Tapes No. 2, 3 and 4
Both sides of all three tapes

OREGON CRIMINAL LAW REVISION COMMISSION
Room 309 Capitol Building
Salem, Oregon

A G E N D A

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January 10, 1968
9:00 a.m.

January 11, 1968
9:00 a.m.

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OREGON CRIMINAL LAW REVISION COMMISSION

Third Meeting, January 10 and 11, 1968

Minutes

January 10, 1968

Present:	Senator Anthony Yturri, Chairman Judge James M. Burns Senator John D. Burns Mr. Robert Chandler Mr. Frank D. Knight Attorney General Robert Y. Thornton Mr. Donald L. Paillette, Project Director
Absent:	Representative Dale M. Harlan, Vice Chairman Mr. Donald E. Clark Representative Edward W. Elder Representative Carrol B. Howe Senator Thomas R. Mahoney Representative James A. Redden Mr. Bruce Spaulding
Witness:	Mr. Sol Rubin, General Counsel, National Council on Crime and Delinquency, New York City
Other Participants:	Judge Carl Francis, Chairman, Criminal Law Committee of District Judges Association, McMinnville Professor George Platt, Associate Professor of Law, University of Oregon, Eugene Judge Roland Rodman, Lane County Circuit Judge, Eugene Justice Gordon Sloan, Oregon Supreme Court, Salem Mr. Jacob Tanzer, Multnomah County Deputy District Attorney, member of Oregon State Bar Committee on Criminal Law and Procedure, Portland

The meeting was called to order by the Chairman, Senator Anthony Yturri, at 9:45 a.m. He explained that Senator Mahoney was in Arizona for the month of January, Representative Harlan was ill and Mr. Spaulding was trying a case and the latter two would attempt to be present the following day.

Introduction of Mr. Sol Rubin

Chairman Yturri introduced Mr. Sol Rubin, General Counsel for the National Council on Crime and Delinquency, who, he said, was recognized as a leading authority in the field of criminal law and corrections and was the author of numerous books and texts on the subject.

National Council on Crime and Delinquency

Mr. Rubin explained the organization and purpose of the National Council on Crime and Delinquency. The main office of the National Council was in New York where his office was maintained, and in about 20 states citizens had established state councils as a part of that organization staffed by full-time consultants, the consultant in Oregon being Mr. Lee Cumpston. He outlined that the purpose of the state councils was to develop a program on the scene, study the penal system in the state and attempt to deal with legislation, administration, standard setting and to assist juvenile courts. Through the headquarters office basic standards were promulgated through advisory councils consisting of leading authorities in the particular field in which model legislation and policy statements were being drafted.

One such advisory group was a Council of Judges made up of appellate judges, trial judges, representatives of juvenile and family courts and criminal courts. This Council had high prestige, Mr. Rubin said, and contained one representative from the United States Supreme Court, judges from the United States Court of Appeals, state Supreme Court judges and a number of trial judges, one of whom was Judge William Fort of Eugene. Through this Advisory Council of Judges a Model Sentencing Act had been produced and this Act pointed the way in which the NCCD would recommend that the sentencing aspects of Oregon's proposed reform go.

Model Sentencing Act

Mr. Rubin indicated that every state involved in criminal law revision was turning to the Model Penal Code for guidance and he, as a member of the American Law Institute, had worked on that document. It consisted of three main portions and the first portion about which the NCCD had something to say, but had no real guidance to give any state, was the statement of definitions of substantive crimes plus related elements. This was, he said, probably the most difficult and time consuming part of penal code revision.

The second part of the Model Penal Code, and the one in which the NCCD was most involved, was the structure for a State Department of Corrections. He commented that the correctional field generally was not particularly pleased with the structure suggested in the Model Penal Code because it was complex and unwieldy and while it might be suitable for the largest states, for most states it was too cumbersome.

The NCCD had taken several years to produce a Model Sentencing Act in the field of corrections and administration and it was published in 1966. He expressed the view that this structure was the one that would be commonly used by legislatures in the future since the success of a modernized criminal code was dependent on what happened to the penal system in the state as a result of that code.

Mr. Rubin said that most correctional systems in this country had certain ills in common. The principal institution for adult offenders was a maximum security institution, fairly large in size and chiefly custodial in nature. In every state, according to surveys made by the NCCD, both probation and parole were under-used. He said there was no doubt that a statute could support an administrative structure or hinder it. He called attention to a recent Supreme Court decision stating that individuals on probation who were alleged to have violated their probation were entitled to counsel at their hearing and if they were indigent and wanted counsel, they were entitled to assigned counsel. He was of the opinion it would be necessary for the Commission to provide the wherewithal for meeting this requirement and noted that the Oregon statute was devoid of the necessary due process provisions on probation revocations.

Mr. Rubin said that when the population of a state prison was considered, a relatively small percentage of the inmates were dangerous people in the sense that they would seriously assault someone. The majority were property offenders, many of whom were serving time for very small offenses in terms of monetary loss. The first thing the Advisory Council of Judges struggled with was a definition of the dangerous offender and the final definition made a great distinction between dangerous and nondangerous persons. They determined that the person in the dangerous category was a person who had to be locked up for the protection of the community, who had committed or attempted to commit or threatened to commit a serious assault upon another person. Not everyone in this category would repeat that crime so information was needed about the personality of that defendant. The Model Act contained criteria requiring that if the person was suffering from a severe personality disorder indicating a propensity to commit further crime, he could be sentenced to up to 30 years, subject to parole.

The second category of dangerous offender was the man in organized crime and this category encompassed the racketeers, the Mafia and people in a continuing criminal operation.

For an individual in the first category described, in order for the court to know about the personality of that defendant, it was necessary, Mr. Rubin said, to have the resource of a "diagnostic work-up" so the Model Sentencing Act called for referral to a state center operated for that purpose. He was of the opinion it was important that judges have a diagnostic service available prior to sentencing and with that in mind the Model Sentencing Act provided that the Department of Corrections could offer the diagnostic service to the judges at the point of sentencing. The Model Sentencing Act also called for a mandatory presentence investigation in all serious cases.

Mr. Rubin called attention to the proposed Michigan criminal code. Michigan, he said, contained one of the largest penitentiaries

in the world -- Jackson prison with approximately 5,000 inmates. In Michigan's first draft they started with high maximum terms for most offenders together with minimum terms and the NCCD had pointed out to them that experience had shown that long terms for most offenders were futile, expensive and built large prison populations. This had been demonstrated in a number of ways, one of them in a three year project in Saginaw County, Michigan, where the NCCD staff worked in cooperation with the sentencing judges, elevated the use of probation and substantially reduced the rate of prison commitment as well as the recidivism rate.

Judge Burns asked Mr. Rubin if he was aware of any statistics showing the recidivism rate as it related to specific sentencing practices, indeterminate sentencing laws, etc. Mr. Rubin said there were such studies and they showed that it made no difference what the dispositions were. In general the recidivism rate was about the same whether the man was given probation, imprisonment or parole. The recidivism rate did vary, however, by type of offense.

Judge Burns then asked if the statistics showed that regardless of how long a man was imprisoned, the rate of recidivism remained about the same. Mr. Rubin said he could not cite those statistics but suspected that the longer a man was kept in prison, the higher the rate of recidivism would be.

Mr. Rubin called attention to a book written by Mr. Glazier on the federal prison system concerned with recidivism which attempted to measure the impact of different treatment aspects on prisoners. Mr. Rubin said he had written a critique of the book which was published in "Federal Probation" in which he said that Mr. Glazier claimed certain success with groups of prison inmates but drew his conclusions on the assumption that they had been properly committed. Mr. Rubin asked him how he knew that the successes were better than they would have been had these people been placed on probation. Mr. Glazier's reply was also published in "Federal Probation" and he acknowledged that the assumptions were true. Mr. Rubin said the book did not in any way establish that the treatments were correct for any of these people. He added that Mr. Glazier was well informed on the subject and thought the Commission would be well advised to invite him to appear before them.

Judge Burns asked Mr. Rubin what statistics he was aware of as to the recidivism rate of those who were placed on probation before a diagnostic work-up as opposed to those confined after a diagnostic work-up. Mr. Rubin said he doubted that such statistics were in existence.

Mr. Rubin noted that Minnesota was the first state to abolish its habitual offender statute, and Michigan had also repealed its habitual

offender statute as well as its sexual psycopath statute. Judge Burns asked Mr. Rubin if he was referring to civil commitment of sexually dangerous persons when he talked about the "sexual psycopath statute" and explained that Oregon had both a civil commitment procedure plus a procedure for enhancing the penalty for those who had committed crimes of a sexual nature. Mr. Rubin replied he was referring to both procedures and explained that the revised Michigan Act encompassed serious crimes such as an assaultive act upon a child but discarded provisions for enhanced punishment in accordance with the Speck decision.

Mr. Chandler asked Mr. Rubin if his point was that a dangerous offender should be sentenced under the dangerous offender procedures and not be given an added sentence because his crime was of a sexual nature and received an affirmative reply.

Mr. Jacob Tanzer pointed out that a mentally ill person removed from society because he was potentially dangerous didn't really belong in the penitentiary. Mr. Rubin noted that there had been a number of state and federal court decisions saying that if such a person was not given psychiatric treatment, the commitment was invalid. He said that if society ever arrived at the point where maximum custody was used only for dangerous people, the prison populations could be reduced to the point where it would be possible to provide psychiatric treatment for all inmates.

Senator Burns called attention to the high recidivism rate among persons convicted of writing bad checks. He said they were in need of treatment because there was obviously something wrong with them, yet they did not fall in the category of dangerous individuals and asked what disposition Mr. Rubin recommended for these cases. He was told that the Model Sentencing Act contained a provision for certain serious crimes that would be punishable by a ten year sentence and the state could name its own crimes for this second category of offenders. For the nondangerous person commitment was provided for up to five years. He indicated that the Model Sentencing Act dealt only with felonies.

