Tape #66
Both sides

OREGON CRIMINAL LAW REVISION COMMISSION
Room 421 Capitol Building
Salem, Oregon

March 20, 1969
1:00 p.m.

A G E N D A

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OREGON CRIMINAL LAW REVISION COMMISSION
Ninth Meeting, March 20, 1969

Minutes

Members Present: Senator Anthony Yturri, Chairman
Judge James M. Burns
Senator John D. Burns
Representative Wallace P. Carson, Jr.
Representative David G. Frost (delayed)
Representative Douglas W. Graham (delayed)
Representative Harl H. Haas (delayed)
Mr. Frank D. Knight
Senator Berkeley Lent
Mr. Robert Y. Thornton

Absent: Mr. Robert Chandler
Mr. Donald E. Clark
Mr. Bruce Spaulding

Staff: Mr. Donald L. Paillette, Project Director

Also Present: Judge Carl H. Francis, McMinnville, Oregon
Justice Gordon Sloan
Mr. Jack Wiseman, Deputy Director, State Board of Parole & Probation, Salem, Oregon

The meeting was called to order by the Chairman, Senator Anthony Yturri, at 1:00 p.m., Room 421, Capitol Building, Salem.

Election of Vice Chairman

Chairman Yturri explained that since the previous vice chairman was no longer serving in the Legislature he no longer qualified for membership on the Commission and it was necessary to elect a vice chairman. He declared nominations in order for that position.

Representative Carson placed the name of Senator Burns in nomination.

Mr. Knight moved the nominations be closed and that the secretary be instructed to cast a unanimous ballot for Senator John Burns as vice chairman of the Commission. The motion carried unanimously. (Rep. Graham, Haas, Frost not present.)

Chairman Yturri noted that both of the drafts on the agenda, Kidnapping and Related Offenses, P.D. #3, and Assault and Related Offenses, P.D. #2, had been considered by subcommittee No. 2 and he, therefore, turned the meeting over to Representative Carson, chairman of that subcommittee.

Kidnapping and Related Offenses; P.D. No. 3; February 1969

Representative Carson pointed out that while subcommittee No. 2 had considered the drafts, it had done so prior to his appointment on the Commission and he asked Mr. Paillette to lead the discussion of the proposed draft.

Mr. Paillette stated that P.D. #3 was the version of Kidnapping and Related Offenses approved by subcommittee No. 2. The format is that followed in other drafts of substantive offenses, beginning the Article with a section on definitions. The definitions apply throughout the Article which is composed of six sections. He advised that the key definitions are the definitions of "restrain" and "abduct".

Mr. Paillette stated that section 2 of the draft sets out the elements of Kidnapping in the second degree. The elements are: an unlawful restraint, knowledge that the restraint is unlawful, a substantial interference with another's liberty, an unconsented to restraint, secreting or holding the victim in isolation and using or threatening to use deadly physical force. This sets out the basic crime of kidnapping.

Mr. Paillette explained that Kidnapping in the first degree is an aggravated offense. It would be those instances where the abduction was for the purpose of compelling a person to pay money or deliver property as ransom; or to hold the victim as a shield or hostage or to inflict serious physical injury; or to terrorize the victim or another person.

Mr. Paillette referred to section 4, Unlawful Imprisonment, and stated that within the framework of the Kidnapping and Related Offenses Article, unlawful imprisonment is a new crime in the sense that there is not a comparable statute under the present penal law.

Mr. Paillette explained that section 5, Custodial interference in the second degree, covered situations which sound of the kidnapping offense but which do not come up to the magnitude of the crime itself.

Representative Frost now present.

Section 2. Kidnapping in the second degree.

Mr. Paillette pointed out that a person commits the crime of kidnapping if he abducts another person. Subsection (2) of section 2 sets out the defense and he reported that there was a good deal of discussion in subcommittee in respect to this as to whether this should appear in the Kidnapping Article at all or whether it should appear elsewhere in the code. It was felt by the subcommittee that the defense would apply specifically to kidnapping and should be set out in the kidnapping Article.

Mr. Paillette advised that subs (a), (b) and (c) of section 2 (2) are all required to make out the defense to the crime of kidnapping. The language "the burden of injecting the issue" is tentative language. Although the Commission has approved similar language with respect to defenses in the Comprehensive Theft Article, the subcommittee recognized that this provision would be subject to modification. The Commission might ultimately utilize this language, which is borrowed from the Michigan proposal; or might frame it in the form of a defense and set out that the burden is on the defendant by a preponderance of the evidence; or might set it out as an affirmative defense. The policy decision in subcommittee was that whatever form the Commission decided to use, there should be a defense available if all of the factors were present.

Chairman Yturri asked if the word "deadly" were defined anywhere.

Mr. Paillette replied that "deadly physical force" is defined in the Definitions Section of the Preliminary Article. Although the Kidnapping Draft was written before the general definitions were formulated, he said the Kidnapping Draft proceeded on the assumption that the definition would be that deadly physical force was the kind of force that is likely to cause serious physical injury or death.

Mr. Paillette remarked that the Kidnapping Draft, as well as the Assault Draft, was drafted by Jeannie Lavorato. Miss Lavorato is no longer with the Commission but did present the draft to the subcommittee and did the basic background research on the Article.

Mr. Paillette referred the members to the commentary in the draft and observed that the concept in the proposed draft is not a very great departure from existing law in substnace although the structure is changed quite a bit. Two separate sections are proposed, each one dealing with a separate degree of the crime. He noted existing statutes, in effect, provide for the aggravated type of kidnapping in ransom situations.

Judge Burns observed that the thing that bothered him about the term "deadly physical force" was its use where it is and also because as he read it on page 2 it is virtually a circular definition with "serious physical injury". He read from the commentary: "'Serious physical injury' means physical injury which creates a substantial risk of death, . . ." and then "'Deadly physical force' means physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury." He noted that if "deadly physical force" was used or threatened to be used, that under second degree kidnapping a defense cannot be made out and it would be first degree kidnapping if one of the actor's purposes was to inflict "serious physical injury" upon the victim. Judge Burns said he could not see any difference between the two and he felt there would be great difficulty in framing the indictments and in the proof problems.

