed a previous felony.

Senator Burns pointed out that subsection (3) was aimed at the check burglar who stole blank payroll checks and cashed them, and this type of conduct might well be classified as a Class C felony. Chairman Yturri again expressed the view that it would be preferable to retain the habitual criminal act. Senator Burns said he was inclined to agree but for the time being would go along with the proposal under consideration.

Mr. Paillette expressed the view that section 6 was preferable to the habitual criminal act for two reasons: It allowed the court to identify the dangerous offender on the first offense and it did not require a separate procedure and pleading on the part of the state but allowed the court to proceed on its own.

Judge Burns moved to approve section 6 tentatively with subsection (1) amended to read:

> "The defendant is being sentenced for a Class A felony and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity;"

The motion included the caveat that section 6 would be reviewed after the subcommittee had graded the crimes. Motion carried.

Mr. Johnson said he had reservations with respect to approval of subsection (3). The provision, he said, was designed to cover organized crime. Mr. Paillette agreed that it contained extremely broad language. Mr. Johnson asked how the state would prove that a member of the Cosa Nostra was "a part of a continuing criminal activity." Mr. Paillette read subsection (7) of section 7 which dealt with this problem. Subsection (3) was subsequently deleted. See page 41 of these minutes.

Section 7. Dangerous offenders; procedure and findings. Mr. Paillette advised that section 7 did not use the diagnostic facility which was discussed in the Model Sentencing Act. It incorporated some of the language from ORS 137.112 through 115 and set up the same kind of standards embodied in those statutes for sexual offenders.

Representative Carson noted that the 30 days referred to in subsection (3) ran against the defendant. Mr. Paillette pointed out that this section did not deal with the question of whether that 30 days should be credited against his sentence.

Senator Burns asked if section 7 contemplated an in-patient psychiatric examination and was told by Mr. Paillette that the intent was to give the court discretion to have the examination conducted either at a State Hospital or in the county where the proceeding took place.

In reply to a question by the Chairman as to the defendant's right to counsel, Judge Burns said section 7 assumed that the defendant had been represented by counsel. It was unlikely, he said, that a situation would arise under section 7 where he had not been represented. Chairman Yturri asked if the court, after ordering a psychiatric examination, would then notify the defendant and his attorney that counsel had a right to be present at the examination. Judge Burns said that the judge would order the examination and would normally require the defendant to be confined for 30 days.

With respect to the last sentence of subsection (7) concerning the defendant's financial resources, Chairman Yturri asked if this information would be included in the presentence report, assuming that it had not been brought out at the trial. Judge Burns said it would be brought out at the hearing. Chairman Yturri inquired as to the kind of a hearing which was contemplated and was told by Mr. Paillette that it would be the same type of presentence hearing presently conducted for aggravation or mitigation of punishment. Both the Chairman and Senator Burns believed this should be stated in the statute and that a procedure for the hearing should be set forth therein.

Chairman Yturri commented that the state had no right to examine the defendant with respect to his holdings or income at the time of the hearing. Mr. Paillette agreed and noted that this information would be obtained under subsections (1) and (2). Subsection (3), he said, allowed for a presentence hearing but did not require one.

A brief recess was taken at this point and upon resumption of the meeting, Representative Carson moved to strike subsection (3) of section 6. Motion carried with Senator Burns voting no.

Representative Carson next moved to delete subsection (7) of section 7. Motion carried. Representative Carson explained that implicit in this and the previous motion was the direction to the staff to make the necessary internal changes to conform sections 6 and 7 to the revisions just adopted.

Senator Burns asked if the elimination of subsection (7) had disturbed the right of the defendant to a presentence hearing at which there would be confrontation and cross examination with respect to the severe personality disorder question. Mr. Paillette replied that this right was preserved in subsection (5) of section 7. Senator Burns asked if the defendant at the presentence hearing was granted the right of cross examination and the right to examine the sufficiency of the prior convictions as they related to subsection (2) of section 6. It was determined that this was not included in section 6.

Senator Burns stated that additional language in subsection (5) should be incorporated to take care of this question. He suggested that the addition should be similar to ORS 168.080, which set out the requirements for prima facie evidence of former convictions, and a definition of "former convictions" should also be included. He noted that ORS chapter 168 would be repealed in its entirety to be replaced by sections 6 and 7 of this draft.

Professor Platt asked if the present habitual criminal act referred to prior felony convictions committed in Oregon or if it also embraced felony convictions in other states. Judge Burns replied that under ORS 168.015, former conviction of a felony was defined as being a felony conviction in a court of this state, in a court of the United States "and which offense also would at the time of conviction of the principal offense have been a felony if committed in this state."

Mr. Johnson asked if the new code should cover a crime which was a felony under the old criminal code but was a misdemeanor under the revised code. Senator Burns replied that if it were a felony at the time the crime was committed, it should be so considered under the revised criminal code and others agreed.

Senator Burns then moved that the applicable provisions of ORS 168.015 and 168.080 be incorporated into section 7. Motion carried.