Revision Procedure

Senator Burns asked Mr. Rubin if he felt the first priority in the order of criminal law revision was procedural rather than substantive and asked if he would place first priority on sentencing, parole and probation. Mr. Rubin asked Senator Burns if he considered sentencing law to be procedural and received an affirmative reply. Mr. Rubin said he would not necessarily place first priority on sentencing but was of the opinion that one of the first decisions the Commission would have to make was whether to simplify the statutes defining felonies, by providing for not more than three or four categories of felonies, or whether to retain the diversity of sentencing embraced in

present law. He expressed the view that it would not be suitable to enact substantive crime definitions without considering sentencing at the same time. He recommended that the substantive revision be undertaken first but urged that sentencing be considered with the substantive law.

Judge Burns asked Mr. Rubin if the proposed Michigan code would be presented to the legislature as a package and received an affirmative reply. He then asked if, based upon Mr. Rubin's experience, he felt presentation of a complete code to the legislature was the best method rather than presenting it on a piecemeal basis. Mr. Rubin replied that in his opinion it was the only way to accomplish a complete revision. He said that New York had submitted its code to the legislature in one package with the exception of the abolition of capital punishment. It was possible to deal with probation and parole separately but beyond that, the whole package should be submitted to the legislature.

McNaghten Rule vs. Durham Rule

Mr. Chandler commented that many first offender felons in Oregon were either given suspended sentences or placed on probation and asked Mr. Rubin how the judge should determine when the diagnostic work-up he had referred to previously was needed. He also asked Mr. Rubin if he was convinced that psychiatry was enough of a science that the psychiatrist's recommendation could be given credence. Mr. Rubin's reply was that the NCCD recommended adherence to the McNaghten Rule because it was a narrow rule and unless a person was obviously insane, his organization believed his case should be adjudicated. Since the sentencing judge was not involved in rules of evidence at the point of sentencing, he could handle the sentence quite informally and psychiatric expertise could be useful to him. The Durham Rule, he said, was "a total flop" and he cited an article examining the operation of the Durham Rule in the District of Columbia which substantiated his statement. In reply to Mr. Chandler's question Mr. Rubin said that any judge who wanted a presentence investigation should have one. From this presentence report, from the trial or from any other source, if the judge wanted a diagnostic work-up, he could, prior to sentencing, commit the defendant to a diagnostic facility but it was not a separate proceeding under the Model Sentencing Act.

Professor George Platt asked if the experts agreed on the desirability of the McNaghten Rule to a higher degree than they did on the Durham Rule. Mr. Rubin replied that psychiatrists had not agreed on the formulation of responsibility under the Model Penal Code and he did not know whether they would agree on this subject today but he was certain that the psychiatrists had not contributed to the trial what the Durham Rule advocates expected of them. He again referred to the study conducted in the District of Columbia which showed that work-ups

which came from diagnostic centers were inferior to those prepared by hospitals in the community.

Another advantage of the McNaghten Rule, he said, was that under McNaghten a jury had to decide whether or not the defendant was sane and the ordinary juror could understand this instruction whereas he could not understand the Durham Rule.

Judge Carl Francis pointed out that the Oregon legislature a few years ago had repealed the McNaghten Rule, rejected the Durham Rule and adopted the American Law Institute formulation but the bill was vetoed by the Governor because of inadequate facilities in Oregon. He asked Mr. Rubin to comment on the ALI formulation. Mr. Rubin replied that he was opposed to it because it was not too different from the Durham Rule in that it provided subtle tests at the trial level on which a psychiatrist could testify not only in two different ways but in ten different ways. This was entirely different from saying that the defendant was or was not insane.

Mr. Knight explained that in Oregon when a defendant entered a plea of not guilty by reason of insanity, all the facts were presented to the jury in one package and he was either found guilty, not guilty or not guilty by reason of insanity. He asked Mr. Rubin if he had any comments on whether or not this procedure should be separated into two hearings -- one a determination of whether the defendant committed the act charged and the other to determine his responsibility. Mr. Rubin replied that he would not be in favor of separating the two. Some jurisdictions, he said, did have separate procedures and the system was not working out too well.

Mr. Chandler noted that California had followed the practice for many years of first determining whether the man was guilty or innocent and if he was found guilty, there was a second proceeding with the same prosecution, the same judge and even the same jury to make a determination on his plea of insanity. There had been some talk of returning to the one trial system, he said, one disadvantage of the California method being excessive cost.

Chairman Yturri asked Judge Burns if he found any difficulty with Oregon's present system of having both determinations made at the same time and was told he had experienced no difficulty with it.

Diagnostic Centers

Senator Burns asked if the current trend was to establish a diagnostic facility to which a defendant convicted of a crime could be sent for a period of, for example, 60 days. During the 60 day period he would be given a diagnostic evaluation and returned at the end of that term to the sentencing judge for commitment to another institution. Mr. Rubin replied that the NCCD was opposed to such a syster

Psychiatric expertise, he advised, was very short in this country and no state was able to provide a diagnostic work-up for every convicted felon; the resources should be preserved for persons in a dangerous category. If a man appeared to be potentially good probation material, there was no point in committing him for 60 days. He contended that such a person should not be kept in jail in default of bail, one reason being that it prejudiced him before the sentencing judge in that a man coming from jail for sentence appeared to be a poorer risk than one who had been out on bail. Mr. Rubin pointed out that psychiatrists had been consulted by the NCCD in developing this viewpoint, one of the experts being Dr. Menninger who had been enthusiastic about putting the psychiatric expertise at the point of sentencing rather than on the trial.

Mr. Rubin explained that about a year and a half ago there was a joint sentencing institute conducted in Denver, sponsored by the Eighth and Tenth judicial districts. Dr. Joseph Satten challenged the NCCD on the necessity of institutional commitment for diagnostic work-ups. He maintained that 60 to 90 days was not needed to prepare an evaluation and it was feasible to prepare a diagnostic work-up on an outpatient basis in a community hospital. The Model Sentencing Act did provide for commitment for diagnostic purposes for the dangerous offender because he was going to be committed in any event, but for the person who was potentially material for treatment in the community, the 60 to 90 day commitment would be destructive.

Mr. Thornton asked Mr. Rubin to comment on the medical and diagnostic center at Vacaville, California, where prisoners were sent after sentencing. It was an attempt, he said, to use the diagnostic approach for rehabilitation after sentencing. Mr. Rubin replied that the emphasis of the NCCD was on making diagnostic work-ups available for the sentencing judge prior to sentencing, and they believed it was meaningless to prepare an evaluation for every man who was committed.

Judge Burns asked what magic there was in a report by a psychiatrist, a psychologist or a social worker. He said he was faced daily with the problem of diagnostic reports which were virtually useless. Mr. Rubin's reply was that there was absolutely no magic in a diagnostic work-up. The psychiatric profession was aware of their inadequacies in determining the future danger of a person to society. When the judges drafted the Model Sentencing Act, they discussed this problem and Dr. Menninger had said that if a judge received a psychiatric report in jargon, it should be returned for clarification. The NCCD was working on this problem, he said, and planned to have a panel of psychiatrists at the Advisory Council of Judges' meeting in May to discuss it further.

Mr. Rubin recommended a book written by Dr. Seymour Halleck entitled "Psychiatry and the Dilemmas of Crime" in which Dr. Halleck supported the Model Sentencing Act and discussed what psychiatry could

and could not do to solve the problem. The NCCD had also undertaken to produce a pamphlet called "Guidance to the Judge in Sentencing the Dangerous Offender." The draft of this pamphlet, he said, would be further considered at the Council meeting in May.

Public Reaction and Public Hearings

Chairman Yturri pointed out that different segments of the population considered crimes particularly affecting their livelihood or lives more serious than crimes affecting some other segment and asked what weight other states revising their criminal codes had given to public reaction and public emotion. Mr. Rubin replied that in the states with which he was familiar, the public reaction was not as significant as it was likely to be in Oregon. No other state had such an array of theft laws and no state had the bad check problem prevalent in Oregon. He termed the number of persons serving terms in the Oregon penitentiary for writing bad checks as "scandalous" and urged that the statute be amended to reduce the number of offenders. In New York, he said, the abolition of the death penalty had aroused public interest as had sex offenses but other crimes, even the violent crimes, received very little public attention.

Judge Burns noted that Illinois had held public hearings around the state after their drafts were formulated and had solicited public opinion. He asked Mr. Rubin if he felt such a procedure was indispensable. Mr. Rubin replied that the practice followed by most states of holding public hearings was a sensible one although the use of the word "public" was a misnomer because the public did not attend. Special interest groups and pressure groups were more likely to take part in these meetings. If public hearings were held, he advised that they should be structured according to the needs of the Commission and planned to be hearings of public education.

Chairman Yturri said he had talked to two individuals experienced in code revisions and both of them felt that the information should be disseminated from the Commission itself to determine public reaction. They were of the opinion that public hearings merely distorted the true function of the Commission.

Disparity in Sentencing

Mr. Rubin pointed out that when minimum terms were included in a statute, the parole board could not operate until that minimum term had been served. The Michigan committee had agreed that if it was the responsibility of the parole board to study a prisoner and release him at the most opportune time, the board should not be restricted by minimum terms. He also urged that within the maximum penalty structure, the judge should be empowered to determine the maximum sentence.

Senator Burns mentioned the problems created by disparity in sentencing which were further aggravated in Oregon by the diverse problems of the eastern and western sections of the state. He asked Mr. Rubin to comment further on why he believed in a judge-fixed maximum sentence.

Mr. Rubin advised that one of the interesting things in the Michigan code was that it contained no provision for parole for a misdemeanor conviction. Michigan's reasoning was that misdemeanor offenders were serving short terms, for many there had been no presentence investigation, and individualization of terms was not feasible; therefore, Michigan said, let them all serve the same terms so at least there would be no disparity in the sentences. Michigan contrasted that concept with longer terms for felons where parole did operate.