Judge Burns also called attention to the use of "serious bodily injury" in section 4 of the draft.

Mr. Paillette stated that this was a typographical error and the wording should be "serious physical injury".

Senator Lent did not agree that there was a circuity in the definitions. He felt that one term defined an injury while the other defined the force producing the injury.

Judge Burns pointed out that the language in section 2, subsection (2)(a) read "with intent to use or to threaten to use deadly physical force" and that in section 3 subsection (3) " [purpose] to inflict serious physical injury". In neither instance would it necessarily mean that the actor actually inflicts serious physical injury or uses deadly physical force; the condition exists of the danger of the use as opposed to actual infliction.

Mr. Paillette explained that the attempt in the proposed draft was to provide a defense in a very limited type of situation--the family situation. Even though the actor was a relative and he had the sole purpose to assume control of the person, if in so doing there was evidence that he intended to use or had threatened to use deadly physical force, the defense would not become available to him. He noted that the definition of "deadly physical force" is important here and also in justification as a defense. The "serious physical injury" definition becomes important in the robbery context and is also extremely important in the Assault Draft. In the Assault Draft the definitions become important because the seriousness of the injury will determine the seriousness of the assault crime. He did not feel the definitions were circuitous for the reasons set forth by Senator Lent.

Judge Burns asked if it were Kidnapping in the first degree to abduct a person with the purpose of inflicting serious physical injury on him; could not first degree kidnapping be made out of any case where the circumstances were such that a substantial risk of death or serious disfigurement, etc., were actually created.

Chairman Yturri asked if under Kidnapping in the first degree, it requires the purpose to use deadly physical force to inflict a serious physical injury. He felt a serious physical injury could be inflicted without the use of a deadly physical force. He asked to whom the "deadly physical force" in second degree was to be directed--to the victim or to someone else.

Mr. Paillette replied that under first degree the force could be directed to the victim or to another person.

Mr. Knight referred to the language in section 2 subsection (2)(a) ". . . coupled with intent to use or threaten to use deadly physical force;" and asked if this was not really threatening physical injury.

Chairman Yturri felt there would be a void unless something were added to "deadly physical force". It has to be upon the victim or upon another.

Senator Lent suggested that sub (a) be amended to read: "The abduction is not coupled with intent to cause or the threat to cause serious physical injury;". This would get rid of the "deadly physical force" altogether.

Judge Burns agreed that this would help.

Representative Haas now present.

Senator Burns advised that he had sat in on the meeting of subcommittee No. 2 when it considered P.D. #2 and the subcommittee made the policy decision to insert the defense as a part of kidnapping. He felt the Commission should address itself to this policy.

Mr. Paillette advised that the commentary speaks to this on page 7 of the draft. He noted that what is being looked at specifically is the parental kidnap situation. Oregon presently has not only kidnapping provisions but also has a separate statute on taking away a child with intent to detain from a parent. Courts have generally held that the parent who abducts his child is guilty of kidnapping if a custody decree has been entered but is not guilty in the absence of such decree. The minority of the states have departed from this rule, he said, by exempting parents from kidnapping altogether or they have mitigated the seriousness of the offense. He noted that parents are exempt from the Federal Kidnapping Act.

Mr. Paillette remarked that when the draft was being put together it was felt that, generally, parents should be exempt from kidnapping and other sections directed toward that situation. It would be a relative minor offense--custodial interference. Since custodial interference would probably be a misdemeanor, it was felt there might be instances, because of the acts of the parent, where it might warrant a felony prosecution. Particularly when a child is removed from a parent and stolen from the state.

Representative Frost referred to the language in section 3 sub (3) "to inflict serious physical injury or to terrorize . . ." and thought a relative or husband picking up a child and taking it home with him could be guilty of first degree kidnapping when he could not be under second degree. Most of the situations arising would involve the terrorizing of either the mother or the father.

Judge Burns thought the problem arose because there was no definition of "terrorize".

Chairman Yturri agreed with Representative Frost and quoted from the commentary: "If the relative abducts the child for any other purpose, e.g., extortion, terrorization of the mother, perpetration of any crime upon the child, then the exclusion does not apply and the abductor may be found guilty of kidnapping."

Senator Lent observed that both first and second degree kidnapping depended upon someone abducting someone so that "abducting" becomes the key. He noted that the definition of "abduct" is to "restrain a person" and that the definition of "restrain" is to restrict or take someone someplace "without his consent and with knowledge that the restriction is unlawful," and asked what makes the restriction unlawful. Abducting someone is made kidnapping and that is the only way it becomes unlawful.

Representative Frost questioned that the language "and with knowledge that the restriction is unlawful" in section 1 was needed.

Mr. Knight did not know why it had to be in the section except perhaps to define the mens rea.

Mr. Thornton observed that the MPC contained the word "terrorize," also without defining it.

Representative Frost picked out the language "without his consent" in section 1 and said this imputes consent can be given whereas there is the situation of children and incompetents who are incapable of giving consent.

Mr. Paillette advised that the draft sets out what "without consent" is, however.

Senator Lent questioned that the language "without his consent and with knowledge that the restriction is unlawful" could be deleted because of the problem of the policeman making an arrest.

Mr. Paillette recalled that this was one of the points discussed in subcommittee. He noted that "restrain" is not only used in the kidnapping sections but would come into play later on in other sections, also--unlawful imprisonment talks about "restrain". The definition of "restrain" was intended to cover the situation of detention by an officer or in a store (shoplifting). It was felt there should be some language in the definition which would not place them in the framework of penal sections.

Mr. Knight asked if there was not a better way of defining a mens rea for something than saying" with knowledge that [it is] unlawful". It seemed to him that a defendant would use lack of knowledge that an act was unlawful as a defense and, technically, if he could convince a jury, he would have a good defense even though intending to do specifically what the draft is trying to get at.

Chairman Yturri observed that Michigan and the MPC did not have that problem.

Senator Lent thought that what the draft was trying to state is that the restriction is without consent and with knowledge that it is not privileged or authorized by some other rule.