Other Sentencing Alternatives and Procedures

Judge Burns asked whether the subcommittee wanted to consider appellate review of sentences. Mr. Johnson commented that appellate review would be one way of alleviating the problem of disparity in sentencing. Senator Burns was of the opinion that if the indeterminate sentence were adopted, there would be little need for a sentencing review procedure. After further discussion, Chairman Yturri stated that this problem would be considered further at the time of the procedural code revision.

Mr. Paillette said he assumed everyone had read the ABA Standards Relating to Sentencing Alternatives and Procedures. If that publication contained any procedures which the subcommittee wished to incorporate in any of the drafts being studied at this meeting, he suggested that they be brought up at this time. Additionally, he called attention to the excerpts from the criminal codes of other states set out at the end of each of the drafts, some of which contained provisions not included in these Articles.

Senator Burns stated that an opportunity was presented at this time to consider the areas of multiple offenses, consecutive sentences and disposition of offenders owing out of state time. He said it would be almost impossible to accomplish anything within this scope at today's meeting but he indicated he would like to see some drafts on these subjects referred to the subcommittee.

Senator Yturri asked what the state of the law would be with respect to concurrent and consecutive sentences if the Commission did nothing and was told by Judge Burns that the present law with respect to sentencing was that the court could make sentences either concurrent or consecutive and it would remain in that state unless changed by the Commission. However, he said, sentences could not be concurrent if they were required to be served in different institutions.

After further discussion, the subcommittee decided that the best policy would be to consider these subjects when the procedural revision was undertaken.

Grading of Crimes

Mr. Paillette indicated that there were several ways of undertaking the task of grading the crimes. One would be to go through the proposed code section by section and make a decision as to how each crime was to be classified. The Michigan code, he said, was the closest to the proposed Oregon code as far as the degrees of crime were concerned. Another way to go about the grading would be to compare the Oregon crimes with the Michigan crimes and make a decision as to whether to adopt the Michigan classification. The third alternative would be to make broad policy decisions as to what kind of crimes the subcommittee wanted to include in each category and the staff would then classify the crimes and bring them back to the subcommittee for approval.

Following a brief discussion, the members decided to go through the proposed code section by section and make a determination with respect to each crime contained therein.

In making the individual decisions as to the classification of each crime, the subcommittee made use of several reference materials. Following Mr. Paillette's summation and explanation of each crime, the classification used in the Michigan Revised Criminal Code was considered and comparisons were also made to the grading of similar crimes in the Model Penal Code, the New York Revised Penal Law and to the penalty structure in existing Oregon law.

The subcommittee recommended that the offenses be graded as follows:

ARTICLE 6. INCHOATE CRIMES

Inasmuch as inchoate crimes were related to virtually all of the offenses described in the proposed criminal code, the subcommittee decided to grade them after all other crimes had been classified. See pages 63 and 64 of these minutes for grading of inchoate crimes.

ARTICLE 10. CRIMINAL HOMICIDE

Murder	Punishable by life imprisonment
Manslaughter	Class B felony
Criminally negligent homicide	Class C felony

ARTICLE 11. ASSAULT AND RELATED OFFENSES

Assault in the third degree	Class A misdemeanor
Assault in the second degree	Class C felony
Assault in the first degree	Class B felony
Menacing	Class A misdemeanor
Recklessly endangering another person	Class A misdemeanor

ARTICLE 12. KIDNAPPING AND RELATED OFFENSES

Kidnapping in the second degree	Class B felony
Kidnapping in the first degree	Class A felony
Custodial interference in the second degree	Class A misdemeanor
Custodial interference in the first degree	Class C felony

The subcommittee first discussed making the two degrees of custodial interference Class A and Class B misdemeanors. Senator Burns pointed out, however, that custodial interference in the first degree should be graded a Class C felony to provide a vehicle for extradition. If a person were removed from the state and the crime was graded as a misdemeanor, he said, the authorities would have no extradition process available to them. For this reason the grading classification outlined above was adopted.

Coercion	Class C felony

ARTICLE 13. SEXUAL OFFENSES

Rape in the third degree	Class C felony
Rape in the second degree	Class B felony
Rape in the first degree	Class A felony
Sodomy in the third degree	Class C felony
Sodomy in the second degree	Class B felony
Sodomy in the first degree	Class A felony
Sexual abuse in the second degree	Class A misdemeanor
Sexual abuse in the first degree	Class C felony
Contributing to the sexual delinquency of a minor	Class A misdemeanor
Sexual misconduct	Class C misdemeanor

Mr. Paillette recommended that sexual misconduct be classified as a violation but the subcommittee ultimately decided that it should be a Class C misdemeanor.

Accosting for deviate purposes	Class C misdemeanor
Public indecency	Class A misdemeanor

There was some discussion that public indecency should be classified as a lesser crime than a Class A misdemeanor. Senator Burns pointed out that this crime carried a penalty of a year in the county jail under existing law. Mr. Paillette noted that the revised section required a specific intent and was not as broad as the existing statute. The subcommittee then decided that public indecency should be classified as a Class A misdemeanor.