Mr. Rubin indicated that his respect for the judiciary was greater than his respect for parole boards. Not only were the judges more experienced but they had more professional expertise and spent more time with the defendant. A judge's sentence was a judicious process performed in public in the context of a presentence investigation and was quite different from the secretive and administrative process of the parole board. He maintained there was no magic in removing a judicial function from a judge and giving it to a board.

Another element that could approach constitutional dimensions was that the judge who fixed a maximum sentence was exercising a due process responsibility. Since the Eighth Amendment prohibited cruel and unusual punishment, the judge had the responsibility to see that a sentence was not excessive. In committing the defendant he did two things: (1) Allowed a period of time for correction; and (2) Protected against excessive sentencing. A parole board with that guidance from the judge was in a better position to make a wise decision than one where all the defendants were committed for the same length of time.

Chairman Yturri posed a situation where two defendants were committed for identical offenses and were given obviously disparate sentences. When they appeared before the parole board, the board could see the circumstances were about the same, that there was disparity of sentence for no good reason and the board could release them after they had served the same length of time. Mr. Rubin agreed but added that the problem of disparity of sentencing would not be solved either by a code or by a parole board. One of the most promising methods of reducing disparate sentences, he said, was by judges working together as had been done in Michigan. Prior to sentencing three judges would sit down as a panel. One judge had the responsibility for sentencing but the three conferred prior to imposing sentence. In that district in Michigan where this had been tried, disparity had been greatly reduced and the use of probation had been enhanced.

Judge Burns commented that at the November meeting of circuit judges, Judge Ted Knutsen from Minnesota had described the panel of judges as tried in Michigan and the way it had been used in Minnesota. Since that meeting, he said, he and two other judges in Multnomah County had informally constituted a sentencing panel and in each of their cases they circulated the presentence report and each judge indicated what his sentence would be. As time permitted, they then met and discussed the cases after which time they indicated what their sentence would be. Finally, they listed what the sentencing judge actually did so they had a record of what the result would have been without the conference by merely looking at the presentence report, what the result would have been following the conference, and also the final result. Preliminarily, he said, they had found this procedure most helpful and there had been far less initial disparity than they had supposed there would be. They were hopeful of persuading other judges in Multnomah County to go to this system when further statistics had been compiled. Mr. Rubin commented that Judge Burns' experience was much the same as that reported by others who had tested the system.

Chairman Yturri asked how such a system would work in eastern Oregon where the judges were separated by long distances and Judge Burns indicated the panel had found that the need for specific individual conferences dwindled as experience was gained with the procedure. He thought the distance problem would not be insuperable and believed most of the work could be handled by circularizing the presentence report followed by conference phone calls at the outset as needed.

Justice Gordon Sloan advised that at a judges' meeting several years ago various cases were circulated among the judges prior to the meeting and they were asked to indicate what kind of sentence they would impose. A wide disparity in sentencing resulted. The cases were then discussed at a conference, the judges again evaluated the cases and indicated what their sentences would be. In reply to a question by Mr. Chandler, Justice Sloan said he did not know whether there had been a significant change in disparity on the second ballot but he was of the opinion that such a procedure would be helpful to judges, particularly those in isolated areas.

Senator Burns said he believed strongly in the true indeterminate sentencing provision. He outlined one case where co-defendants were tried separately before different judges for the same crime. One received two years probation and the other two years in the correctional institution. The second man was extremely bitter and Senator Burns believed the sentence had contributed to his recidivism. In another case a man was convicted of assault with a dangerous weapon and received a one year sentence. The sentencing judge didn't know he was a sociopath but the counselor had told Senator Burns that the man would commit murder when he was released. At the end of one year

he had to be released and three months later he did commit murder. If he had been committed under an indeterminate sentence, Senator Burns observed that the authorities would have had longer to work with him and the murder might have been averted.

Mr. Rubin commented that the first case cited by Senator Burns would not have been resolved by the indeterminate sentence. The prerogative of the judges would have been the same and the disparity could still have existed in the disposition of the cases. In the second case the diagnostic work-up should have been performed before sentence was imposed. Over-sentencing, he said, was no solution and only created further problems. The solution was for the judge to be as well informed as possible at the point of sentencing.

Mr. Tanzer pointed out that while sociologists were unable to predict what a man would do, neither could the judges. He suggested that rather than forcing the judge to make a predictive sentence, the judge might be kept in the process longer and something worked out in the nature of coordination between the judge and the parole board on individual cases so that the decision as to length of incarceration would be made after the man had been confined and observed for a period of time.

Mr. Rubin was of the opinion that the man's conduct in prison was a highly distorted record because he was not in a normal society during that period. The parole board, upon releasing a man, was predicting the future just as much as the judge was at the point of sentencing him.

Chairman Yturri observed that since there was no precise science for predicting the future, the best that could be done was to determine the course pointing the way toward the highest percentage of satisfactory results.

The meeting was recessed at 12 noon and reconvened at 1:30. The same members were present as attended the morning session with the exception of Mr. Thornton who arrived at 3:55 p.m.

Plea Bargaining

Chairman Yturri asked Mr. Rubin to discuss the definitions of crime and substantive law. Mr. Rubin explained that in this field he was expressing his personal views, not those of the National Council on Crime and Delinquency, and they came from his experience in working on the New York revision and the Michigan draft. He said he had one general concern about the way in which the Model Penal Code draft dealt with substantive law, which was reflected in both the New York and Michigan drafts, and that was with respect to plea bargaining. Until the last few years, he said, plea bargaining was something done in the back rooms. It was under suspicion and if the judge was

involved, he had to be careful to keep his judicial skirts clean. This situation appeared to be changing. The President's Crime Commission now said that plea negotiation was fine and there should be more of it. If the judge was on the scene at the time, all he had to do was approve the bargain. He also noted that the American Bar Association project on standards for judicial administration had published a report with a series of proposals that would encourage plea bargaining and relegate the judge to the position of approving or disapproving the bargain and the process did not make it easy for him to disapprove.

Plea bargaining, he said, could be supported by penal code content in a number of ways and the question of the judge-fixed maximum also applied. A prosecutor under a judge-fixed maximum could say, "I am going to recommend one year." Under a system where the maximum sentence was not fixed by the judge, it was possible for a prosecutor to say, "If you are committed, I am going to recommend a one year minimum to the parole board." Mr. Rubin explained that another big ingredient in encouraging plea bargaining was to provide for several degrees of a crime. By fixing a series of diminishing degrees of crime, a code would actually contribute to the power of a prosecutor to negotiate because the degree was exclusively being selected by him. A penal code revision, he said, could increase opportunities for bargaining, could leave them about the same or could reduce them. The more grades of an offense provided in the code, the more it increased the opportunity for the prosecutor to negotiate with the sentence around the charge. He did not deny the legitimacy of more than one grade of an offense but urged that the gradations be held to a minimum.

Mr. Rubin was critical of the New York code because it enlarged the definitions of a crime so that wider groups of people could be brought in for a particular crime. Good drafting of a penal code, he said, demanded definitive and strict language and both the New York and Michigan codes had expanded and loosened their definitions of crime. One product of this was to give prosecutors greater power in determining who was going to be prosecuted. Mr. Rubin said he was surprised to find that defense lawyers, who presumably would want to have a more lenient situation, would protect the system of great punishment if that system allowed them to bargain; i.e., they were more interested in the power to negotiate than in a penal code that was more rational.

The Model Sentencing Act, Mr. Rubin explained, authorized a fine in every felony case. There were many instances in which a fine was reasonable because it was a punishment but still allowed the person to remain in the community. The Act also contained a provision for deferred sentence and this provision was in use in several states. It allowed a defendant to arrive at the point of a conviction of guilt but the judgment of conviction was not entered and, upon consent, he

could be placed upon probation. If he succeeded on probation, he had no criminal record. The Model Sentencing Act provided for a great deal of flexibility on the sentence, he said, and attempted to simplify the conviction process, not to make it easier, but the NCCD did not wish to assist a process that made the arrival at a conviction a matter of negotiation.

Chairman Yturri called attention to the case of Rose v Gladden, a post-conviction proceeding, in which the defendant had been charged with assault with intent to kill and entered a plea to the crime of assault with a dangerous weapon. The Supreme Court upheld the plea bargain and said:

> "It should be noted that under some circumstances the most valuable service counsel can perform for an accused client is to obtain the reduction of the charge from a more severe to a less severe charge. To adopt a rule that would foreclose this avenue and require the client to gamble on the outcome of a trial on the more severe charge would work to the detriment of many criminal defendants. . . "

Judge Burns commented that the hypocrisy in the plea bargaining situation disturbed him and he thought the report of the President's Commission that the judge become more involved should be given careful consideration.

Chairman Yturri referred to a letter the Commission had received from a district attorney recommending statutory amendment to remedy the situation where the judge refused to dismiss the more severe charge and proposing that the statute insist that he do so. He asked if the fact that the judge countenanced plea bargaining would advance the cause which Mr. Rubin favored; namely, to reduce the length of sentences. Mr. Rubin replied that there was some justification for the negotiation process under present penal codes but he was advocating a reformed code which would not encourage negotiation.

Mr. Paillette pointed out that the comments on plea bargaining in the President's Crime Commission report were made in connection with observations about the state of confusion of criminal law in the United States, the cluttered dockets, etc., and the report contended that plea bargaining helped to alleviate congestion in the criminal courts. He asked Mr. Rubin if he believed it was necessarily inconsistent to revise the criminal code to broaden the possibilities for plea bargaining. Mr. Rubin thought there was no inconsistency but there was a question as to whether it was desirable. His objection to the New York and Michigan codes was that they supported negotiation of pleas and gave up the concept of strict drafting on definitions of crimes.