Judge Burns referred to Section 212.4 of the Model Penal Code, Interference with Custody, and noted it talked about the child situation and used the language ". . . he. . . takes or entices any child . . . from the custody of its parent, . . . when he has no privilege to do so." He did not feel in this section a definition of "privilege" was needed.

Chairman Yturri advised that Illinois defines "Unlawful Restraint" as follows: "A person commits the offense of unlawful restraint when he knowingly without legal authority detains another." He thought this was what should be incorporated in the draft.

Senator Lent suggested the language "without his consent and without legal authority" be used.

Judge Francis cited instances where officers take berserk individuals into custody and wondered how the situation would be covered under the definition in the draft. These would be emergency situations where persons would be placed in confinement and where no sanity petition would have been filed. He wondered if some privilege should be spelled out in the statute.

Judge Burns advised that in Portland some 20% to 40% of the mental hearings originate where the person is actually taken into custody by an officer who does not lodge a charge against the individual; the individual is obviously disturbed and is taken into custody and taken to a hospital.

Mr. Knight referred the members to ORS 426.215 and read:

> "Any peace officer may take into custody any person who he has reasonable cause to believe is dangerous to himself or to any other person and who he has reasonable cause to believe is in need of immediate care or treatment for mental illness. If a peace officer takes a person into custody under this section, he shall remove him forthwith to:
>
> (a) A hospital,. . ."

Senator Burns moved to amend section 1 (1) be deleting "with knowledge that the restriction is unlawful" and inserting "without legal authority".

Representative Frost thought the Commission had glossed over the basic policy decision of whether or not to include the parental kidnapping as an offense. He asked if there was a child stealing section that would be a misdemeanor.

Mr. Paillette replied that it could come under custodial interference which would be a misdemeanor.

Mr. Knight noted that if the child were taken across a state line it would become custodial interference in the first degree and this would fall into the felony class.

Mr. Paillette advised that this was necessary in order to extradite the individual from another state.

Senator Burns' motion to amend section 1 (as above) carried unanimously. (Rep. Graham not present).

Senator Burns moved the adoption of the definitions as drafted. Judge Burns said he would second the motion but he wanted to be heard on two or three of the definitions.

Judge Burns quoted from section 1 (1)(b), which defines when restraint is without consent, ". . . if he is a child who has not yet reached his sixteenth birthday or[is]incompetent person and the parent, guardian or other person having lawful control . . ." and asked if this meant legally declared incompetent. He thought this should be specifically stated one way or the other in that a person could very well have lawful control of someone who is an incompetent and yet there might not be any order of guardianship that has established that formal relationship.

Chairman Yturri did not feel the language meant legally declared incompetent.

Mr. Paillette said that he did not believe that the drafter had in mind requiring that there be a court order. He did not think the New York drafters intended that either.

Senator Burns recalled that the subcommittee had discussed this and had desired that a degree of flexibility be left there. He thought this flexibility was desirable so that it would be a matter of proof.

Judge Burns was satisfied with this as long as the commentary would make it clear that that was the Commission's intent.

Mr. Knight wondered if the definitions were creating a "statutory rape" situation in that it relates to "moving him from one place to another... without consent" and anyone under sixteen could not give consent. He cited the eighteen year old who takes out a fifteen year old girl.

Senator Lent did not think this would be a problem because the restraint does not become part of the crime unless it also becomes a part of abduction.

Mr. Knight thought it would become a problem wherever it is a part of a crime to restrain a person without abducting him.

Mr. Paillette observed that even there it would require that the restriction of movement be intentional to come within the definition of restraint.

Judge Burns said he would also like to speak on the definition of "relative".

Senator Burns moved to amend his motion so as to insert the word "is" after the word "or" and before "an" in section 1 (1)(b).

The language would then read: "...child who has not yet reached his sixteenth birthday or is an incompetent..."

Chairman Yturri announced that hearing no objection, the motion would be so amended.

Senator Lent stated that it had been established that the Commission meant the language in section 1 (1)(b) to mean incompetent in fact and not incompetent in law, necessarily. He asked what the incompetency referred to--incompetency for what purpose; to make a contract, to make a will?

Senator Burns thought the intent was mentally incompetent.

Senator Lent asked if there was some definition of that somewhere that would be of aid.

Mr. Knight observed that a physically incompetent person would still have the mental competency to consent.

Representative Frost asked if they were talking about someone incapable of understandingly consenting to the taking or to the restraint. If this were so, he agreed with Senator Lent that the definition did not accomplish this with the use of the word "incompetent".

Mr. Thornton suggested that the word "an" could be deleted and the language "a mentally" be inserted before the word "incompetent" in section 1 (1)(b), but he thought it would get into the danger of contention that a person would have to be legally declared incompetent.

Senator Burns did not think this would get to the question raised by Representative Frost nor to the hypnosis situation, either.

Representative Frost thought perhaps language to the effect that he was "unable to understandingly consent" or "incapable of consent" could be put in. He thought the problem was the use of the word "incompetent".

Justice Sloan suggested saying "unable for any reason to understandably give a consent".

Chairman Yturri thought the same problem would be encountered in trying to determine the meaning of "unable to understandably give a consent".

Judge Burns was of the opinion that this was a problem that could be much better handled in subcommittee.

Mr. Paillette requested an indication from the Commission as to whether or not there was agreement that there should be some provision to cover this type of situation.

Senator Lent thought it was necessary to go back to another situation, also; the question of whether anyone under sixteen is incapable of consenting or whether the whole thing should be tied in to a question of fact as to whether or not the person understands what he is doing and is capable of making a decision as to whether or not to go along. He questioned that there should be an artificial standard and then an actual, factual standard.

Representative Carson suggested the language "...anyone by reason of age, mental incompetency, [etc.] is incapable of giving a valid consent" and leaving that to a fact determination. The age would be one circumstance; in a given case fifteen might qualify.

Mr. Knight did not see any reason for an artificial standard (age) in this when it is still in rape situations.

Senator Burns noted that the Commission was at a disadvantage in considering the draft because the drafter, Miss Lavorato, was gone and the subcommittee members considering it through the three drafts are gone also. He thought the rest of the Kidnapping Article was less controversial and easier to get through but he thought it might be in order to delay further consideration and go on to the Assault Draft.