ARTICLE 14. THEFT AND RELATED OFFENSES

Senator Burns pointed out that the definition of theft embraced 50 statutes in the present criminal code ranging from grand larceny to petty larceny and it would be necessary to break the range down to a dollar value. Judge Burns noted that the dividing line between petty and grand larceny in the Michigan Code was $250.

Mr. Paillette reminded the members that for the purposes of grading, the intention of the Commission was that a dollar value would be included in the Theft Article and that the penalty would not be made dependent upon where the theft was committed as did the Michigan code.

Senator Burns suggested that everything valued at less than $250 be a Class A misdemeanor and everything over $250, a Class C felony.

Mr. Paillette explained that the Theft Article was drawn with the intention that the penalty section would become a part of the basic section on theft and there would not be a different section on theft by deception, theft by extortion or theft by receiving so far as the dollar amount was concerned. Those sections would merely cover the means by which the theft was committed.

Professor Platt indicated that section 223.1 (1) in the Model Penal Code was omitted from the proposed Theft Article and it was his contention that a similar provision should be added. The section to which he referred read:

> "Consolidation of Theft Offenses. Conduct denominated theft in this Article constitutes a single offense. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this Article, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the Court to ensure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise."

Judge Burns asked how the indictment would be drawn under the Model Penal Code language and was told by Professor Platt that it would say, "John Doe committed the crime of theft by stealing $280 from Joe Doakes on March 27, 1970." Mr. Paillette explained that the district attorney would generally allege theft, the only exception being for the crime of extortion where a distinction was drawn. Professor Platt said that the indictment would be sufficient so long as the district attorney alleged the crime of theft, and this term would include any type of conduct denominated theft under the provisions of the Theft Article.

Judge Burns commented that this course might create a due process problem because the defendant was entitled to be notified of the charges against him. Professor Platt advised that the Oregon Supreme Court in recent decisions had ignored the distinctions in the failure in the indictment to allege the proper crime. In one case the

district attorney had alleged larceny, the facts showed embezzlement and the court found him guilty as charged. He said that the only charge necessary was that the defendant had stolen something and was guilty of theft. How he stole it was beside the point so far as the indictment was concerned.

Mr. Paillette recalled that the Theft Article at one time contained a procedural section such as that referred to by Professor Platt but it had been deleted by the subcommittee. It permitted a general allegation subject to the discretion of the court.

Judge Burns remarked that under the draft the defendant could commit theft by receiving stolen property knowing it was stolen, he could commit theft by deceiving someone, he could commit theft by simply taking something or he could commit theft by extortion. He asked if the intent was that all the district attorney would have to allege in the indictment was that on the 24th day of May the defendant stole $280. Mr. Paillette replied that this was precisely what the Theft Article was attempting to accomplish. He read section 155.45 of the New York Revised Penal Law to show the subcommittee how this question was handled in New York.

Senator Burns said that if a person found and kept a diamond ring valued at more than $250, a passive act, he would be guilty of a felony. Professor Platt remarked that keeping the diamond ring was not a passive act because it involved an intentional act and was just as reprehensible as theft by deception.

Judge Burns expressed agreement with Professor Platt but urged that an increased penalty be placed on theft by extortion. Mr. Paillette advised that if a person were injured during the course of the crime, that offense would be covered elsewhere and would carry a more severe penalty. In the coercion statute, he said, the language was almost identical to theft by extortion except that under the latter section property was obtained.

Professor Platt urged that at the next Commission meeting the members should consider the addition of a section linking the new procedural aspects of theft which was not contained in the proposed code. It was crucial, he said, to the understanding and adoption of the Theft Article to adopt either the approach of section 155.45 of the New York code or section 223.1 (1) of the Model Penal Code. Chairman Yturri agreed that this type of section should be included and asked Mr. Paillette to present a proposal to the next Commission meeting.

After further discussion the subcommittee agreed on the following classifications for theft:

Theft	Class C felony for property exceeding $250 in value Class A misdemeanor for property less than $250 in value
Theft of lost, mislaid property	Class A misdemeanor
Theft by extortion	Class B felony
Theft by deception	Class C felony
Theft by receiving	Class C felony

Mr. Paillette recapitulated the action of the subcommittee with respect to the grading of the theft offenses: A distinction had been drawn between theft by extortion and other theft crimes. Theft by extortion would be a Class B felony and the remaining crimes would be either a Class C felony or a Class A misdemeanor, depending on the dollar value. The subcommittee concurred that this was their decision.

Mr. Paillette and Professor Platt were of the opinion that the subcommittee was making a mistake in classifying extortion as a Class B felony. Mr. Johnson commented that it would result in a different form of indictment from that used for other theft offenses and said he would be willing to reconsider the subcommittee's action but the other members were unwilling to do so.

Tape 5 of this meeting begins here:

Theft of services. Senator Burns advised that the theft of services section supplanted the statute on defrauding an innkeeper in existing law. If the $250 line were drawn for this offense and it was graded a Class C felony, the same as the other theft offenses, he said he could go to a motel resort area, run up a bill for more than $250, refuse to pay the bill and be guilty of a felony. He expressed the view that theft of services should be a misdemeanor since it was a less serious offense than were the other forms of theft.