Penalty Provisions

Mr. Paillette mentioned that no matter how good a criminal code was, that code would be only as effective as its implementation by the people who were going to enforce and administer it. Mr. Rubin said he concurred but since we live in an imperfect society, the law was wise to require strict handling of any situation that could result in the loss of a person's liberty. Mr. Rubin was particularly critical of the fact that the Michigan and New York codes contained in many instances five different grades for the same crime.

Judge Burns asked Mr. Rubin if he could suggest a recently revised code that was better in this respect than the Michigan and New York codes and Mr. Rubin said he was unable to do so. He added that while he did not hold the common law definitions sacred, he did not favor the direction in which the new changes were going.

Judge Burns asked Mr. Rubin if he would propose any allowance or enhanced penalty for the person who committed a crime against property in a highly organized manner and gave as an example a person who robbed a construction office of their checks and check protector and cashed thousands of dollars worth of bad checks on that firm. He said this crime was, of course, greater than that of the man who cashed an NSF check. Mr. Rubin replied that under the Model Sentencing Act the disposition of such a case would be within the discretion of the judge. The whole question of a criminal who didn't act alone but as a part of a continuing operation, he said, was in the Model Sentencing Act, section 5 (c), in loose terms and such a person could be included under the definition of a dangerous offender.

Tape 2 of this meeting begins here:

Mr. Knight explained that in Oregon several statutes provided for indictable misdemeanors where the crime was considered a felony until the time the court pronounced a misdemeanor sentence and asked Mr. Rubin to comment on such a procedure. Mr. Rubin was of the opinion that statutes in this category should be revised to provide for a feasible disposition of such a crime. If the crime fell into the felony classification, that provision should be included in the statute and by the same token, specific provision should be made for crimes that were misdemeanors.

Senator Burns asked Mr. Rubin for his point of view with respect to the sentencing judge requiring the defendant to bear court costs. Mr. Rubin said his personal opinion was that it was a foolish thing to do because an additional penalty was being imposed on that individual in a most unjust way unless all losing defendants were given this additional burden. He pointed out a recent Supreme Court decision interpreting a New Jersey statute requiring that an indigent prisoner in a post-conviction proceeding pay for a transcript. The court said that if the state of New Jersey did not require other defendants to pay for their transcript, this prisoner could not be required to pay for his; it was invalid from a constitutional point of view. Mr.

Rubin indicated that there was also a development taking place in relation to collection of fines. One case said that if an individual had been fined and a condition of his probation was that he pay the fine, his probation could not be revoked if he became unable to pay.

Judge Burns asked Mr. Rubin how many states had adopted significant parts of the Model Sentencing Act and was told that Minnesota had adopted part of it and it was in Michigan's proposed code to an even greater extent. Michigan had also passed the youthful offender portion and several states had passed the diagnostic center provisions but only Minnesota had adopted the basic outline for the thirty, ten and five year sentencing provisions. Judge Burns inquired if there was any reason why only one state had "seen the light" and Mr. Rubin explained that this was a difficult concept to sell because it was both revolutionary and highly controversial. It was easy to see, he said, how a newspaper or a legislator would say, "I'm not going to turn all those psycopaths loose in our state." The Model Sentencing Act would not do so, he said, but it appeared that way on the surface. He explained that anything that attempted to reduce severity of punishment encountered resistance. The entire penal history of this country since it was founded was a gradual increase in severity so any effort to reduce penalties encountered immediate resistance by police, prosecutors, judges and legislators.

Chairman Yturri pointed out that many states had adopted the indeterminate sentence. Mr. Rubin said that the indeterminate sentence, whatever that term meant, had been one of the ingredients that had resulted in longer terms of imprisonment in general. If the session laws of any year were examined, he said, the researcher would discover that if there were revisions in the penalties, nine out of ten times the penalties were increased.

Juvenile Crime

Chairman Yturri asked Mr. Rubin to discuss juvenile crime and to make recommendations as to the age at which a juvenile should be treated as an adult. Mr. Rubin commented that the question of juvenile offenders would come up in connection with the definitions of crimes dealing with the issue of age (i.e., statutory rape) and in special statutes which only juveniles could violate. The NCCD had dealt with these problems in a Standard Juvenile Court Act and Standard Family Court Act published in 1959. States which had adopted the Standard Juvenile Court Act had found it to be very satisfactory, he said.

In terms of age jurisdiction he recommended that states give their juvenile courts exclusive jurisdiction over all children under 18 years of age with a transfer provision by which juveniles who were 16 but under 18 who had committed felonies could be transferred for criminal prosecution.

Article IV of the Model Sentencing Act entitled "Alternative Sentencing of Minors" in a general sense stood midway between juvenile court jurisdiction and adult criminal court jurisdiction and provided that the juvenile court judge had discretion to transfer a juvenile to criminal court. The NCCD recommended that states adopt something of this kind. In 1966 Michigan passed this law and the state of New York also has a law similar to it. If a person under 21 years of age went into a court charged with a felony or a misdemeanor originating in a criminal court, the NCCD recommended a statute to offer the criminal court judge, at his discretion and based upon a preliminary investigation, the choice of treating that minor in his court or in what might be called civil terms similar to a juvenile court procedure. This added greater flexibility to the treatment of minors.

Senator Burns outlined a case he was working on for a juvenile defendant accused of a crime for which he could be remanded to adult court. A caseworker had been assigned to the defendant to work with him, talk to him and to make a recommendation to the juvenile court as to the disposition of his case. Senator Burns said he had always understood that what the defendant told the caseworker was in confidence and the caseworker could not be compelled to testify against him. There now appeared to be some thought that assuming the juvenile defendant had been completely advised of his rights, the counselor could be subpenaed to testify against him.

Mr. Rubin replied that he absolutely could not be compelled to testify under such circumstances. The juvenile court should so instruct the counselor and the court would be upheld in its action. If the juvenile was a defendant in a criminal court, the juvenile court judge would be well advised to let that information go to the sentencing judge of the criminal court but that information should not otherwise be made available. Juvenile proceedings could not be exploited to acquire information from the juvenile, he said. The NCCD believed that in any case in the juvenile court the defendant was entitled to counsel and if he was indigent, he was entitled to assigned counsel.

Mr. Knight suggested that it might be desirable to make it possible to remand a juvenile to adult court on a misdemeanor charge to make him face up to the fact that he was going to be held responsible for his acts, and it might be better to do this before he was branded as a felon for the rest of his life. Mr. Rubin replied that the purpose of the waiver was not to give another court the opportunity of frightening the defendant more than the juvenile court. The purpose was to protect the exclusive jurisdiction of a juvenile court.

Judge Roland Rodman asked Mr. Rubin if he was including traffic cases in his remarks and was told that traffic cases were excluded. Mr. Rubin recommended that for traffic cases, routinely disposed of in any court, the juvenile court should retain jurisdiction but should

dispose of them in exactly the same way as a traffic court; i.e., by imposing a fine. The NCCD did not approve of fines generally but did approve of them for traffic cases. Judge Rodman asked Mr. Rubin if he would disapprove of Oregon's blanket remand for traffic cases and received an affirmative reply.

Chairman Yturri asked what criteria the remanding judge should utilize in reaching a decision as to whether the juvenile should be remanded to the adult court for trial. Mr. Rubin said the NCCD had issued a publication on this subject and before doing so had circularized a group of judges. The results of that circular showed that in large communities there were very, very few transfers made, so their feeling was that the criteria for remand should be very narrow and should have two principal ingredients: (1) In a situation of great gravity; and (2) In instances where the resources available to the juvenile court were inferior to the resources available to the criminal court.

Senator Burns asked Mr. Rubin about a situation where a youthful offender was sent to a training school and when the school found it could not cope with him, he was sent to the correctional institution. Mr. Rubin said the NCCD was utterly opposed to such an act and would argue that it would be unconstitutional.

Mr. Chandler inquired about the opposite procedure of sentencing him first to the correctional institution and then transferring him to a training school. Mr. Rubin said not all the decisions were clear on that point and he expected the question to come before the Supreme Court in the near future but the NCCD would be opposed to it as a matter of policy.

Advisory Committee

Judge Burns asked Mr. Rubin what function he saw for an advisory committee in lieu of or combined with public hearings and asked him to comment generally on his views with respect to an advisory committee to assist the Commission. Mr. Rubin answered that he saw no great merit in advisory committees but he did suggest that expertise in various areas be solicited. He commented that if the Commission was broken into subcommittees with specific areas of the code assigned to each, that subcommittee might want to call upon an advisory committee or choose consultants to advise them but he believed the major portion of the advice to the subcommittee should come from the staff and he mentioned that he did not see any great advantage in having an across-the-board advisory committee.

Chairman Yturri pointed out that Professor Charles Bowman of Illinois and Professor Arthur Sherry of California had suggested that as many people as possible be kept in contact with the Commission's action and they had specifically mentioned such groups as the judges'

associations, district attorneys' association, sheriffs' association, educators, police officers and others directly concerned and interested. The Chairman had in mind, he said, to divide the Commission into at least three subcommittees and to appoint an advisory committee composed of seven to nine individuals from different walks of life. The subcommittees could meet with the advisory committee to maintain a liaison with the groups he had mentioned and the subcommittees would in turn bring the views of the advisory committee to the Commission.

Mr. Rubin said if he were the Project Director, he would prefer not to operate in that manner. If the Commission was soliciting public opinion, it should be addressed to the Commission itself and if subcommittees were selecting expertise, in most instances that could go through the staff but he was of the opinion that to put an advisory committee between the Commission and the other groups would be more of an obstacle than an aid.

Mr. Paillette asked Mr. Rubin what his view would be toward a subcommittee soliciting the views of certain groups through the advisory committee when the subcommittee was working on a preliminary draft and knew that those groups would be more interested in that draft than other groups. Mr. Rubin replied that if the subcommittee wanted certain groups to express themselves, they should solicit their views directly.