Senator Burns felt the subcommittee should receive some direction as to which way the Commission felt the draft should go on kidnapping. He noted that the draft, the New York approach, with the affirmative defense in it and with the definitions in it, is quite a departure from the Model Penal Code approach. The MPC approach, he said, is really simpler and the Commission might think the draft should go the MPC route. This would obviate the questions with respect to age, with respect to definitions and with respect to the affirmative defense.

Justice Sloan asked Senator Burns if he was referring to MPC Section 212.1 and Senator Burns said that he was.

Justice Sloan informed the Commission that he had attended one subcommittee meeting on the Kidnapping Draft and the thing the subcommittee had wrestled with and which drew them away from the MPC was the language referring to the removing of another from his place of residence or business. The subcommittee felt this was too restrictive.

Senator Lent thought the MPC approach could be used but be broadened without too much trouble.

Mr. Paillette pointed out that the MPC contained an age of consent of fourteen.

Section 4. Unlawful imprisonment.

Mr. Paillette informed the members that the big decision here was whether they even wanted an unlawful imprisonment statute to take care of some of the minor situations which perhaps should be penalized under the criminal code but which should not be considered kidnapping. The derivation of the section is the New York code, Section 135.10 and it is similar to Section 212.2 of the MPC. He noted, however, that the draft contained but one degree of the offense whereas New York has two degrees. It was discussed in subcommittee as to whether or not there presently were ample civil remedies and whether or not the section was even necessary in the draft.

Senator Burns recalled that the earlier drafts had contained two degrees of unlawful imprisonment and that he had moved to restrict the draft to one degree of the offense. He read from the subcommittee minutes the discussion relating to this subject. See Minutes, Subcommittee No. 2, December 12,1968, pp. 6-9.

Judge Burns asked what kind of circumstances would fall into section 4 that would not fall into sections 2 or 3.

Mr. Paillette replied that one possibility brought up in subcommittee was the example of the college campus situation. The case where the college president might be locked up in a closet while the campus was taken over. It would be a question of fact, he said, as to whether the situation would expose him to the risk of serious physical injury.

Senator Lent said he could still see no difference between unlawful imprisonment and kidnapping in the second degree.

Mr. Paillette stated that "abduction" was needed in kidnapping.

Senator Lent pointed out that one meaning of "abduction" is "to restrain a person with intent to prevent his liberation by...using or threatening to use deadly physical force".

Judge Burns added that this, in turn, means, "using force under circumstances which readily are capable of causing serious physical injury."

Senator Lent thought that Section 4 was simply a part of the definition of "abduct". He thought it would have the same meaning if unlawful imprisonment read," A person commits the crime of unlawful imprisonment if he abducts another person...".

Senator Burns moved to delete section 4, Unlawful imprisonment. He felt it so very close to civil remedies that it would invariably get the district attorney into civil disputes and it would run the danger of running parallel to second degree kidnapping.

Mr. Knight observed that this could present a Pirkey problem.

Mr. Paillette indicated that in subcommittee he had not been persuaded that the section was needed but the subcommittee felt it should be considered by the Commission.

The motion to delete the section carried unanimously. (Rep. Graham not present.)

Section 5. Custodial interference in the second degree.

Mr. Knight noted that the section used the terms "incompetent" and "committed" and that it defines "committed". He asked if the defining of "committed" did not turn around and get to the point of defining "incompetent".

Mr. Paillette repeated his earlier contention that in using the term "incompetent" the draft did not necessarily mean an incompetent who had been adjudged an incompetent, as such. A "committed" person could include an "incompetent" but he did not think that by that definition the draft was restricting "incompetent" since it is used in the alternative--"...any incompetent or committed person...".

Representative Haas asked if there was not a conflict between section 5 subsection (1) where it states,"...he takes or entices any child who has not yet reached his sixteenth birthday from the custody of its parent" (the policy being that this is just being used as a cut-off date) and subsection (2) where it states, "...or other dependent...entrusted to another's custody by...authority of law." A seventeen or eighteen year old could be "entrusted to another's custody...by authority of law."

Mr. Knight asked if under subsection (1) you could entice a sixteen year old away from his parents but under subsection (2), if you enticed a sixteen year old away from a foster home you would be committing a crime.

Judge Burns remarked that the language"...or other dependent...entrusted to another's custody...by authority of law" could be a father and mother.

Judge Francis asked if the Valley Migrant League was a "recognized social agency".

Judge Burns felt that "recognized social agency" is a term that ought to be avoided.

Mr. Thornton was of the opinion that the language needed a little tightening up.

Chairman Yturri felt the solution was to send the draft back to subcommittee for further consideration.

Judge Burns had a couple of things he wanted to bring up for the benefit of the subcommittee. First, he referred to section 6, Custodial interference in the first degree, subsection (2), to the language, "...the

person's safety will be endangered or that his health will be materially impaired" and said it seemed to him that these were significant differences from the previous language of "serious physical injury" and should be cleared up. Secondly, he felt the subcommittee should take a look at the definition of "Relative" in section 1. It refers to "adoptive relative of the same degree through marriage or adoption" and he thought this needed some attention.

Mr. Paillette asked for some expression from the Commission as to the policy changes desired.

Chairman Yturri asked the Commission members for some direction in respect to including, for example, the defenses in second degree--should the MPC be followed or the Illinois or the pattern in the draft.

Senator Burns was of the opinion that a basic policy decision had been made early to avoid affirmative defenses as much as possible throughout the whole revision. He thought the subcommittee should make every effort to avoid an affirmative defense here. With that in mind, he felt the MPC approach more concise even though it contained some disturbing language such as, "a substantial distance" and "for substantial period",etc.

Senator Burns stated he felt the crime of "Custodial interference" should be retained.

Mr. Knight questioned doing away with the affirmative defense.

Judge Burns thought this was a matter of drafting, essentially.

Mr. Paillette referred to section 3, Kidnapping in the first degree, and asked if it was the feeling of the Commission that the reasons set forth were good and acceptable for enhancing the degree of kidnapping.