Mr. Paillette stated it would not be illogical to place a different penalty on theft of services as well as on unauthorized use of a vehicle. Both, he said, were similar to theft but were not actually theft because the definition of theft required the taking of property and no property, as the term was defined, was involved in either of these two sections. The theft of services section picked up from the existing statutes not only defrauding an innkeeper but also

offenses such as failure to pay a taxi driver, dropping slugs in coin machines, crossing a toll bridge without paying, etc.

Mr. Johnson said that if the services were valued at more than $250, perhaps this should remain a Class C felony. Mr. Paillette replied that he was not suggesting that a dollar value be placed on theft of services. Mr. Johnson indicated that theft of $250 worth of services was a fairly serious crime. Representative Carson commented that it bordered on a bad debt and was a form of criminal misdealing.

Senator Burns commented that the crime was a Class A misdemeanor in New York and a Class B misdemeanor in Michigan. If it were graded the same as theft, he said, it would go into court as a felony and the offense could be defrauding a taxicab driver. He observed that this was a high penalty for such an offense.

Senator Burns observed that the subcommittee could make theft of services, unauthorized use of a vehicle and extortion all contingent upon the $250 line of demarcation. This, however, would create an inconsistency when someone stole an old car which was worth less than $250. The crime would then be a misdemeanor whereas stealing a newer car would be a felony.

Senator Burns then moved that theft of services be graded a Class A misdemeanor. Motion carried.

Senator Burns next moved to make unauthorized use of a vehicle a Class C felony. Motion carried.

Result of the subcommittee's action:

Theft of services	Class A misdemeanor
Unauthorized use of a vehicle	Class C felony

Value of stolen property. Mr. Paillette called attention to section 8 of the Theft Article entitled "Value of stolen property" wherein subsection (3) stated:

> "When the value of property cannot reasonably be ascertained, it shall be presumed to be an amount less than $_____."

The subcommittee agreed that the amount of $250 should be inserted in the blank space.

Tacking. For the purposes of establishing a dollar value, Mr. Paillette asked if the subcommittee wanted to allow for a tacking provision in order to bring the total of all transactions above the

$250 demarcation. This would apply, he said, to offenses such as shoplifting and purchases charged to stolen credit cards.

The members were agreed that a tacking provision should not be included. This decision was partially rescinded, however, when a tacking provision was added to the section on fraudulent use of a credit card. See page 54 of these minutes.

Shoplifting and entering a motor vehicle with intent to steal. Mr. Paillette pointed out that the proposed code was making a substantial change with respect to shoplifting by grading the crime a misdemeanor when it was a felony under existing law. Professor Platt commented that shoplifting was seldom if ever punished as a felony and he contended that making the crime a misdemeanor unless the stolen merchandise was worth more than $250 was a step in the right direction.

Senator Burns said some people might be more critical of the change which had been made in the crime of entering a motor vehicle with intent to steal something in the automobile than of the revision in the shoplifting statute. If the value of the property was worth less than $250, it would be a misdemeanor but under present law the crime was punishable as an indictable misdemeanor, regardless of the amount. Chairman Yturri said he could see nothing wrong with the subcommittee's decision in that respect and Senator Burns agreed but said he was merely pointing out that this might be considered by many to be a more serious crime than shoplifting.

ARTICLE 15. BURGLARY AND CRIMINAL TRESPASS

Burglary in the second degree	Class C felony
Burglary in the first degree	Class B felony

Senator Burns commented that he understood the intent of the Commission to be that the penalty for burglary would be enhanced if the person used or threatened the use of a dangerous weapon or caused physical injury. Judge Burns commented that the grading just adopted by the subcommittee would reduce the penalties five years from the present law. Mr. Paillette advised that burglary with explosives carried a 40 year maximum penalty under existing law and this was the only place where there was a major departure from the present penalty structure.

Senator Burns asked to be recorded as voting in favor of making burglary in the first degree a Class A felony.

Possession of burglar's tools	Class A misdemeanor
Criminal trespass in the second degree	Class C misdemeanor
Criminal trespass in the first degree	Class A misdemeanor

Professor Platt was of the opinion that criminal trespass in the second degree was not a serious, moral crime. The person was in a place where he had no right to be but he was not necessarily there for any specified criminal purpose. He suggested that it be graded as a violation rather than a misdemeanor.

Representative Carson remarked that it was very close to the public trespass law which presently carried a maximum penalty of three months or a $500 fine. Chairman Yturri indicated that the offense should be a Class C misdemeanor.

Judge Burns pointed out that ORS 164.462, unlawful entry of a dwelling, carried a maximum penalty of one year or a $500 fine which was even higher than the penalties for a Class C misdemeanor under the new grading system.

Judge Burns moved to reaffirm the decision to make criminal trespass in the second degree a Class C misdemeanor and criminal trespass in the first degree a Class A misdemeanor. Motion carried.