Senator Burns expressed concurrence with Mr. Rubin's point of view and was of the opinion that to put a broad based advisory group between the ultimate decision and the public would be unwieldy. The groups should be utilized by the subcommittees on an ad hoc basis but not on an official basis, he said, and Mr. Rubin expressed agreement.

Court Rules

Chairman Yturri asked Mr. Rubin if he believed standards set forth in recent Supreme Court decisions -- for example, the Miranda decision -- should be incorporated in the statute. Mr. Rubin replied that the NCCD was currently engaged in preparing a policy draft on this question. Inasmuch as decisions in this field were changing so rapidly, the recommendation would be that the necessary formulation and implementation of those decisions be handled by court rule rather than by statute.

Mr. Paillette asked Mr. Rubin to expand on his recommendation to approach the revision of the substantive law ahead of the procedural law. Mr. Rubin said the greater urgency was on substantive law and sentencing plus the fact that the procedural law could be a reflection of what was done in the substantive law. He said there was more commotion in the prearraignment procedures than anywhere else and in his opinion it was best left alone for the moment. If Oregon followed the NCCD recommendation, much of the procedure would be covered by rules of the court rather than by statute.

Mr. Rubin remarked that the NCCD was currently dealing with rules for the juvenile court covering all of the procedure from the time a juvenile was taken into custody until the moment of disposition of his case -- problems of warnings under interrogation, prompt arraignment, issuance of warrants, protection against improper publicity and other matters, contemplating that these subjects would be adopted by Supreme Court rules and by courts with rule making powers.

Chairman Yturri requested a recommendation for a state where the Supreme Court apparently did not have rule making power. Mr. Rubin replied that if the court could not promulgate rules, the NCCD publication could serve as a guideline for the legislature.

Professor Platt pointed out that Illinois had been in a difficult situation wherein the court insisted it had inherent powers and the legislature insisted it did not. The judicial article in Illinois was substantially amended and did not settle that particular question but the legislature, when it came to criminal procedural matters in its new code in 1963, granted specifically to the Supreme Court the power to make rules to supplant legislation which the legislature did enact. It then legislatively said, in effect, "These are the rules we think should be enacted but we can see that greater flexibility ought to be allowed and if the court wants to move into the field, it may do so." The court did move in and in effect legislated out of existence certain matters in the procedural code.

Mr. Thornton thought it was possible for the Oregon legislature to grant the Supreme Court limited rule making power in certain areas in this state.

American Civil Liberties Union

Chairman Yturri asked Mr. Rubin if the American Civil Liberties Union had taken an active part in promoting the Model Sentencing Act in any of the other states and was told that they had not been concerned with it in New York. Mr. Rubin said they had reviewed and been interested in the New York penal code draft but had submitted an inadequate report.

Offer of Assistance

Mr. Rubin advised the Commission that he and his agency were available to aid them in any way possible and were particularly interested in assisting with the corrections, parole, probation and sentencing structure of the proposed code. The National Council on Crime and Delinquency also had a special interest in juvenile and family law provisions and would be happy to assist with drafting or recommendations in this area. He indicated too that the NCCD would

appreciate receiving drafts of the substantive law. The Chairman assured him he would receive copies of all drafts prepared by the Commission and they would welcome his comments and advice.

Conclusion

Commission members had no further questions to ask Mr. Rubin.

Chairman Yturri on behalf of himself and the Commission thanked Mr. Rubin for an enlightening and interesting day and for devoting so much time to their problems.

The meeting was adjourned at 4:50 p.m.

Tape 3 of this meeting begins here:

January 11, 1968

Present: Senator Anthony Yturri, Chairman
Representative Dale M. Harlan, Vice Chairman
Judge James M. Burns
Mr. Robert Chandler
Mr. Donald E. Clark
Mr. Frank D. Knight
Representative James A. Redden
Attorney General Robert Y. Thornton
Donald L. Paillette, Project Director

Absent: Senator John D. Burns
Representative Edward W. Elder
Representative Carrol B. Howe
Senator Thomas R. Mahoney
Mr. Bruce Spaulding

Witnesses: Professor Courtney Arthur, School of Law, Willamette University
Mr. Ed Branchfield, Administrative Assistant to the Governor
Professor George Platt, School of Law, University of Oregon
Justice Gordon Sloan, Oregon Supreme Court, Salem
Mr. Jacob Tanzer, Multnomah County Deputy District Attorney

The meeting was called to order by the Chairman, Senator Anthony Yturri, at 9:45 a.m. He first reviewed the material in the members' notebooks consisting of an agenda, an organizational chart, descriptions of the duties and responsibilities of the Project Director, the Research and Drafting Chief, the Revision and Adoption Subcommittees and an Advisory Committee, a roster of suggested names of persons who might be appointed to the Advisory Committee and a proposed budget.

Introduction of Donald L. Paillette, Project Director

Chairman Yturri next introduced to the Commission Mr. Donald L. Paillette, Project Director. He commented that after considerable search for a suitable person to fill this position, the Commission was fortunate in retaining Mr. Paillette. He gave a brief resume of his background: Mr. Paillette graduated from the University of Oregon in 1953; served in the United States Air Force; worked for the Eugene Register Guard radio station; obtained his law degree in 1962; served as deputy district attorney and later as district attorney for Lane County; served as Counsel for the Senate Judiciary Committee in 1967; associated with one of the leading law firms in Eugene; resigned from that firm to accept this position with the Commission.

Mr. Paillette commented that revision of the criminal code was not only extremely significant to the state of Oregon but presented him with an exciting opportunity. He assured the Commission he would give his best efforts to developing and culminating a successful project.

He observed that probably the most difficult decision the Commission would have to make initially was precisely where to begin. He called attention to the wide variety of material available on the subject of criminal law, much of it compiled by other states which had completed or were working on revisions. These sources presented, at very little cost, some of the best thinking in the country in this area -- the Model Penal Code, the Illinois and New York codes as well as many others -- which could be used for comparative research and laid side by side with the Oregon code. Most states, he said, had approached their revisions from the standpoint of the substantive law first and this appeared to him to be a reasonable approach. He indicated that it should not be assumed that everything in the present Oregon code was bad and part of the initial effort of this Commission would be to look at the code as written and as interpreted to see what should be changed.

Advisory Committee

Mr. Paillette said, "As we enter into this fact-finding process and as we move through the preliminary drafting stage and eventually as we culminate our efforts, we certainly want to open every possible avenue of communication with every professional and lay group that has an interest in this project that has instructive and productive suggestions to make to this Commission. At the same time we do not have unlimited time nor an unlimited budget so we have to balance the productive efforts and the time table we establish along with the need for keeping the various groups informed and for keeping the Commission informed. Generally the opinion of other states has been that the best way to do this is through the use of an advisory committee."

He said his idea of an advisory committee would be to coordinate the views of the various lay and professional groups throughout the state of Oregon as the Commission proceeded through each phase of the revision project. He called attention to the organizational chart, attached hereto as Appendix A, where the advisory committee was included along with a list of membership possibilities.

Mr. Chandler related, as an example, that if the Commission removed "rustling" as a crime and placed rustling under some other category, the Oregon Cattlemen's Association would object. Chairman Yturri replied that an educational program would take care of that problem and that one of the duties of the Project Director would be to keep the Oregon Cattlemen's Association and other interested groups informed of what the Commission was doing.

Mr. Paillette agreed that it was vital that every group be kept informed and be given an opportunity to make their views known. Some states, he said, had made the mistake of not getting the views of all interested groups as they went along and had encountered criticism and opposition after they had completed their work.

Mr. Chandler noted that there was a problem of balancing of viewpoints as well as the problem of making sure that the viewpoint received from an organization represented the majority view of that organization and not just the view of the person making the presentation. Chairman Yturri said it was anticipated that the representative on the advisory committee would have the responsibility of communicating with those in his organization and should be able to say that he reflected the views of the group he represented.

Mr. Paillette noted that the appointment of an advisory committee posed a policy decision not only as to whether the Commission wanted an advisory committee but also as to the number of members to be placed on it. He read the description he had prepared of the advisory committee's function:

> "The advisory committee will consist of professional and lay people who will function in an advisory capacity to the Commission. This committee will be encouraged to assist in the law revision activity by reviewing tentative proposals of the Commission and submitting their views and ideas to the Commission."

Mr. Paillette added that a large part of their activity could be handled by correspondence or through subcommittees.

Mr. Chandler advised that he was impressed with Mr. Rubin's argument of the previous day that the best use of an advisory committee was to advise on specific projects and when that particular committee's function was completed, it should be disbanded and another committee formed to undertake a specific job on another specific project. In order to cover the whole spectrum of all the interested groups, he said, an advisory committee would need to be a large group, at least 15 persons, plus another large segment representing lay groups which could create another 12 or 15 individuals and it could become unwieldy because of sheer numbers. He was of the opinion that different people should be used for different projects.

Chairman Yturri said the final decision on advisory committees did not have to be made at this time and suggested this particular phase of the organizational chart be eliminated, at least temporarily, and that other names be added to the list of possible advisory committee appointees. The roster of names is attached hereto as Appendix C. The Project Director or the subcommittee chairman would then have the responsibility of contacting the necessary groups interested in the matter the subcommittee was considering at a particular time.

Mr. Chandler said he would not like to see the Commission placed in the position of acting against the advice of a formal advisory committee who recommended against something which the Commission had decided, perhaps from a broader viewpoint, would be wise. Judge Burns said that on the other hand he would not want the Commission to be in the position of finishing a draft and then have several organizations come in and say it was no good. Chairman Yturri remarked that most states had followed the philosophy that it was better to get the approval of these groups in advance in order to gain their support rather than their opposition.

Mr. Chandler contended that the advice of the groups should be solicited in the pre-drafting stage but the Chairman disagreed that this was the best course. He was of the opinion that the best way to proceed was to submit drafts to interested groups which could be related to the background and the problem that existed, together with a complete explanation and the Commission's proposed solution to the problem.