Judge Burns said that he would be much happier with a definition of "terrorize" and he also wondered if some commentary language might be useful in defining "hostage". He was not sure the term has such a degree of acceptance so as to be readily acceptable.

Senator Burns suggested Mr. Paillette use the robbery and burglary enhancement factors. He thought there was a common enhancement factor that had been applied uniformly through robbery, burglary and others. He felt, also, that some difficulty is run in section 3 (1) of going headlong into extortion.

Assault and Related Offenses, P.D. No. 2; February 1969

Representative Carson asked Mr. Paillette to give the Commission a broad overview of the draft and then to go through it section by section.

Mr. Paillette related that the draft was divided into five sections: Assault in the third degree; Assault in the second degree; Assault in the first degree; a new crime called "Menacing"; and another new one called "Recklessly endangering".

He advised that under the draft assault is made a separate substantive offense. The seriousness of the crime of assault depends upon the culpability with which the defendant committed the act, the seriousness of the injury inflicted upon the victim and the means employed, such as a dangerous or deadly weapon.

Mr. Paillette read a statement from the New York commentary with respect to assault which he felt applied equally to the proposed draft:

> "The proposed assault formulation, requiring actual physical injury, places the crime of assault in the main category of offenses (robbery, larceny, perjury, etc.) which are committed only when the offender succeeds in his criminal objective. And as with other offenses of this nature, an unsuccessful endeavor (a common law assault not resulting in a battery) constitutes an attempt. Attempted assault, then, will be governed by the same rules which apply to attempts to commit other crimes. It will be necessary to discuss attempted assault in terms of the law of attempts, in particular in regard to the elements of proximity and impossibility."

Senator Lent excused from meeting.

Mr. Paillette informed the members that the Article Inchoate Crimes, which includes attempts, is drafted in rough form and he thought it would be helpful to keep this in mind when considering the Assault Draft. He said that Professor Platt is working on the "attempt" definition and his early draft defines "attempt" this way: "A person is guilty of an attempt to commit a crime when he purposely engages in conduct which would constitute such crime by performing or omitting to perform an act which constitutes a substantial step toward commission of the crime."

Mr. Paillette advised that this definition is quite similar to the approach that has been taken by the MPC, California and others, although the language is a little different. The draft approach to assault, then, is quite a change from the existing law in that it requires injury to the victim.

Assault in Oregon case law, he said, has been defined as "any intentional attempt by force or violence to do injury to the person of another coupled with the present ability to do such injury." He referred to the commentary and read from page 10. Mr. Paillette noted that the commentary cited State v. Wilson, a 1959 Oregon case, and read comments made by the Oregon Supreme Court in the case. See Commentary, p.10.

Representative Carson excused.

Mr. Paillette advised that it is intended that an attempt to commit an assault is a lesser included offense and the conviction under this draft would be for an attempt where that is shown by the evidence but not the assault.

Mr. Knight stated that State v. Wilson was completely thrown out with the definition of assault because under the draft assault is the battery and not the assault. The question in State v. Wilson, he said, was if you used the definition of an assault as being an attempted battery, could you have an attempted assault because it was an attempt to commit an attempt. The court said no, assault was a separate crime so you could have an attempted assault. Now, he continued, that would be an attempted attempted assault which the Supreme Court got around by saying assault was a substantive crime, not an attempted battery.

Mr. Paillette said he thought it still would not be attempted assault under the proposed draft.

Mr. Knight thought it might be covered under attempted assault if the definition of attempt goes far enough back--much farther back than the case law definition of attempt now. In Wilson, he related, it was argued that the defendant did not have the present ability to assault his wife because she was some place where he could not get at her.

Judge Burns pointed out that he has taken a substantial step toward, which, essentially, is the "guts" of the attempt draft and is probably what will be adopted. He is attempting it when he is running around a building looking for his wife--this is a substantial step.

Mr. Paillette said that that is the reason the definitions of attempts found in the MPC are moving farther back into the preparation stage. If it can be determined that a substantial step has been taken toward a commission of a crime, it is going to amount to an attempt.

Mr. Knight asked if "Menacing" was to be classed as a misdemeanor. Mr. Paillette thought it would be so classed. Mr. Knight then concluded that it would be a misdemeanor for someone to wave a pistol around regardless of whether it is loaded or unloaded unless he actually shoots at the person. Then, he said, it would be attempted assault. Just pointing the pistol at someone does not necessarily mean that the actor is planning to use it. It does put the other person in fear of being shot but does not mean the actor plans to use it--which would then be attempted assault. It would be menacing, he said, unless the person were actually shot.

Mr. Paillette pointed out that the draft contained section 5, recklessly endangering another person, which covers reckless-type conduct where there may not be an attempt to either frighten or to injure anyone. It is necessary, he said, to read all of the sections together; just because an offense is called somethi[illegible] else does not mean that it will not be covered.

Mr. Knight asked if section 5, Recklessly endangering, would not also be a misdemeanor.

Mr. Paillette asked if Mr. Knight's objection was that this type of conduct should be a felony.

Mr. Knight replied that when someone waves a pistol around, regardless of whether someone is shot, it is a felonious assault situation. He thought perhaps the attempt definition could be made broad enough to cover that type of situation.

Mr. Paillette observed that the difference in the type of culpability must be kept in mind--whether the conduct is intentional or reckless. One of the present statutes, pointing a firearm at another, is a misdemeanor offense because it envisions reckless conduct, not an intent to shoot someone.

Mr. Knight remarked that under present assault the actor does not have to actually pull the trigger whereas under the proposed definition it would depend upon the injury to the person not upon the danger to the person.

Senator Burns thought that one had only to look at the first page of the draft and the list of existing statutes to see that the present law on assault is one of the biggest hodge-podges that Oregon has. The Supreme Court recognizes this, he said, because most of the laws as far as assault is concerned, now, are case law rather than statutory law. He felt that the subcommittee did a fine job and that it is moving in the right direction to separate assault and battery and to get away from the conventional concept. Before he sat in on the subcommittee meeting, Senator Burns admitted that he, too, had the reservations expressed by Mr. Knight.