ARTICLE 16. ARSON, CRIMINAL MISCHIEF AND RELATED OFFENSES

Senator Burns commented that the first decision which should be made with respect to the Arson Article was whether first degree arson was to be a Class A or a Class B felony. Judge Burns thought it should be a Class A felony to burn down a person's home and noted that first degree arson was a Class A felony in Michigan if another person was present. Chairman Yturri remarked that the proposed Oregon statute was more encompassing than the Michigan statute. Senator Burns was of the opinion that if first degree arson were classified as a Class A felony, first degree burglary should also be graded as a Class A felony and Representative Carson concurred.

After further discussion, the following grades were agreed upon:

Reckless burning	Class A misdemeanor
Arson in the second degree	Class C felony
Arson in the first degree	Class B felony

Criminal mischief in the third degree	Class C misdemeanor
Criminal mischief in the second degree	Class A misdemeanor
Criminal mischief in the first degree	Class C felony

ARTICLE 17. ROBBERY

Senator Burns noted that robbery in the third degree was linked to theft by the wording of the section. He asked if it created a problem when robbery was tied to the definition of theft in view of the fact that a $250 line had been drawn between a felony and a misdemeanor charge. Judge Burns thought this created no problem because even if the robber were trying to steal only $200, it would still be a robbery. Mr. Johnson commented that if the robber said, "Empty your cash box," and the box contained $50, the robbery was no less serious because the offender was still using or threatening to use physical force upon the victim.

The following grades were approved:

Robbery in the third degree	Class C felony
Robbery in the second degree	Class B felony
Robbery in the first degree	Class A felony

ARTICLE 18. FORGERY AND RELATED OFFENSES

Chairman Yturri suggested that the two degrees of forgery be classified as Class B and Class C felonies. Senator Burns commented that it made no sense to impose the same classification for first degree forgery and burglary armed with a dangerous weapon. First degree forgery, he said, could be the forgery of a will which was an insignificant crime when compared to a burglar armed with a dangerous weapon who harmed someone.

Mr. Johnson commented that forgery was usually a more sophisticated crime but was nonetheless serious and Professor Platt said it was no more sophisticated than, for example, theft by deception which was a Class C felony.

Chairman Yturri and Judge Burns were of the opinion that both first and second degree forgery could be classified as Class C felonies. Judge Burns commented that every first degree offense would be covered by second degree forgery also. Senator Burns suggested

that they be graded Class C felonies and that a recommendation be made to the Commission that the two degrees of forgery be combined into one offense. Mr. Johnson expressed agreement and noted that the counterfeiter could be attacked under the federal statute.

Judge Burns pointed out the distinctions in the Michigan code and suggested that second degree forgery be a Class A misdemeanor and first degree a Class C felony. Chairman Yturri commented that the Michigan approach was superior to the two degrees contained in the proposed Oregon draft and Mr. Paillette advised that the Commission had rejected the Michigan provisions and decided this was the better way to handle the matter.

Representative Carson said he agreed that the Michigan section was better and contained a better delineation and distinction between the crimes. If the Michigan approach were not adopted, however, he would favor Senator Burns' suggestion to combine the two sections into one and make the crime a Class C felony.

Chairman Yturri pointed out that forging a check would be first degree forgery because a check was a commercial instrument and second degree would be any instrument other than the ones specifically defined in the proposed first degree forgery statute. Mr. Paillette read from that section the instruments which would be covered. Senator Burns asked what would not be included there and was told that not listed were instruments such as a letter, fishing license, identification card, etc.

After further discussion, the subcommittee agreed on the following classifications:

Forgery in the second degree	Class A misdemeanor
Forgery in the first degree	Class C felony
Criminal simulation	Class A misdemeanor
Fraudulently obtaining a signature	Class A misdemeanor
Unlawfully using slugs	Class B misdemeanor
Fraudulent use of a credit card	

Mr. Johnson inquired if a dollar value was included in this section and received a negative reply from Chairman Yturri. Representative Carson asked what the result would be if a person charged a thousand dollars worth of goods to a stolen credit card and was told by Senator Burns that this conduct could be prosecuted under the Theft Article.

Mr. Paillette read the following excerpt from the commentary to this section:

> "What remains of the present statutes, then, is the gist of ORS 165.300 . . . with the scope of the crime enlarged to include use of a forged or stolen credit card. The existing statute provides for misdemeanor punishment if the total amount of goods or services obtained is less than $75 and for felony penalties if the total amount exceeds $75. It is anticipated that a similar provision will be retained when the crimes are graded by the Commission."

Mr. Paillette commented that the person who went on a buying spree with a stolen credit card should be taken into account and suggested that a tacking provision be added to this section to be keyed into the $250 demarcation line drawn in the Theft Article.

Senator Burns moved that Mr. Paillette draft a tacking amendment to be added to the section on fraudulent use of a credit card which would provide that the crime would be a Class A misdemeanor if the goods or services obtained were less than $250 and Class C felony if the total amount exceeded $250. Motion carried.