Judge Burns and Representative Redden expressed agreement with the Chairman's suggestion and proposed that the guidelines be laid out in advance for presentation to the group rather than asking them to come in and tell the Commission what it should do.

Mr. Paillette emphasized that it was not his intent to use an advisory committee to cut off the flow of opinions and information but, on the contrary, to facilitate them. Certainly, he said, the staff anticipated being in contact with all interested groups and individuals and to arrange for their appearance before the Commission or the subcommittees.

Judge Burns pointed out that the Commission would find out, as the drafting progressed, how the advisory committee system was working and since they were not wedded to the system, the functions and responsibilities of the advisory committee could be determined as they went along.

Chairman Yturri suggested that for the time being no decision be made on the appointment of an advisory committee.

Adoption and Revision Subcommittees

Mr. Paillette read the description of the duties and responsibilities he envisioned for the revision and adoption subcommittees:

> "The Chairman will appoint three revision and adoption subcommittees, each assigned certain specific revision projects. Each subcommittee will be assisted by the Project Director and through him will coordinate the activities of the various lay and professional committees regarding each area of the criminal code under consideration for revision.

> The subcommittee, upon receiving a preliminary draft, will meet with the draftsman to review the draft, hear the background presentation, and accomplish any redrafting. After giving the preliminary draft tentative approval, the subcommittee can then direct that it be mimeographed in sufficient quantities for circulation among the advisory committee and other appropriate groups for their review and criticism. Further redrafting is accomplished, if needed, and the draft is then referred to the whole Commission for further action."

Chairman Yturri asked Mr. Paillette to outline how a subcommittee would work on a subject such as "Crimes Against Property." Mr. Paillette explained that the subject would first be turned over to the Project Director who would coordinate the material through his research and drafting assistants.

Mr. Chandler thought it would be necessary to make certain basic policy decisions prior to drafting; for instance, whether to limit the degrees of Crimes Against Property to some specific number. He felt that unless this was done prior to the research and preliminary drafting, the subcommittee would be limited to a recodification. Mr. Paillette replied that some policy decisions would of necessity be made by the subcommittee with the Commission as a whole passing upon each draft as it was referred to them by the subcommittee.

Mr. Chandler believed that unless basic questions were settled well before it reached the drafting and subcommittee stage, a great deal of work would be wasted. Chairman Yturri stated he would be in favor of turning the subcommittee loose with, for example, the theft statutes and letting them bring back to the Commission what in their best judgment was appropriate.

Judge Burns suggested that preliminarily the theft subcommittee, for example, should be advised that generally the Commission wanted a certain type of statute. Chairman Yturri asked if that decision could be made by the Commission prior to the time the necessary research was conducted and Mr. Knight commented that a broad general policy, such as to reduce the number of categories of theft, could be decided upon. Mr. Chandler agreed that the subcommittee could be told that the categories should be reduced and within each category the number of offenses should be reduced as much as possible and that the sentences should be reduced to broad categories.

Mr. Paillette noted that the subcommittees and the Commission would have available the work product of the research showing not only the present Oregon law and how it had been interpreted by case law but also a comparison of the laws of other states, the pertinent United States Supreme Court decisions plus the thinking of the various groups in the state of Oregon who had an interest in that particular area.

The approach in California, he said, had been to keep the channels of communication open but at the same time not get the Commission bogged down in an endless series of public hearings that were informative but not too productive.

Legislative Counsel

Mr. Thornton asked where the Legislative Counsel was going to tie into the Commission's work. Chairman Yturri read section 5 of Chapter 573, Oregon Laws 1967, and Mr. Paillette explained that technical assistance as described in that chapter would include drafting and research assistance. He said it was too early to say exactly what the Legislative Counsel Committee would be doing but they would play an important role in the Commission's work.

Chairman Yturri noted that because of budget limitations, the Commission would be forced to rely not only upon Legislative Counsel but also on the law schools, the Attorney General's office and the Bar, among others, to assist them with drafting and research.

Project Director

Mr. Paillette read to the committee the job description he had prepared setting forth a skeleton outline of the duties he anticipated he would be called upon to perform:

> "Responsible directly to the Criminal Law Revision Commission. Charged with implementation and administration of Commission policy and procedures. Supervises and directs professional staff work. Coordinates and participates in research, preliminary drafting and related matters with draftsmen and research consultants. Compiles background materials and prepares policy memoranda for Commission. Submits preliminary drafts to appropriate subcommittees and assists in preparation of final drafts of proposed legislation. Contacts professional and lay groups regarding Commission activities. Informs news media of Commission activities."

Chairman Yturri asked Mr. Paillette what he contemplated his first duties would be and was told that the first priority was to set up a staff for research and drafting. He said he would consult with as many people as possible -- law schools, Legislative Counsel, Bar, etc. -- and discuss their fundamental duties because the structure needed to be set up to accomplish the initial comparative research that would be essential.

Research and Drafting Chief

Mr. Paillette called attention to the organizational chart which suggested a Research and Drafting Chief to work with the Project Director. His duties would be:

> "It is anticipated that the Commission will be able to contract on an honorarium basis with a law school faculty member to fill this important position. He, in turn, will enlist the aid of research and drafting assistants. Projects for research and drafting will be assigned and coordinated by the Project Director in accordance with decisions of the Commission. Preliminary drafts will be submitted to the Project Director for referral to a Revision and Adoption Subcommittee for its consideration."

As outlined in the organizational chart, beneath the Research and Drafting Chief would fall Research and Study, Drafting and other Consultants and under Drafting there would be a Technical Staff. These staff assistants, Mr. Paillette explained, could come from any number of sources, some of them being the ones suggested earlier by the Chairman, but a means of coordinating the work of all these people was essential to insure against duplication of effort and to make certain that each individual knew what he was expected to do.

Professor Courtney Arthur

Preliminary provisions, definitions and statement of policy. Judge Burns noted that all the revised codes contained general preliminary provisions and definitions and there was a great deal of work connected with that area alone. Chairman Yturri agreed this could well be an initial subject for one of the subcommittees and advised that he had asked Professor Courtney Arthur of the Willamette University School of Law to take the first few articles in the Model Penal Code to see how the Oregon code compared with the terminology used in that document and to determine if those terms would conform to Oregon's code.

Justice Gordon Sloan commented that it appeared to be good draftsmanship in a code of this kind to specifically state the legislative intents and purposes of the code as a guideline to exactly what was intended to be accomplished. He expressed the view that the first order of business might be to formulate and draft a policy statement which could prove to be of great assistance to the subcommittees and draftsmen.

Chairman Yturri introduced Professor Courtney Arthur who noted that the Model Penal Code at the beginning set forth purposes and principles of construction which he had found to be most helpful. He also called attention to the drafters' comments following each section and suggested the Commission include both such comments and a statement of purpose in the proposed code.

Offer of assistance. He indicated that the Willamette School of Law would cooperate in any way possible with the Commission and felt it was vital for the welfare of each law school in the state to participate in the revision. He observed that while professors had limitations on their time during the school year, he personally would be delighted to work with the Commission to the extent of his available time and would also offer his services during the summer months.

The Willamette Law School, Professor Arthur said, required each third year law student to write a publishable paper as a writing and research exercise and he could perhaps channel some of this research into the criminal law field so it would be of benefit to the Commission.

Procedure. Professor Arthur said he would agree completely that the Commission should begin work on the substantive law rather than the procedural, one reason being that, temporarily at least, the United States Supreme Court had preempted the procedural field and it might be an exercise in futility to write a procedural code and have it "shot down" in the next six months. He said his definition of the substantive law would include definitions of substantive crime, general principles of criminal law and necessarily would include sentencing.

Professor Arthur believed that prosecutors and judges particularly should be called upon for their ideas because they were involved daily in this field. Supreme Court justices were also an excellent source of information and had available tremendous research facilities in the form of their excellent clerks. The Bar should also be consulted but he suggested that the Commission submit drafts to the Bar rather than calling upon them to produce drafts.

He informed the Commission that West Publishing Company had produced a complimentary copy of the code for some states, when the final draft was completed, to circulate among all members of the Bar and all interested parties and this was a tremendous tool for disseminating information and gaining support.

Professor Arthur said he had worked a great deal with the Model Penal Code and was quite familiar with its contents and suggested that the Commission use it as a basis for its revision in company with other codes. The Model Penal Code, he said, was well organized and was a product of long and thoughtful work by judges, prosecutors, lawyers, teachers and practical people. The research had already been done and the Commission could build upon that research immediately. The Model Penal Code, he noted, looked some technical problems squarely in the face and attempted to solve them. He discussed some of the contents of the Model Penal Code and pointed out its advantages over present Oregon law and suggested that the people conducting the research should begin with the Oregon law, next show the Model Penal

Code provisions, followed by variations of that law as adopted in other codes. He further suggested that everyone working on drafting and research for the proposed code should meet occasionally and exchange views.

Mr. Chandler asked Professor Arthur if he favored simplifying and organizing the code into as few parts as possible. Professor Arthur replied that he would favor such a plan to the extent it could be done without creating an unintelligible situation, but he would not favor simplification to the point where it would cause constant litigation. The highest goal, he said, would be to eliminate problems and arrive at certainty rather than just simplification.

Judge Burns asked Professor Arthur to comment on the code which in his opinion had achieved the best results and was told that he had spent the most time and was therefore most familiar with the Model Penal Code. The Michigan code, he said, looked good because it had the benefit not only of the Model Penal Code, but also of New York, Illinois and other codes and was the most recent in the field.

Plea Bargaining. Judge Burns next asked Professor Arthur to comment on plea bargaining with specific attention to the part the judge should take in such a process. Professor Arthur replied that plea bargaining was a necessary fact of life. He said it created disrespect for the law when defendants found this practice was followed behind closed doors and it would perhaps be better to bring it out in the open. He also believed judges might well become more involved because if negotiations were carried out in the presence of a judge, some unfairness might be prevented.