Representative Frost stated that there were a number of things in the draft which were bothering him, also. First, the classical definition of battery is being taken and called assault; then, the question of definitions worried him. He noted the commentary contained definitions of deadly weapon and dangerous weapon and he assumed that a car could be a dangerous weapon. He asked if the draft covered the situation where a wife runs her husband down with a car. He asked, also, if the definitions appeared someplace in the statutes.

Mr. Paillette replied that the situation of the wife running her husband down with a car would be covered under the draft. He advised that the definitions of "dangerous weapon" and "deadly weapon" will be included in the General Definitions Draft and have been approved by the subcommittee considering the draft.

Representative Frost referred to the language "manifesting gross indifference" contained in section 3, assault in the first degree, and asked if this would also be a statutory definition.

Mr. Paillette answered that it was not anticipated that this term would be defined. He recalled that the first draft had used the language "extreme indifference" and that the subcommittee had objected to this. The subcommittee felt the term "gross" had a rather fixed meaning in the law.

Representative Frost asked if "gross indifference" had a readily recognizable, understood meaning; it did not to him.

Chairman Yturri noted that there had been discussion in the subcommittee on this very subject and read from the minutes of subcommittee No. 2, February 20, 1969, pp.18-19.

Representative Graham now present.

Representative Frost wondered why it was not possible to just go to "reckless and wanton disregard to the life of another". He asked if "gross indifference" meant something.

Senator Burns observed that "wanton" had been completely eliminated throughout the code. He felt that "gross indifference" had meaning.

Judge Burns said there was presently a second degree murder statute which reads:

> "Any person who kills another by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any design to effect the death of any particular individual, is guilty of murder in the second degree."

He said that this would cover the situation where a gun is fired into a house or into a crowd or where a heavy object is dropped from a building, etc. It seemed to him that the phrase "gross indifference" could be adequately covered by the use of such examples typical in the commentary of the MPC, without meaning that it has to be exactly that. He thought that in this sense "gross indifference" is meaningful to a jury and was not sure that it would be necessary to have the court define it further for the jury.

Chairman Yturri again referred the members to the minutes of subcommittee No. 2, February 20, 1969, saying there was a good deal of discussion set forth on this very subject before the draft being considered by the Commission was approved by the subcommittee.

Mr. Knight observed that what is presently assault with intent to kill will simply be covered by what the Supreme Court has already, by opinion, made attempted first degree murder, attempted second degree murder, attempted manslaughter. When discussing assault in the first degree, he continued, it does not mean what is now thought of as assault with intent to kill; that would be attempted murder.

Judge Burns noted there would have to be a physical injury resulting to come under first, second or third degree assault.

Mr. Paillette stated that the draft does away with all of the "assault with intent to" do something else crimes now in the statutes--assault with intent to rob, assault with intent to rape; all of those would be looked at as an attempt to commit that substantive crime--the crime of robbery or rape.

Mr. Knight thought this was fine; his whole objection to this would fairly well be taken care of if there were a comparable statute to what is now assault with a dangerous weapon. In the present draft about the only place it would really fit would be in the menacing.

Judge Burns thought it would also fit into the "attempts".

Mr. Knight still thought that unless the prosecution could show that the actor actually had the intention of using the dangerous weapon, he could not be prosecuted for attempted assault.

Judge Burns observed that the actor's intentions are never known except by a construction of his activities and that would be a matter of proof, which it is now.

Mr. Knight said that he simply felt that waving a loaded gun around is a dangerous act; there is enough danger that someone will get killed or seriously injured that it should be a felony crime to do it regardless of whether the actor is actually intending to shoot a person with the gun or just intending to threaten a person with it.

Representative Carson now present.

Judge Burns thought the kind of conduct described by Mr. Knight might be called an attempted assault; it would depend whether or not the actor's conduct was what would be called a "substantial step" toward the completion of one of the degrees of assault.

Mr. Knight remarked that causing a physical injury would have to be the actor's ultimate aim because assault under the draft is only causing physical injury; it is not putting the victim in fear of physical injury.

Chairman Yturri asked Mr. Paillette if there was to be any other section in the code on the use of firearms besides "recklessly endangering".

Mr. Paillette replied that he could not say, off-hand, whether there would be anything that would specifically cover the situation raised by Mr. Knight.

Judge Burns pointed out that the commentary covering section 5, recklessly endangering another person, states that "this section is intended to cover the reckless pointing of firearms and, therefore, it was deemed

unnecessary to include a special subsection prohibiting this particular conduct. The rude or threatening exhibition of deadly weapons will also be covered by [other] sections...". He assumed that all Mr. Knight wanted was for section 5 to be a felony.

Senator Burns thought that from a proof standpoint there would be fewer proof problems involved in prosecuting someone running around waving a gun under the provisions in the proposed section 5 than there would be in charging him with assault now.

Mr. Knight thought this might be so but he thought the actor should possibly face a penitentiary sentence rather than sixty days in the county jail. If the proposed section 5 were not graded as a misdemeanor offense, there would be no problem because there would still be a felony crime of assault with a dangerous weapon.

Senator Burns pointed out that the offenses had not been graded as yet. He thought it might possibly be made an indictable misdemeanor but he thought it should be approached at the time the offenses are graded and the penalties added.

Representative Frost referred to section 1 and section 2 of the draft and gathered that the difference between the sections in a common garden variety fistfight would be the result of the fight. This would determine the degree of the crime rather than the intent of the actor delivering the blow. He did not think it should be the result; it should be the intent.

Mr. Knight pointed out that it all hinged on defining assault as a battery.

Representative Carson contended that if you asked the average person what assault is he would not talk about the fine, legal distinctions taught in law school. He also pointed out that in the area of assault the whole penalty structure is measured on the relative success of the assault.

Mr. Knight noted that in homicide the penalties were based on the actor's plan, whether there was premeditation, malice, negligence, etc. It is not the accomplished fact that makes the degree different. He felt when discussing arson and robbery, for instance, that the possible danger to the victim was important, not what was actually accomplished.