Fraudulent use of a credit card	Class A misdemeanor when goods or services received are worth less than $250 Class C felony when goods or services received are worth more than $250
Negotiating a bad check	Class A misdemeanor

Mr. Paillette explained that if the bad check were large enough to be classified as a felony theft, it was anticipated that the defendant would be charged with theft by deception. Therefore, the crime of negotiating a bad check should carry a misdemeanor penalty.

A dinner recess was taken at this point and the subcommittee reconvened at 7:30 p.m. with the following persons in attendance: Chairman Yturri, Judge Burns, Senator Burns, Mr. Johnson, Mr. Paillette and Professor Platt.

ARTICLE 19. BUSINESS AND COMMERCIAL FRAUDS

Members recalled that a number of the offenses contained in Preliminary Draft No. 2 of the Article on Business and Commercial Frauds had been deleted by Commission action. Since the Article had not been redrafted, there was some uncertainty as to the precise sections which were eliminated but the subcommittee graded the following sections with the understanding that they would later pick up any which might have been overlooked at this meeting:

Falsifying business records	Class A misdemeanor
Sports bribery	Class C felony
Sports bribe receiving	Class C felony
Misapplication of entrusted property	(Not graded)
Issuing a false financial statement	(Not graded)
Obtaining execution of documents by deception	(Not graded)

ARTICLE 20. OFFENSES AGAINST THE FAMILY

Bigamy	Class C felony
Incest	Class C felony
Abandonment of a child	Class C felony

Mr. Paillette pointed out that abandonment of a child was a Class A misdemeanor in Michigan and Senator Burns advised that if the crime were classified as a misdemeanor, it would preclude extradition proceedings should the parent go out of the state.

Criminal nonsupport	Class C felony
Endangering the welfare of a minor	Class A misdemeanor
Child neglect	Class A misdemeanor

ARTICLE 21. BRIBERY AND CORRUPT INFLUENCES

Bribe giving	Class B felony
Bribe receiving	Class B felony

Judge Burns commented that although Michigan and the Model Penal Code graded bribery as a Class C felony, this was an area

where a higher penalty would have a real deterrent effect because it involved rational people who were fully aware of what they were doing and who would be fully aware of the consequences of their conduct. Chairman Yturri agreed and added that in some instances the bribe could constitute an interference with governmental operations. He therefore believed a penalty more severe than a Class C felony was warranted.

ARTICLE 22. PERJURY AND RELATED OFFENSES

Perjury	Class C felony
False swearing	Class A misdemeanor
Unsworn falsification	Class B misdemeanor
Initiating a false report	Class C misdemeanor
Criminal impersonation	Class A misdemeanor

ARTICLE 23. ESCAPE AND RELATED OFFENSES

Escape in the third degree	Class A misdemeanor
Escape in the second degree	Class C felony
Escape in the first degree	Class B felony
Aiding an unauthorized departure	Class A misdemeanor
Supplying contraband	Class C felony

The subcommittee first discussed making the crime of supplying contraband a Class A misdemeanor. It was pointed out, however, that this crime could pose a real danger to attendants in institutions when an inmate was supplied with a knife or a gun and the crime should be considered a more serious offense than a misdemeanor.

Bail jumping in the second degree	Class A misdemeanor
Bail jumping in the first degree	Class C felony

ARTICLE 24. OBSTRUCTING GOVERNMENTAL ADMINISTRATION

Obstructing governmental administration	Class A misdemeanor
Refusing to assist a peace officer	Violation

Judge Burns pointed out that ORS 162.530 was divided into two subsections, each carrying its own penalty. One was 10 to 30 days or $10 to $500 fine and the other carried a penalty of not more than six months or a fine of not more than $500.

Senator Burns contended that the crime of refusing to assist a peace officer was too serious to be classified as a violation and asked to be recorded as favoring the classification of a Class C misdemeanor.

Refusing to assist in firefighting operations	Violation
Bribing a witness	Class C felony

The subcommittee first discussed classifying the crime of bribing a witness as a Class A misdemeanor. Judge Burns recalled that bribing a sports figure had earlier been graded as a Class C felony and bribing a witness should be at least as important as bribing a sports figure. Class C felony was then approved.

Bribe receiving by a witness	Class C felony
Tampering with a witness	Class A misdemeanor
Tampering with physical evidence	Class A misdemeanor

Mr. Johnson recommended that the crime of tampering with physical evidence be graded as a Class C felony but Judge Burns maintained that the crime should not be classified differently than tampering with a witness. Mr. Johnson pointed out that tampering with physical evidence could become important in anti-trust litigation.

Mr. Paillette indicated that this section was new law to Oregon and was of the opinion that it should be graded as a misdemeanor.

Mr. Johnson expressed the view that the accountant who intentionally falsified records should be running more of a risk than a misdemeanor penalty and asked to be recorded as favoring the grade of a Class C felony.