Chairman Yturri commented that when the judge permitted a plea to a lesser crime and accepted the motion of the district attorney to dismiss the more severe crime, he had in mind the ends of justice as well as the interest of the taxpayers. He said he did not see anything wrong in permitting the judge to do this and if there was a review, the case could be reviewed on whether or not the accused had knowingly waived his rights. Judge Burns replied that there were, however, some Supreme Court decisions which said plea bargaining was all right for the lawyer but not all right for the judge.

Chairman Yturri asked what would be wrong with a law that stated that if a request was made jointly by the accused and the district attorney and if there was a waiver of rights knowingly made, the judge had the authority to accept a plea to the lesser offense. Mr. Knight said he did not think the judge should be actively involved in telling the district attorney or the defendant what type of plea should be entered and should only be involved in accepting the plea.

Mr. Jacob Tanzer suggested that negotiated pleas be reserved for special or unusual cases and expressed the belief that they should be the exception rather than the rule. He was of the opinion that the

court should in no way involve itself in the plea except to see that it was above-board, on the record and voluntary. He thought the matter might be handled by supervisory powers of the Supreme Court but was not certain that it could be handled by statute.

Criminal Appeals by the State

Mr. Chandler said it had been suggested that the state should have a right of appeal in criminal cases in some closely defined areas and asked Mr. Tanzer for his views on that subject. Mr. Tanzer said he agreed that the state should have an expanded right of appeal, particularly in cases of a directed verdict where the case was taken away from the jury. He also noted that the appeal process should be shortened in some manner; perhaps by court rule.

The meeting was adjourned at 12 noon and reconvened at 1:30 p.m. with the same members present as had attended the morning session with the exception of Representative Redden who was testifying before another committee.

Mr. Ed Branchfield, Administrative Assistant to the Governor

Chairman Yturri introduced Mr. Ed Branchfield whom he had requested report on any new developments regarding the possibility of obtaining federal assistance for the criminal law revision project. Mr. Branchfield reported that the situation had changed very little since the last time he had appeared before the Commission.

He had been advised by telephone, he said, that the Crime Coordinating Council would receive $15,000 from the federal government. The funds had been expended on the federal program under which $25,000 grants were made to states so that source was no longer available. He said he felt certain, as did others with whom he had talked, that the Safe Streets and Crime Control Act would pass sometime this year and some federal money would then be available. Oregon, he believed, should have as good a chance to get assistance from that source as any other state.

He said he could not speak for the Crime Coordinating Council but was satisfied that it was the intent of the Council to cooperate with the Criminal Law Revision Commission in every way possible and to assist in submitting their application for a grant once the law had been passed.

Mr. Thornton advised that there were several areas of real controversy involved in the proposed bill. He commented that Mr. Courtney Evans of the U. S. Department of Justice was scheduled to report at the February meeting of the Crime Coordinating Council and at that time Mr. Thornton said he would ask him directly whether it was intended that the bill include aid for criminal code revision.

Mr. Paillette noted that Mr. Evans had written to Norman Stoll of the Law Improvement Committee on April 20, 1967, at which time he said:

> "As regards your inquiry re pending administration legislation, a criminal code revision effort could clearly be included in a state plan under Title I and action grant under Title II of the proposed Safe Streets and Crime Control Act of 1967 . . . "

Policy Decisions

Approval of budget. Chairman Yturri called attention to the proposed budget, a copy of which is attached hereto as Appendix B. Mr. Chandler moved that the budget be approved as submitted and the motion carried unanimously.

Job Descriptions. The Chairman asked if the Commission wished to approve the job descriptions as outlined by Mr. Paillette. Mr. Knight suggested the Commission should not be tied down too much to final decisions at the initial planning stage and other members agreed.

Priority on Procedure. After a brief discussion, Judge Burns moved that the Commission proceed by giving first priority to substantive criminal law with consideration to be given to matters in the procedural law as work progressed. The motion carried unanimously.

Chairman Yturri next suggested that some specific area of the code be selected for the guidance of Mr. Paillette. Mr. Chandler advised that the Commission first decide what kind of revision it was going to undertake -- whether housekeeping, substantive or a complete revision. The enabling legislation, he said, made it clear that the legislature expected the Commission to completely revise the code, and the Chairman directed that the Commission should assume that to be its primary function.

Judge Burns said, "It seems to me we ought to make Don aware that as we are setting out, at this point at least, we want a better road map and we are setting out on the road of real substantive revision. We will draw upon the Model Penal Code and the Michigan code and such other codes as seem appropriate without necessarily wedding ourselves to specific organization or detail, but this is the task we are charting out. We recognize that we have a considerable area of the general provisions in the front part of the Model Penal Code that go along with other provisions and we can use them when we get into the specifics of Crimes Against Persons, Crimes Against Property, etc., but at the outset at least and looking toward the drafts which will emanate from this structure, those are the guidelines we will want to follow. It seems to me that is the way we should be heading."

Chairman Yturri said that in his opinion the Commission should undertake a subject that was not the most difficult but in which they could take some pride when it was completed and suggested Crimes Against Property might be appropriate. Other members of the Commission concurred with this suggestion.

Mr. Thornton suggested that rather than singling out a particular subject, the Commission start with the definitions at the beginning of the Model Penal Code and follow that code through in a chronological order. He proposed that the work at least begin in that fashion.

Chairman Yturri pointed out that he had written to Professor Arthur to ask him to do some research with respect to the preliminary articles in the Model Penal Code and asked him if he had had an opportunity to begin this task. Professor Arthur replied that it would be necessary to start with a new approach to these principles because of the many improvements in the new codes. He suggested that a beginning be made by working concurrently on general principles and on a specific area of substantive law, such as Crimes Against Property, because they were virtually inseparable. The Chairman expressed agreement with this approach.

Representative Harlan moved that the Commission begin by following the outline in the Model Penal Code. There was a brief discussion on the point but no vote was taken on the motion.

Professor Arthur asked who was going to do the actual drafting. Mr. Paillette answered that it would be done by a number of people and that he contemplated setting up a research and drafting staff through the law schools, the Bar and Legislative Counsel. He said that he did not know what the Bar's position would be with respect to how much, if any, drafting they could do. He said he anticipated doing a good part of the drafting himself but would have to rely strongly on others to assist in the drafting process. It was possible, he said, that each subcommittee would have a draftsman to assist the members. He noted that although the ultimate responsibility was his, the size of the drafting project was going to be too great for one individual to accomplish.

Professor Platt commented that the smallest number of draftsmen that could be utilized would be the best number and others agreed with this observation.

The Commission discussed the type of research that would be necessary and it was generally agreed that the present statute should be set out together with Supreme Court decisions affecting that section, if any, followed by the Model Penal Code section and sections from other revised codes.

Advisory Committee. Mr. Knight moved that any action with respect to the appointment or establishment of advisory committees be deferred. The motion carried unanimously.

Subcommittees. Chairman Yturri indicated he would appoint the subcommittees in the near future and the members would be notified.

Future Meetings

Chairman Yturri said he would try to arrange future meetings on week ends for the convenience of the members. A number of future meetings, he said, might be two day meetings with subcommittees meeting much of that time.

Memorial

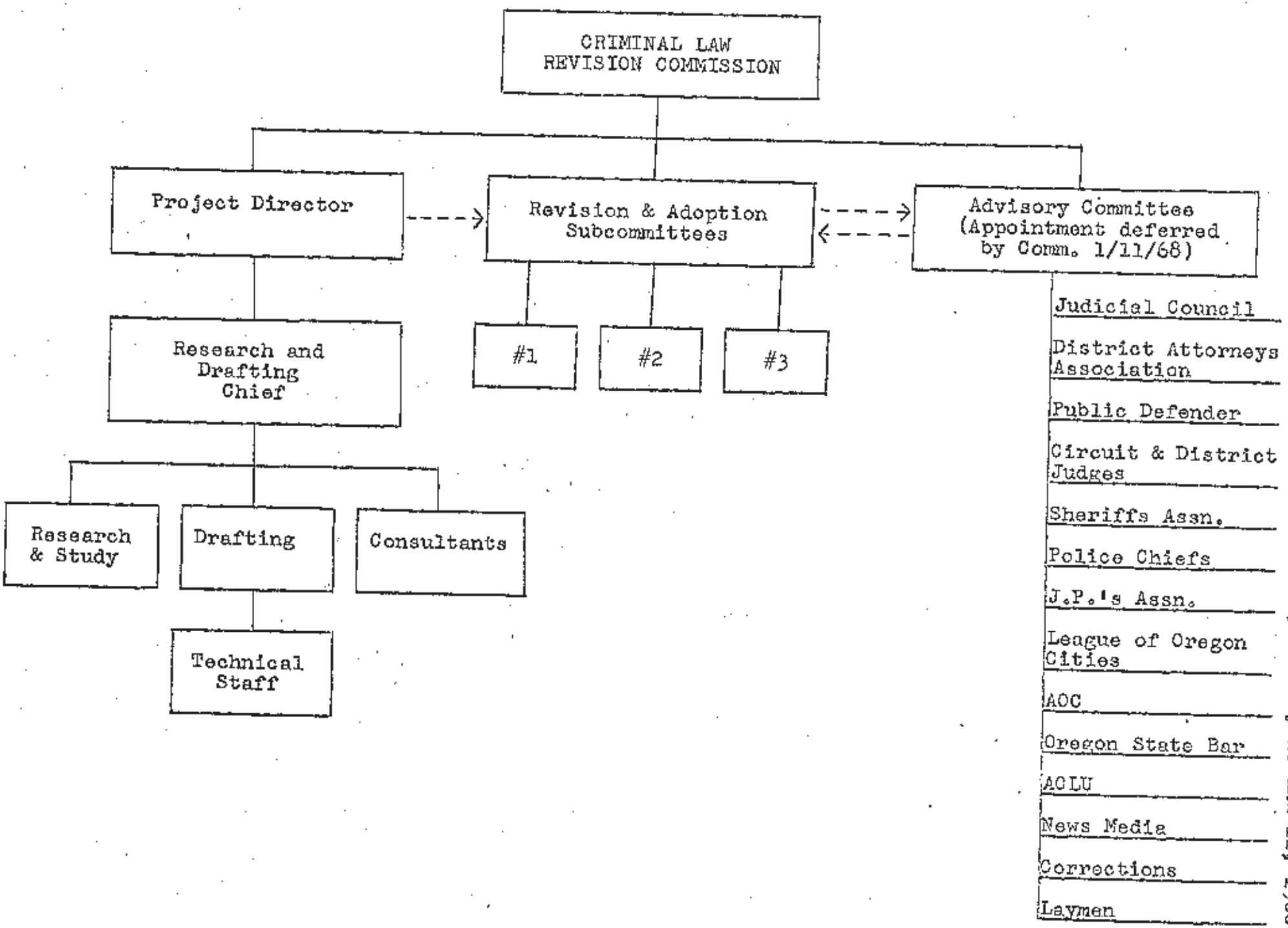
Judge Burns thanked the Commission members for their contributions to the memorial fund for his daughter.