Representative Frost added that in burglary it was the breaking and entering with the intent that was bad. He was not sure that it would be possible to get away from some types of grading based on intent and the different types of weapons used, but he thought that a fistfight, regardless of the result (less than death), should be one degree.

Mr. Knight stated that at the present time the difference between simple assault and battery and aggravated assault and battery without the dangerous weapon is the use of means and force likely to produce serious bodily injury.

Judge Burns remarked that presently, in most instances, in personal crimes, the intent is determined by the result. The intention and culpability is measured by the result and he did not think the proposed draft was departing from that policy at all.

Judge Burns commented on the use of "intentionally" and "knowingly" in the first three sections defining assault and wondered why both terms were needed. He observed that the MPC contained a definition of "knowingly" but he did not believe there was one of "intentionally".

Mr. Paillette replied that the MPC does not define "intentionally" but it does define "purposely", which is basically the same as the draft definition of "intentionally". The culpability definitions in subcommittee at this time include a separate definition for "intentionally" and a separate definition for "knowingly". They comprehend different states of mind.

Judge Burns noted that section 1 (2) reads,"negligently causes physical injury to another by means of a deadly weapon" and that the chart on page 4 of the commentary under the "Comments" column reads,"This subsection covers any deadly weapon including any type of vehicle, any vessel or aircraft." He did not think this comment complied with the definition of "deadly weapon" appearing on page 2, a weapon "designed for and presently capable of causing serious physical injury." He did not think an automobile was a deadly weapon.

Mr. Paillette said that this was a drafting error. It was discussed in subcommittee and the chart should reflect the change to both "dangerous" and "deadly" weapon.

Senator Burns referred the members to the subcommittee discussion of this matter in the minutes, subcommittee No. 2, February 20, 1969, pp. 10-12. Assault in the third degree, simple assault, would occur where physical injury is caused to another or through negligence a physical injury is caused to another through a deadly weapon. Assault in the second degree covers the AWDW situation prevalent now by the use of a car because of the language "deadly or dangerous weapon".

Judge Burns did not want to have a crime made out of a rear-end accident.

Senator Burns stated that the definition of a "deadly weapon" does not embrace a vehicle. He observed that the Commission minutes should show that the commentary on page 4 of P.D. No. 2 should be corrected so that the first item under the "Comment" column reads: "This subsection covers any deadly weapon as defined by _____." Senator Burns advised that subcommittee No. 1 has approved a definition of "deadly weapon" but the Commission has not worked on it as yet.

Chairman Yturri referred the members to the discussion on this subject recorded in the minutes of subcommittee No. 2, February 20, 1969, pp. 10-11.

Mr. Knight noted that under the provisions of section 2 if a person were guilty of reckless driving and "recklessly causes serious physical injury to another by means of a deadly or dangerous weapon", he would be guilty of assault in the second degree.

Senator Burns thought this was wrong. He stated that the car rundown was where a person "intentionally causes serious physical injury by means of a...or dangerous weapon."

Representative Frost observed that section 2(2) was "causes physical injury to another" whereas section 2 (3) was "causes serious physical injury to another".

Senator Burns thought the language "or dangerous" should be deleted in section 2 subsection (3).

Representative Carson noted that the language "or dangerous" had been taken out of the first draft of section 1 and the conduct in sections 2 and 3 is reckless or intentional, not negligent. He thought this would get away from Judge Burns' concern about the rear-end accidents.

Judge Burns repeated his concern about bringing the auto accident cases under the criminal law under a section that he suspected would be graded as a felony or at least an indictable misdemeanor. He was satisfied this would bring about a tremendous increase in prosecutions because with the broad definition of "serious physical injury", a car is clearly a dangerous weapon at all times. Any time there is protracted impairment , he said, it is a jury question and the injured plaintiff would be on the district attorney's doorstep urging prosecution because it is a good way to browbeat the settlement, etc.

Mr. Paillette thought the Commission would end up with an anomalous situation because they would be saying that if a person recklessly endangered someone a crime is committed even though that person is not hurt but if a person recklessly inflicts serious physical injury on someone, there is no separate crime. He felt there was a public policy here--the protection of people from this kind of injury. There are presently statutes forbidding recklessly endangering someone; in fact, pointing a firearm is a form of recklessly endangering as is leaving a refrigerator without removing the hinges.

Mr. Paillette stated that perhaps the definition of "recklessly" would help a little in considering the problem and read the definition being considered by subcommittee No. 1:

> "'Recklessly' means that with respect to a result or to a circumstance described by a statute defining a crime a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross

deviation from the standard of care that a reasonable person would observe in the situation."

This, said Mr. Paillette, is what is meant when discussing "recklessly causes physical injury".

Judge Burns voiced the opinion that the definition of "physical injury" could be improved. He noted that it was presently defined as "impairment of physical condition or substantial pain" and asked if he read the definition right when he understood it to mean that physical injury means substantial pain.

Mr. Paillette replied that it was the intent of the subcommittee to cover substantial pain within the definition of physical injury.

Mr. Paillette directed the attention of Judge Burns to section 2, Assault in the second degree, to the language "(2) intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon" and asked, particularly in respect to a deadly weapon, if the Judge thought there was a possibility of a Pirkey problem between section 2 and section 3. Section 3, he noted, relates to an aggravated crime because of circumstances manifesting gross indifference to the value of human life. Could the mere use of a deadly weapon manifest a gross indifference to the value of human life? If there is a situation where a deadly weapon has been employed by the defendant, could the district attorney choose either assault in the first degree or assault in the second degree?

Senator Lent now present. Rep. Frost excused.

Judge Burns did not think there would be a problem--not with commentary on "gross indifference" as was discussed earlier in the meeting.

Senator Burns moved the adoption of section 1 as drafted and Representative Carson seconded the motion. The motion carried with Representative Haas voting "no", Rep. Frost not present.

Senator Burns moved the adoption of section 2 as written and Rep. Carson seconded the motion.

Judge Burns moved to amend Senator Burns' motion so as to remove the words "or dangerous" from subsection (3) of section 2. Representative Haas seconded Judge Burns' motion.