Tampering with public records — Class A misdemeanor

Resisting arrest — Class A misdemeanor

Hindering prosecution — Class C felony

Mr. Paillette explained that hindering prosecution was an after-the-fact type of crime and was limited by the mens rea requirement to aiding persons who had committed a felony.

Compounding — Class A misdemeanor

Simulating legal process — Class B misdemeanor

ARTICLE 25. ABUSE OF PUBLIC OFFICE

Inasmuch as the Article on Abuse of Public Office had not been redrafted following its approval by the Commission, there was some uncertainty as to its precise provisions. For this reason Mr. Paillette suggested that this Article be graded by the staff to conform to the counterparts in the Michigan code and later reviewed by the subcommittee. The members agreed.

ARTICLE 26. RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES

Treason — Life imprisonment

The subcommittee discussed the advisability of making treason a Class A felony but ultimately decided to retain the penalty in ORS 162.030, life imprisonment.

Riot — Class C felony

Senator Burns was in favor of making riot a Class B felony.

Unlawful assembly — Class A misdemeanor

Disorderly conduct — Class B misdemeanor

Judge Burns pointed out that some of the conduct which would fall under the disorderly conduct section could be fairly serious while other conduct was of minor importance. Senator Burns was of the opinion that a six months jail sentence was ample punishment for any violation of the proposed disorderly conduct statute, and the members agreed to make it a Class B misdemeanor.

Public intoxication — Class C misdemeanor

The subcommittee discussed making the crime of public intoxication a violation rather than a misdemeanor. There was some discussion concerning the authority of the police to hold a person in jail who was picked up for drunkenness over the weekend if a violation penalty were attached inasmuch as a violation did not carry with it a jail sentence. Senator Burns suggested this point be researched and that the commentary contain some mention of whether the police would have the authority to hold a person in jail overnight when he was picked up for an offense which was classified as a violation.

Loitering — Class C misdemeanor

Harassment — Class B misdemeanor

The subcommittee considered making harassment a Class C misdemeanor but raised it one degree to a Class B misdemeanor when it was pointed out that the section would replace ORS 165.550 relating to objectionable telephone calls.

Abuse of venerated objects — Class C misdemeanor

Senator Burns contended that the crime of abuse of venerated objects should be a Class B misdemeanor.

Abuse of corpse — Class C misdemeanor

Cruelty to animals — Class B misdemeanor

Mr. Paillette pointed out that the proposed section on cruelty to animals would cover bestiality which was treated in ORS 164.040 as a form of sodomy.

Falsely reporting an incident — Class C misdemeanor

Mr. Paillette advised that the section on initiating a false report in the Perjury Article had been classified as a Class C misdemeanor. The crime of falsely reporting an incident was aimed at crimes such as a bomb threat.

ARTICLE 27. OFFENSES AGAINST PRIVACY OF COMMUNICATIONS

Eavesdropping	Class C felony
Possession of an eavesdropping device	Class A misdemeanor
Divulging an eavesdropping warrant	Class A misdemeanor
Divulging illegally obtained information	Class A misdemeanor
Tampering with private communications	Class B misdemeanor

ARTICLE 28. OFFENSES INVOLVING FIREARMS AND DEADLY WEAPONS

Inasmuch as the Firearms Article had not been approved by either a subcommittee or the Commission, no action was taken with respect to it.

ARTICLE 29. PROSTITUTION AND RELATED OFFENSES

Prostitution	Class B misdemeanor
Promoting prostitution	Class C felony
Compelling prostitution	Class B felony

ARTICLE 30. OBSCENITY AND RELATED OFFENSES

Senator Burns suggested that the obscenity sections dealing with minors should be classified as misdemeanors but it would be advisable to provide for a higher fine than the $1,000 amount fixed for a Class A misdemeanor. Judge Burns observed that ORS 167.151 carried a penalty of six months or a $1,000 fine, or both, and noted that Michigan classified these crimes as Class A misdemeanors but added a $10,000 fine. All members agreed that this would be an appropriate penalty structure.

Professor Platt asked how this could be accomplished and was told by Mr. Paillette that an addition could be made to section 6 of the Article on Authorized Disposition of Offenders which would say "except as otherwise specifically provided" or language to that effect.

Senator Burns moved to give Mr. Paillette authority to make the necessary amendments to accomplish the intent of the subcommittee to grade the four obscenity crimes pertaining to minors as follows:

Furnishing obscene materials to minors	Class A misdemeanor; $10,000 fine
Sending obscene materials to minors	Class A misdemeanor; $10,000 fine
Exhibiting an obscene performance to a minor	Class A misdemeanor; $10,000 fine
Displaying obscene materials to minors	Class A misdemeanor; $10,000 fine

The motion carried unanimously.

Publicly displaying nudity or sex for advertising purposes	Class A misdemeanor

ARTICLE 31. GAMBLING OFFENSES

Promoting gambling in the second degree	Class A misdemeanor
Promoting gambling in the first degree	Class C felony
Possession of gambling records in the second degree	Class A misdemeanor
Possession of gambling records in the first degree	Class C felony
Possession of a gambling device	Class A misdemeanor

ARTICLE 32. OFFENSES INVOLVING NARCOTICS AND DANGEROUS DRUGS

Criminal dealing in drugs. Mr. Johnson said he would be willing to make an exception for this one crime of criminal dealing in drugs and classify it as an indictable misdemeanor. Chairman Yturri was reluctant to take this approach.