The meeting was adjourned at 2:30 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission

Appendix A - Organizational chart & Job Descriptions
Appendix B - Budget
Appendix C - Roster of suggested appointees to advisory committee



Appendix A
Criminal Law Revision Commission
Minutes, January 10 and 11, 1968

Project Director

Responsible directly to the Criminal Law Revision Commission. Charged with implementation and administration of commission policy and procedures. Supervises and directs professional staff work. Coordinates and participates in research, preliminary drafting and related matters with draftsmen and research consultants. Compiles background materials and prepares policy memoranda for Commission. Submits preliminary drafts to appropriate subcommittees and assists in preparation of final drafts of proposed legislation. Contacts professional and lay groups regarding Commission activities. Informs news media of Commission activities.

Research and Drafting Chief

It is anticipated that the Commission will be able to contract on an honorarium basis with a law school faculty member to fill this important position. He, in turn, will enlist the aid of research and drafting assistants. Projects for research and drafting will be assigned and coordinated by the Project Director in accordance with decisions of the Commission. Preliminary drafts will be submitted to the Project Director for referral to a Revision and Adoption Subcommittee for its consideration.

Revision and Adoption Subcommittees

The Chairman will appoint three revision and adoption subcommittees, each assigned certain specific revision projects. Each subcommittee will be assisted by the Project Director and through him will coordinate the activities of the various lay and professional committees regarding each area of the criminal code under consideration for revision. The subcommittee, upon receiving a preliminary draft, will meet with the draftsman to review the draft, hear the background presentation, and accomplish any redrafting. After giving the preliminary draft tentative approval, the subcommittee can then direct that it be mimeographed in sufficient quantities for circulation among the advisory committee and other appropriate groups for their review and criticism. Further redrafting is accomplished, if needed, and the draft is then referred to the whole Commission for further action.

Advisory Committee

The advisory committee will consist of professional and lay people who will function in an advisory capacity to the Commission. This committee will be encouraged to assist in the law revision activity by reviewing tentative proposals of the Commission and submitting their views and ideas to the Commission.

Appendix B
Criminal Law Revision Commission
January 10 and 11, 1968

OREGON CRIMINAL LAW REVISION COMMISSION

Budget

PERSONAL SERVICES			
Salaries and Wages			
Project Director	12 months x $1200	$14,400	
Clerk	16 months x $480	7,680	
Typist	1 month x $400	400	
Part-time research		3,000	
Other payroll expense (.004)		92	
	Total Personal Services		$25,572
SERVICES AND SUPPLIES			
Travel			
Travel and per diem through 12/31/67		500	
12 two-day meetings @ $400 per meeting	4,800		
Less absentee factor (.01)	48	4,752	
Other travel		500	
	Total travel	5,752	
Telephone			
Service September through December 1967		61	
Service $17.00 per month x 12 months		204	
Toll calls		300	
	Total telephone	565	
Postage		600	
Office supplies		600	
Research materials		1,000	
Printing and duplicating			
Final report		1,000	
Other		700	
	Total printing & duplicating	1,700	
Contingencies		2,411	
	Total Services and Supplies		12,628
	TOTAL BUDGET		$38,200

Persons Recommended for Appointment to Advisory Committee

City Attorneys

Windsor Calkins, Eugene
James Eichelberg, Corvallis
Wallace Gutzler, Woodburn
Chris Kowitz, Salem
Ron Marceau, Bend
Ken Shetterly, Dallas
Harry Skerry, Ashland
Walt Yeager, Portland

College Professors

Courtney Arthur, Willamette University, Salem
Professor Bisuo, University of Oregon, Eugene
Richard Frost, Reed College, Portland
Joe James, Portland State College, Portland
Professor Klonoski, University of Oregon, Eugene
Ron Lansing, Northwest School of Law, Lewis & Clark, Portland
Thomas McClintock, Oregon State University, Corvallis

Defense Lawyers

William Bernard, Portland
Paul Blanchard, Grants Pass (retired)
James Bodie, Prineville
Alex Byler, Pendleton
John Copenhaver, Redmond
Gordon Cottrell, Eugene
Bradley D. Fancher, Bend
Robert Grant, Medford
William E. Hurley, Portland
Arthur Johnson, Eugene
George Joseph, Portland
Bernard Kelly, Medford
James Minturn, Prineville
Lynn Moore, Springfield
Carl Neil, Portland
Jonathan Newman, Portland
Owen Panner, Bend
Eugene Richardson, Newport
Robert Ringo, Corvallis
Glen Rose, Baker
Bruce Rothman, Portland
Herbert C. Schwab, Portland
Irvin Smith, Portland
Bruce Williams, Salem

Persons Recommended for Appointment to Advisory Committee (Cont'd)

District Attorneys

Des Connell, Chief Criminal Deputy, Multnomah County
Jesse R. Himmelsbach, Baker County
Courtney Johns, Linn County
John Leahy, Lane County
Tom Owens, Jackson County
Roger Rook, Clackamas County
Lewis Selken, Deschutes County
Jacob Tanzer, Multnomah County
George Van Hoomissen, Multnomah County

Former Governors

Robert D. Holmes, Portland
Elmo Smith, Albany
Charles A. Sprague, Salem

Judges

Ed Allen, Chairman, Circuit Judges Advisory Committee on Criminal Law Revision, Eugene
Robert Belloni, U. S. District Judge, Portland
Charles Crookham, Circuit Judge, Multnomah County
William S. Fort, Circuit Judge, Lane County
Carl H. Francis, Chairman, District Judges Advisory Committee on Criminal Law, McMinnville
A. T. Goodwin, Supreme Court Justice, Salem
Earl Meisner, County Judge, La Grande
K. J. O'Connell, Supreme Court Justice, Salem
Gordon W. Sloan, Supreme Court Justice; Chairman, Bar Committee on Criminal Law and Procedure, Salem
John C. Warden, Circuit Judge, Coos County

Laymen

Ed Armstrong, First National Bank, Portland
Edward Armstrong, Civil Engineer, Eugene
Frank Ashton, Portland
Harold Clark, Portland
Dike Dame, First National Bank, Bend
James Hill, Pendleton Grain Growers, Pendleton
Carroll Judy, Salem
Oliver Larson, Portland
Esther Lewis, Housewife, Portland
Robert Mest, Duggan-Mest Chevrolet, Klamath Falls
Donald E. Rocks, Portland
Mrs. Sam Roller, Corvallis
Everett Strobel, Insurance Agent, Pendleton
John Sullivan, U. S. National Bank, La Grande

Persons Recommended for Appointment to Advisory Committee (Cont'd)

Ministers

Reverend Frank Evanson, Episcopal, Milwaukie
Joseph Gross, Episcopal, Portland
James McCobb, Methodist, Corvallis
Rabbi Joshua Stampfer, Portland

News Media

Eric Allen, Jr., Mail Tribune, Medford
Forrest Amsden, KGW-TV, Portland
Max Berg, Labor Press, Portland
John Buchner, La Grande Observer
Robert B. Frazier, Eugene Register-Guard
Jim Hill, The Oregonian, Portland
Jim Howe, KEX, Portland
Robert Ingalls, Gazette-Times, Corvallis
Jim Long, Oregon Journal, Portland
Albert McCready, The Oregonian, Portland
Doug McKean, Oregon Journal, Portland
Doug Seymour, The Statesman, Salem
Don Sterling, Jr., Oregon Journal, Portland
Pete Tugman, The Oregonian, Portland
James Welch, Capital Journal, Salem

Parole and Probation

Mike Balkovich, Portland
John Butler, Portland
Tom Price, Portland
Hal Randall, Salem

Prison Officials

Manuel Mike, Multnomah County Correctional Institution
D. E. Sullivan, Oregon Correctional Institution

Psychiatrists

Dr. Paul Blachly, Portland
Dr. Gearhard Haugen, Portland
Dr. Wayne M. Pidgeon, Portland
Dr. James Shanklin, Portland

Police

Captain Dunn, State Police, Baker
Captain Lyle Harrell, Criminal Division, State Police, Salem
H. D. Maison, Superintendent, State Police, Salem
Al Pollentier, State Police, Condon
Myron Warren, Portland Police Department

Sheriffs

Wendell Barnes, Washington County
Tom Bachelder, Marion County
Carl Bondietti, Clatsop County
John Dolan, Benton County
Robert Gillmouthe, Hood River County
James Holzman, Multnomah County
Tex King, Crook County
Morris McDaniel, Benton County
W. L. Mekkers, President, Oregon Sheriffs Association, McMinnville
Guy Murdock, Benton County
Elaine Dahl Rose, Executive Secretary, Oregon Sheriffs Association, Box 360, McMinnville
Joe Shobe, Clackamas County
Forrest C. Sholes, Deschutes County
Eldon Sitz, Harney County