Mr. Paillette pointed out that the situation covered by subsection (3) would not be mere negligence or a mere accident; it would involve "recklessness" where there would be a conscious disregard of an unjustifiable risk that such an injury would occur to someone. The injury, furthermore, would have to be a serious physical injury as that term is defined.

Mr. Paillette referred to the word "knowingly" contained in subsection (2) of section 2 and read, "means that with respect to conduct or to a circumstance described by a statute defining a crime a person acts with an awareness that his conduct is of that nature or that the circumstance exists."

Chairman Yturri observed that the whole question was whether or not the Commission wanted to provide so that when an automobile operated recklessly causes serious physical injury it would be second degree assault. It would be third degree assault.

Judge Burns remarked that perhaps the motion to amend was badly put because it removes from section 2 not only automobiles but the reckless use of other dangerous weapons as well. Actually, he thought that what he should do, with the consent of his second, would be to withdraw the motion to amend and instead move that appropriate commentary be added to reflect that it was not intended that automobiles be "dangerous weapons" within the meaning of subsection (3) of second degree assault.

Mr. Paillette then asked if it was the intent to cover automobiles anywhere in assault, except under intentional conduct.

Judge Burns thought it could come under third degree, under the language, "intentionally, knowingly or recklessly causes physical injury to another".

Mr. Thornton said he took a little different view of the situation. He stated that he sat on the Traffic Safety Commission and in looking at a study made by this Commission he noted that in prosecutions for negligent homicide that less than 5% of the cases ever go to prosecution and are convicted. He felt there should be some tightening up, not only in negligent homicide but in the serious injuring of individuals by reckless conduct.

Senator Burns was of the opinion that one of the things the Commission must strive for is consistency. It seemed to him that if there was to be a negligent homicide situation, that it would be appropriate, with the definition of "recklessness" which is pretty precise and with the added factor of "serious physical injury", to leave the section as it is and not put something in the commentary that as to subsection 2 the Commission meant automobiles and as to subsection (3) it did not. He indicated that he would oppose the motion by Judge Burns.

Chairman Yturri commented that if it were known now what the penalties were for third and second degree assault, the members might be in a little better position to approach the problem. He thought perhaps it would be best to leave the language "or dangerous" in subsection (3) of section 2 so that automobiles could come under second degree assault and then let the district attorney determine, as he analyzes the facts in the case, whether he will prosecute under third degree. It would be a lesser included offense, anyway. The decision then would be left to the jury.

Mr. Knight stated that as long as what the Commission is doing is determining the degree of injury that a person suffers rather than the intention of the actor, that automobiles should well be included in the section. It really does not matter whether a person is shot and almost killed or hit by a car and almost killed, he is almost dead in both instances.

Judge Burns' motion to amend Senator Burns' motion was defeated. Judge Burns and Representative Haas voted "aye", Representative Frost not present.

Senator Burns called for the question on his motion to approve section 2 of the draft as written. The motion carried. Representative Haas and Mr. Knight voted "no", Representative Frost not present.

Senator Burns moved the acceptance of section 3 of the draft and Representative Carson seconded the motion. The motion carried. Mr. Knight voted "no"; Representative Frost not present.

Section 4. Menacing

Mr. Paillette observed that here there would be an intentional attempt to place another person in fear as distinguished from an intentional attempt to actually cause physical injury. It looks at the effect upon the mind of the victim. He related that in the case of the State v. Wilson, the court had held that:

> "...apprehension of injury on the part of the victim need not be shown to make out the crime. Further, it seems clear that an act done with the intention to place one in apprehension of injury only and not to inflict corporal injury would not constitute the crime of assault in this state. And too, according to the definition, an act done with the intention to inflict corporal injury but where the actor did not have the present ability to inflict corporal injury would not be a criminal assault."

Mr. Paillette noted the lesser crime of menacing was similar to that of both New York and Michigan. Under the MPC itwould be dealt with as simple assault.

Representative Frost now present.

Senator Lent asked if there was any way in which to have "attempted" menacing.

Representative Carson said he did not think so and Chairman Yturri agreed.

Mr. Knight thought in this section, unlike the previous sections, it was the intent that was important, not the result. He felt the victim could be completely frightened and have a heart attack but if the other person did not intend to put him in that situation, it would not be menacing.

Representative Carson moved the adoption of section 4 and Senator Burns seconded the motion. The motion carried unanimously.

Section 5. Recklessly endangering another person

Mr. Paillette stated that a "person commits the crime of recklessly endangering another person if he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person." The section is adapted from Revised New York Penal Law Section 120.20 and is similar to MPC Section 211.2 but does not include the words "danger of death" employed by the Model Penal Code. It was felt these words were redundant in light of the definition of "serious physical injury".

Senator Lent referred to the second line in the section, the language, "if he recklessly engages in conduct..." and said he thought it should be "if he engages in reckless conduct..". Senator Lent was not sure there was not a distinction in meaning involved.

Chairman Yturri asked what "reckless conduct" was. He thought the section was worded so as to apply to any conduct; it could be engaged in recklessly, properly, negligently, etc.

Senator Burns was of the opinion that to depart from the language employed in the section and to go to Senator Lent's suggestion, would necessitate going back to change the culpability definitions because the entire code has been set up with "recklessly" used as an adverb.

Representative Carson moved the adoption of section 5 and Senator Burns seconded the motion.

Judge Burns asked if there would be any difference between attempted assault in the second degree (specifically in subsection (3)) and section 5, recklessly endangering.

Chairman Yturri noted that a deadly weapon was not necessary in section 5; section 2 (3) relates to conduct involving a deadly weapon.

Judge Burns posed a situation where someone runs a red light at night on a blind corner. Would he be guilty of recklessly endangering?

Chairman Yturri said he thought he would be guilty if the circumstances were such that performing that conduct in a reckless way created a substantial risk. This would be a matter of proof.

Judge Burns asked if he would not also be guilty of an attempt to commit a crime under section 2.

Mr. Paillette said he did not think it would be possible to have an attempt to act recklessly.

The motion made by Representative Carson to adopt section 5 carried unanimously.

The meeting was adjourned at 4:10 p.m.

Respectfully submitted,

Maxine Bartruff, Clerk
Criminal Law Revision Commission