Judge Burns suggested that the crime be classified as a Class C felony and an exception placed in the dangerous offender statute which would be specifically limited to sellers of narcotics. If this were done, he said, the exception should apply to a person who was convicted of possession of a large quantity of narcotics and should contain some criteria to require proof that he was a professional criminal and not just a casual seller.

Senator Burns expressed the view that the easiest way to accomplish the wishes of the subcommittee would be to adopt Mr. Johnson's suggestion to make one exception to the five year indictable misdemeanor rule and say that in so far as narcotics were concerned, the maximum sentence would be ten years, thereby perpetuating the provisions of the existing law.

Mr. Johnson endorsed the proposal made by Judge Burns. He called attention to section 7.03 of the Model Penal Code set forth on page 25 of the Article on Authority of Court in Sentencing and suggested that some of the language from that section be employed to accomplish that objective:

> "The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.
>
> "The Court shall not make such a finding unless the defendant is over 21 years of age and the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood."

Senator Burns commented that a professional criminal could be a common prostitute and was of the opinion that the language cited by Mr. Johnson was too vague. He expressed doubt also that the quantitative approach in section 6010 of the Michigan code would solve all the problems.

Judge Burns commented that the Michigan approach could be modified by permitting the court to find that the quantities the defendant possessed when he was arrested were so sizeable that it could lead to no conclusion but that he was a professional dealer. An alternate criteria could be that the court found a pattern of repeated sales activity.

Senator Burns asked what specific amount Judge Burns would recommend as a "sizeable quantity" and was told that two kilos would probably qualify as a substantial amount. Senator Burns said that kilos could be used as a measurement for marihuana but other narcotics would require different designations. Judge Burns said he doubted that specific quantities should be included in the statute.

After further discussion, Mr. Johnson moved that the section on reduction of felonies be amended to include a special subsection relating to the crime of criminal dealing in drugs. That section would then be graded as a Class B felony which could be reduced to a misdemeanor. Motion carried.

Mr. Paillette remarked that this could be accomplished by referring to the criminal dealing in drugs statute by number and the subcommittee agreed.

Criminal dealing in dangerous drugs	Class B felony; indictable misdemeanor
Tampering with drug records	Class C felony
Criminal use of drugs	Class A misdemeanor
Criminal drug promotion	Class A misdemeanor
Obtaining a drug unlawfully	Class C felony

Mr. Paillette said he believed that under existing law, ORS 474.170, the crime of obtaining a drug unlawfully was an indictable misdemeanor. Chairman Yturri urged that the crime be classified the same as present law and the subcommittee decided to classify it as a Class C felony unless Mr. Paillette discovered in checking the statute that it was a misdemeanor in existing law.

ARTICLE 6. INCHOATE CRIMES

Professor Platt advised that the Model Penal Code imposed severe penalties for inchoate crimes by equating the penalty with the crime conspired to and imposed the highest penalty for the completed crime on the conspiracy to commit that crime. Representative Frost, he said, was opposed to this approach and wanted the conspiracy to be punishable as half the punishment for the completed crime.

Professor Platt's suggestion was that the subcommittee adopt a compromise and take the Michigan approach which was to drop the penalty for an inchoate crime one degree from that for the completed crime. If a person then conspired, solicited or attempted a Class A felony, he would be charged with a Class B felony. If a person attempted or conspired to commit murder, that crime would be a Class A felony.

Judge Burns moved that the subcommittee adopt the Michigan approach as explained by Professor Platt.

Professor Platt recalled that Representative Frost was of the opinion that solicitation should be viewed as less serious than

conspiracy or attempt, particularly since solicitation was not a crime at all in Oregon at the present time. Professor Platt related that this did not mean it was not treated as a crime, however, because it was subsumed in the law of attempt by case law.

Senator Burns asked Professor Platt if he would drop solicitation two degrees instead of one. Professor Platt replied that in his opinion it was as serious to solicit someone to commit a crime as it was to attempt or conspire to the crime. Solicitation was still tied to the crime which was attempted, he said, and if a person solicited murder, it should be a serious crime and it would be treated so by being graded as a Class A felony. If an individual solicited a prostitute, this would be less serious and would be classified less severely than murder under the motion made by Judge Burns.

Mr. Johnson asked if anyone on the subcommittee would consider making conspiracy to commit bookmaking a higher crime in view of the fact that this activity ordinarily involved organized crime. Chairman Yturri commented that it was graded as a Class C felony and in his opinion that penalty was sufficient. Other members agreed with the Chairman.

Vote was then taken on Judge Burns' motion to adopt the grading system for inchoate crimes as set forth in section 1005 of the Michigan Revised Criminal Code. Motion carried unanimously.

The meeting was adjourned at 10:15 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission