Tapes #67 and 68
Both sides of the two tapes

OREGON CRIMINAL LAW REVISION COMMISSION
Room 315 Capitol Building
Salem, Oregon

June 17, 1969

A G E N D A

OREGON CRIMINAL LAW REVISION COMMISSION

Tenth Meeting, June 17, 1969

Minutes

Members Present: Senator Anthony Yturri, Chairman
Senator John Burns, Vice Chairman
Mr. Robert Chandler
Mr. Donald E. Clark
Representative David G. Frost
Representative Harl H. Haas
Attorney General Lee Johnson
Mr. Frank D. Knight

Members Excused: Judge James M. Burns
Representative Wallace P. Carson, Jr.
Representative Douglas Graham
Senator Berkeley Lent
Mr. Bruce Spaulding

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

Also Present: Professor George M. Platt, University of Oregon School of Law
Mr. Jake Tanzer, Office of Attorney General

AGENDA: Minutes of Meetings: February 22, 1969; March 20,1969
Kidnapping & Related Offenses: P.D. No. 4
Forgery & Related Offenses: Amend. to P.D. No. 2
Purposes; Principles of Construction; P.D. No. 1
General Definitions; P. D. No. 2
Culpability; P. D. No. 4
General discussion of Commission policy regarding placement of provisions relating to time limitations, jurisdiction, place of trial, etc.

The meeting was called to order by the Chairman, Senator Anthony Yturri, at 9:50 a.m., Room 315, Capitol Building, Salem.

Approval of Minutes of Meetings: February 22, 1969; March 20, 1969.

Mr. Chandler moved the approval of the minutes as submitted. There being no objection, Chairman Yturri announced the minutes of February 22nd and March 20th were approved.

Kidnapping and Related Offenses; P. D. No. 4.

Mr. Paillette recalled that Kidnapping and Related Offenses, P.D. No. 3, had been sent back to subcommittee No. 2 by the Commission at its meeting of March 20, 1969. In the absence of Representative

Carson, chairman of subcommittee No. 2, Chairman Yturri asked that Mr. Paillette lead the discussion on the draft.

Mr. Paillette explained that Kidnapping and Related Offenses, P.D. No. 4, represented quite a departure from P.D. No. 3. He had attempted to incorporate the amendments suggested by the Commission in March and in so doing the form of the previous draft has been pretty well scrapped, although he felt the basic rationale was not changed. He recalled that most of the difficulty with P.D. No. 3 had been with the definitions. The draft had been built around the basic definitions of "restrain" and "abduct". "Abduct" by reference had incorporated the definition of "restrain" and this had evidently caused some problems.

Section 1. Kidnapping and related offenses; definitions.

Mr. Paillette noted that section 1 of the proposed draft contained three definitions: "without consent", "lawful custodian" and "relative" "Without consent" had been defined in the previous draft as meaning: "A restraint is without consent when it is accomplished by: (a) Physica force, intimidation or deception; or (b) Any means, including acquiescence of the victim, if he is a child who has not yet reached his sixteenth birthday or an incompetent person and the parent, guardian or other person having lawful control or custody of him has not acquiesced in the movement or confinement." Mr. Paillette read the definition of "without consent" contained in P.D. No. 4 and referred to the draft commentary which noted that this definition is similar to the definition that appeared in P.D. No. 3, except that the phrase "an incompetent person and the parent, guardian or other person having lawful control or custody of himhas not acquiesced in the movement or confinement" has been replaced by the new language "who is otherwise incapable of giving consent, that the taking or confinement is accomplished without the consent of his lawful custodian". In so doing, the reference to "an incompetent person" has been deleted. He recalled that the Commission had discussed this at the March 20th meeting and there was some question as to the meaning of "incompetent". It seemed to Mr. Paillette that what was to be determined was whether or not the victim had the capability of consenting and so that was the main purpose of the change to the term "incapable". It attempts to focus upon the issue of whether the perso either because of mental incompetency or any other disability is unable to effectively consent to the "taking" or "confinement".

Mr. Paillette observed that he had not defined the term "incapable as it is intended that it be used in its ordinary, dictionary manner. He read from G. & C. Merriam Co., Webster's New Collegiate Dictionary, (1961 ed.): "...lacking in capacity, ability, or qualification; incompetent; unqualified. Lacking legal qualification or power; disqualified; incligible." He felt this definition to be broad enough to include not only mental incompetence, whether or not declared by a court, but any other type of incapacity on the part of the victim.

"Lawful custodian" is defined in the proposed draft but did not appear in the previous draft. The definition not only includes a parent or guardian but also includes someone who has legal responsibility to care for another person because of that person's incompetence, the superintendent of the State Hospital, for example.

Chairman Yturri asked who would be the lawful custodian, in the absence of a court order, of a person 18 to 20 years of age who is deaf, dumb and blind.

Mr. Paillette replied that in the absence of a court order, he did not know who would be the custodian. He felt, however, that the issue would be the same--whether or not the person is capable of giving consent. He referred to the proposed definition of "without consent" and noted that the issue of consent by a custodian would not arise where there was no custodian.

Chairman Yturri understood the question to be faced, then, was whether or not the "taking" or "confinement" was "accomplished by force threat or deception" and the lawful custodian would not come into it. The physical deficiencies the person had would be taken into consideration in determining whether or not there was or was not consent.

Chairman Yturri noted that the definition of "relative" includes parents, brothers, sisters, uncles and aunts and the term "ancestor" gets to grandparents, great uncles and great aunts.

Mr. Paillette advised that the definition applies under sections 4 and 5, Custodial Interference, and the intent is to keep the less serious, family squabbles out of the criminal courts.

Mr. Johnson asked if sections 4 and 5 did not get to matters that would be more appropriately handled by civil procedures.

Mr. Paillette did not think this was so in light of the way in which the sections were limited. It was intended that the sections cover the more serious interference cases where the intent is to hold the child permanently from his lawful custodian or where there is some risk to the person taken because of illness, injury, etc. He noted, also, that it was a much softer approach than that contained in existing law.

Mr. Knight observed that the civil remedy in this type of case often would be no remedy in that the procedure is more circuitous.

Professor Platt said that he could see why the conduct proscribed in section 5 could be called a crime, especially in respect to subsection (2) where the actor exposes the person taken to a substantial risk or physical injury but he was inclined to agree that in respect to just the taking of a child with no injury intended or likely to happen that perhaps this is a place where the criminal sanction could

be removed. He thought that it was generally agreed at the beginning of the work on the revision that, wherever possible, those areas that could be handled civilly should be removed from the criminal code. He admitted that evidently the courts had not been able to cope with these situations because of the problem of crossing state lines. He asked if someone could comment on the depth of the problem of enforcing court decrees as a civil matter.

Mr. Paillette replied that many of the cases involve people who do not have the funds with which to hire an attorney in the state to which the child has been taken to enforce a custody decree.

Professor Platt remarked, then, that the criminal law is being used to enforce what is essentially a civil matter and he wondered if this was really desirable.

Mr. Johnson wondered if the criminal law really did the job anyway and wondered if it really added very much.

Representative Haas commented that he thought it added quite a bit. He cited instances where just having the statute on the books to refer to acted as a deterrent and perhaps was the only thing keeping a client from defying a court decree.

Senator Burns thought this was a compelling point favoring the retention of the section. He wondered about the grading of sections 4 and 5, noting that if custodial interference in the second degree were a misdemeanor, it would not be an extraditable offense. Would this, then, not weaken the law more than what is presently on the books.

Mr. Paillette recalled that this problem had been discussed in subcommittee. ORS 163.640, child stealing, is an extraditable offense. The subcommittee felt that custodial interference in the second degree would be graded as a misdemeanor and custodial interference in the first degree would be graded as a felony so that there would be some criminal sanctions which could be applied, mainly for the purposes of extradition, without going to a kidnapping charge.

Mr. Paillette referred to subsection (3) of section 1, the definition of "relative", and recalled that the earlier draft had contained the words "...including an adoptive relative...". The need for this reference to an adoptive relative was questioned at the Commission meeting and this language does not appear in the proposed draft. In Oregon, he advised, an adoptive parent stands in the same position as a natural parent.

Mr. Clark asked if the MPC used the term "adoptive relative" and wondered if the problem the language was trying to get at was where the natural parent attempts to take custody from an adoptive parent.

Mr. Chandler observed that where there is a legal, adoptive parent, the natural parent has no rights.

Mr. Paillette stated that where there was a situation where a natural parent takes a child away from his adoptive parents with the intent to detain him, the draft definition of "relative" would be important to the natural parent from the standpoint of the defense set out in section 2.

Section 2. Kidnapping in the second degree.

Mr. Paillette explained that section 2 embodies the same rationale contained in the earlier drafts on kidnapping. P.D. No. 4 does not employ either of the terms which gave difficulty earlier--"abduct" and "restrain"; however, the definitions of those terms have been retained in the definitive statement of the crime. The definition of "restrain" contained in P.D. No. 3 employed the language, "means to intentionally restrict a person's movements in such a manner as to interfere substantially with his liberty..." and this language has been incorporated into the proposed section 2. He noted that the word "personal" was a new adjective used in the present draft to modify "liberty" because it was felt to be more precise. There are several types of liberty and what is being discussed in the draft section is "personal liberty" as opposed to "political liberty", for example.

Mr. Johnson asked if the courts have defined the word "liberty".

Mr. Tanzer referred to the Miranda case where the court used it to define a harder word to define--custody. It was apparently considered to have a pretty clear meaning.

Mr. Paillette informed the members that the language contained in subsection (1) (b) of section 2 is language which appeared earlier in section 1, Definitions, of P.D. No. 3, and quoted: "'Abduct' means to restrain a person with intent to prevent his liberation by either: (a) Secreting or holding him in a place where he is not likely to be found; or (b) Using or threatening to use deadly physical force." He noted that the reference to "deadly physical force" in this earlier draft definition was important because the term "abducts" was used within the statement of the crime of kidnapping in the first degree.

Mr. Clark referred to the language, "...he is not likely to be found..." contained in subsection (1) (b) of section 2 and asked if this was a legal term which is quite clear.

Mr. Knight remarked that this would be a question of fact before a jury.

Mr. Tanzer added that this was a recognized definition in the receiving and concealing of stolen property and he thought it would be in this area, also.

Mr. Paillette explained that subsection (2) of section 2 sets out a defense to kidnapping in the second degree. The intent is to provide a defense only in those cases where there are no aggravating factors involved. All three elements set out in subsection (2) must co-exist in order for the defense to be available and the defense applies only to second degree kidnapping.

Representative Frost asked Mr. Paillette if it was not his purpose to, in effect, define section 4, custodial interference in the second degree, as the defense to second degree kidnapping. He wondered if this was accomplished when subsection (2) (c) in section 2 ("his sole purpose is to assume control of that person") is included. The wording section 4, he noted, is "with intent to hold him permanently or for a protracted period...". He asked if this language meant the same as "to assume control...". Representative Frost thought perhaps it might be advisable to use the same language in subsection (2) (c) as is used in section 4 since what is trying to be accomplished is to take away from kidnapping in the second degree the crime defined in section 4, custodial interference.

Chairman Yturri posed a situation where an aunt of a boy under sixteen is dissatisfied with the manner in which he is being brought up by his parents and so takes the child to her home and restrains him there, although no force is used. He understood that this would not be kidnapping in the second degree but would be custodial interference.

Mr. Paillette noted that if the aunt wanted to assume control of the child for a short period of time, say one hour, the provisions of section 4 would not apply; however, if she wished to assume control of the child forever, or for a protracted period of time, it would get into the provisinns of section 4. He added that the intent of the language, "to hold him permanently or for a protracted period..." is to try to keep out of the district attorney's office the situation where a child who is on a visitation and is supposed to be back on a Friday night is not returned until Tuesday morning.

Mr. Johnson called attention to the language "legal authority" used in subsection (1) of section 2 and wondered if this would not cover the defense. He asked if the defense was not designed to protect people who have a legal authority to assume control of a child.

Senator Burns noted this was language that was in the definition of "restrain" in the third draft and had been taken out and made a part of the statement of the crime in the fourth draft.

Mr. Knight did not agree with Mr. Johnson's comment, noting that in Chairman Yturri's example, the aunt would not have had any legal authority to take the child.

Chairman Yturri observed that in the case he set up, involving the aunt taking a child and holding him for one hour, that she would not be guilty of custodial interference under section 4 (1); however, he understood she would be guilty under section 4 (2) since this subsection does not designate a period of time to be involved.

Mr. Paillette answered that this was not right because a "relative is not included under the provisions of subsection (2). This subsection was designed to cover the minor custodial cases not involving a relative. The aunt, he said, would not be committing any crime under the draft provisions.

Mr. Knight thought the aunt would come under the provisions set out in subsection (2) of section 4 because there was nothing in the subsection excepting a relative. Senator Burns also thought she would come within the povisions of subsection (2).

Representative Frost thought the purpose of section 2 (2) was to incorporate section 4 and to keep the relative out of kidnapping in the second degree. He was not entirely certain, however, that this is accomplished because of the difference in the definition.

Chairman Yturri did not think the purpose of section 2, kidnapping in the second degree, was related to section 4 at all, noting that subsection (2) of section 2 read: "It is a defense to a prosecution under subsection (1)" (which is kidnapping in the second degree) "if...." It is, therefore, only to provide a defense against kidnapping in the second degree.

Representative Frost asked if it were not the intent of that defense to mean that while it is something which should be criminally sanctioned, it should not have as strong a penalty as kidnapping in the second degree and so will fall under the misdemeanor of custodial interference.

Chairman Yturri did not think this was necessarily so. He though the only purpose of subsection (2) of section 2 is to negate kidnapping in the second degree. Then, he continued, if it is seen that similar conduct would be criminal under sections 3, 4, or 5, it is necessary to look at those sections.

Mr. Paillette agreed with this analysis.

Mr. Clark asked the reason for using the age of "sixteen" in the draft provisions.

Mr. Paillette replied that this question has been raised whenever an age is stated in a draft and admitted that any age used as a "cut-off" age is arbitrary to a certain extent.

Mr. Clark asked if the intent is to say that between the ages of sixteen and eighteen the child involved would have some say in the matter.

Mr. Knight thought it would give the child of sixteen or over the opportunity to say that he would rather live with someone else other than the parent having custody and then if the parent wanted the custody decree enforced, he could go to court and have a hearing.

Mr. Johnson asked if subsection (2) of section 2 would be a defense even if the actor "Secretly confines the person in a place where he is not likely to be found." (Language contained in sub (1).)

Senator Burns agreed that the defense would apply in this situation where a relative is involved and it was felt that where a relative is involved, the offense should not rise to the seriousness of second degree kidnapping. The actor would still be liable to prosecution under custodial interference.

Mr. Knight added that the defense would not be a defense under section 3, kidnapping in the first degree.

Mr. Paillette added that the purpose is to try to keep the "run-of-the-mill" family custody squabbles out of the district attorney's office but recognizing that there are times, though, when there are other reasons why someone will want to steal a child. There are other considerations also, i.e., where the child is not endangered but may be removed from the state.

Senator Burns understood that sub (2) of section 2 is a defense only to sub (1) of section 2. In order to commit first degree kidnapping it is necessary to violate section 2; therefore, he wondered if there would be a problem where someone could assert he had not violated subsection (1) of section 2 because he had a defense to this and therefore it would not bring into play the crime requisite to first degree kidnapping.

Chairman Yturri noted that the purposes necessary for first degree kidnapping are different from those in second degree kidnapping. In order for the defense to exist under second, the sole purpose must have been to assume control of the child.

Senator Burns asked if the purposes listed in section 3, first degree kidnapping, were not in addition to those listed in section 2, second degree kidnapping.

Chairman Yturri admitted that the same thought had occurred to him but as he read the draft, it is necessary to first look at section 2 and determine if there is a defense to subsection (1). There is a defense to subsection (1) if the three items listed in subsection (2) co-exist. Whenever a purpose to compel ransom or to hold the victim as a shield or hostage or to cause serious physical injury to the victim or to terrorize the victim or another person can be proven, the condition set forth in subsection (2) (c) of section 2 had not been complied with because it negates "his sole purpose is to assume control of that person".

Senator Burns commented that this should be clearly reflected in the minutes as legislative history.

Mr. Paillette added that it was felt in subcommittee that subsection (2) (c) would automatically fall by the wayside if any of the elements taken into first degree existed.

Section 3. Kidnapping in the first degree.

Mr. Chandler stated that he was somewhat bothered by the use of the word "purposes". It seemed to him that it might be unnecessarily confining, requiring more thought and planning than he wanted to ascribe sometimes.

Chairman Yturri noted that the word "purpose" had previously been used and asked if it were not synonymous with "reason".

Representative Haas asked where the abduction of a woman with the intent to rape her would fall.

Mr. Paillette replied that it could fall under subsection (4) and Mr. Tanzer added that it could also fall under rape.

Mr. Paillette agreed and advised that one of the main purposes of the approach taken to kidnapping was to avoid any use of kidnapping as a substitute for some other crime.

Mr. Chandler remarked that he was more concerned with what happene to the victim than with enabling the actor to say he did not intend to do this thing to the victim. This would happen in respect "to cause serious physical injury to the victim".

Senator Burns asked if Mr. Chandler's concern was that he felt the word "purpose" implied "intent" and Mr. Chandler agreed that this was the problem.

Senator Burns recalled that the first draft had listed as one of the optional criteria, "To facilitate the commission of any felony or flight thereafter", and asked why this was deleted.

Mr. Paillette replied that the subcommittee felt it redundant in light of the language, "To hold the victim as a shield or hostage". He noted that other states have a separate subsection on this but the subcommittee did not feel it was needed in view of the language used in subsection (2) of section 3.

Mr. Tanzer referred to subsection (3) of section 3 and asked the reason for using the qualifying word "serious"; why is it necessary to cause "serious physical injury" rather than not have it be sufficient if the actor intends to commit any physical injury.

Mr. Paillette replied that "serious physical injury" and "physical injury" are both defined in the section on General Definitions. "Physical injury" is defined as meaning "impairment of physical condition or substantial pain" so that really any kind of an injury will amount to a physical injury and it was felt that a minor injury should not be sufficient to invoke a first degree penalty.

Senator Burns thought the point raised by Mr. Tanzer was a legitimate point and he recalled the discussions held in subcommittee in respect to the definition of "physical injury". "Physical injury" by itself "means impairment of physical condition or substantial pain" whereas "serious physical injury" means physical injury which creates a substantial risk of death, or ...serious and protracted disfigurement...." Senator Burns thought it possible to have a "substantial pain" short of "a substantial risk of death" and he thought there would be situations where "substantial pain" could be inflicted which would certainly make it first degree kidnapping.

Mr. Tanzer was of the opinion that any intention to do injury, whether it be physical or whether it be serious physical injury or minor physical injury, presents an equal danger to the victim and is the kind of thing which makes abduction a very serious act.

Mr. Paillette asked if he felt that second degree kidnapping would not be a stern enough charge.

Mr. Chandler commented that it would not take much physical injury to terrorize someone, particularly if he does not know what is coming next.

Mr. Tanzer wondered if the proposed language did not almost exclude something lesser. He cited an example where the actor intended to "terrorize" his victim a little but got "carried away", seriously injuring the victim. He thought the draft language in relation to the original intent was a little dangerous.

Senator Burns stated that since second degree kidnapping does not speak to "physical injury" per se, could not a court read into this that there is no lesser included and that if the state proves

no "serious physical injury", they would have no lesser included of second degree kidnapping to fall back on. He asked if this was what Mr. Tanzer meant.

Mr. Tanzer thought perhaps this was what Mr. Paillette meant but explained that what he was suggesting was just the opposite--that there would be a second degree to fall back on.

Mr. Clark did not think dropping the word "serious" from subsection (3) of section 3 would cause any problem and he thought retaining it might. He felt deleting the word would just be giving the district attorney a little discretion in invoking the statute.

Chairman Yturri favored deleting the word "serious" but did feel it would be making it a little easier for the district attorney to prove his case.

Mr. Paillette wondered, if the injury is not serious and some other factor doesn't come into play, such as the terrorizing feature, why the provisions under second degree kidnapping are not adequate to handle that type of problem. He felt that kidnapping in the first degree would be looked upon as one of the most serious crimes set out in the Code and there should be elements that make it serious enough to be first degree.

Senator Burns explained that the difficulty he had with the section was with the language "substantial pain". It seemed to him that from a public policy standpoint, it's every bit as injurious to the victim who is subjected to "substantial pain" as is the situatic where he is held for ransom.

Mr. Chandler also thought that the word "serious" could be left out because the definition of "physical injury" has taken away a mere "scratch on the finger"; it must be "impairment of physical condition or substantial pain."

Senator Burns moved to delete the word "serious" contained in subsection (3) of section 3. The motion carried unanimously.

Mr. Paillette called attention to the use of the word "terrorize" and to the draft commentary regarding this on page 6. He asked if there was a desire to discuss this term further, stating that as a drafting policy terms used in their ordinary meanings should not be defined. He felt that "terrorize" was well defined and had a clear meaning. The MPC indicates they were talking about a "vengeful or sadistic abduction...".

Mr. Chandler suggested that perhaps information should be included in the commentary as to the particular dictionary being used.

Representative Frost asked the reason for using the word "purpose" in section 3 rather than the word "intent".

Mr. Paillette did not think using "intent" would do any harm to the draft; in fact, it might make it conform more with previous drafts to use "intent".

Senator Burns recalled that as the various drafts were considered the attempt has been to standardize the language. He noted that "purpose" has been used in a number of instances and asked if it had been used synonymously with "intent".

Mr. Paillette answered that it had not been necessarily so and thought it could lead to some confusion. He asked Professor Platt what his thoughts were on this.

Professor Platt recalled that in the definition of degrees of culpability it was decided to avoid the use of the word "purposes" and to go strictly to the word "intent". He wondered if the crime could be committed "recklessly", particularly with respect to subsection (4), "to terrorize". This might come within the word "reckless" as it is defined in the levels of culpability. Professor Platt noted that when a word such as "intent" is employed, it is a word of art which is defined elsewhere. He was not sure there were implications that would make the term ambiguous in section 3, but it was possible.

Mr. Paillette said that the basic criminal intent covered by section 3 is to "interfere substantially with another's...liberty". This is set out as the mens rea statement of kidnapping in the second degree and this section uses the word "intent". In order to be guilty of first degree kidnapping, the actor must have the criminal intent which is set out in second degree.

Mr. Knight was of the opinion that the term "purpose" was broader than the word "intent".

Senator Burns referred to the definition of "intent" contained in the Culpability Draft, P.D. No. 4: "...a person acts with a conscious objective to cause the result or to engage in the conduct so described." He thought this was exactly what was being talked about in section 3, kidnapping in the first degree.

Senator Burns recalled that when discussing previous drafts, particularly with respect to Assault, it was said that the thing to be proscribed is the act and he asked if it were necessary under the provisions of section 3, first degree kidnapping, to have a completed act in order to have the crime committed.

Mr. Knight remarked that once an actor has broken and entered with the intent to steal, he has completed the crime of burglary.

Mr. Paillette thought that under Professor Platt's draft definition of "attempt" this would certainly amount to a "substantial step" toward the commission of the crime.

Professor Platt stated that this raised an issue that he had planned to interject: the recommendation in the Inchoate Crimes Article with respect to punishment follows the MPC recommendation which is that the attempt be sanctioned by the same set of sanctions applying to the substantive or completed crime. If the MPC pattern were followed, this would mean that first degree kidnapping would be included as one of the "big three" where the felony of the first degree is attached as the sanction--kidnapping by force, robbery at gunpoint and homicide.

Senator Burns thought that by using the word "intent" in section 3 rather than the word "purpose", looking to the definition of "intent" ("a person acts with a conscious objective to cause the result"), it would not make any difference whether the result occurred or not. It would be best, therefore, to straighten out the ambiguity that exists as a result of the use of the word "purpose".

Chairman Yturri did not think it would make any difference which term was used--"intent" or "purpose". He thought perhaps "purpose" was the better word.

Mr. Paillette said that upon reflection he thought "purpose" was the word that ought to be used. He referred, again, to the mens rea set out in section 2, second degree kidnapping which is "with intent to interfere substantially..." and then referred to subsection (2) of section 2 which sets out the defense to subsection (1), noting that in subsection (2) (c), the sole "purpose" of the actor is "to assume control of that person". The actor could still have the "intent" to take "the person from one place to another" or to "secretly confine the person" (as set out in section 2 (1)) but even though he had this "intent", his sole "purpose" would be to "assume control of that person". Here, he said, the word "purpose" is not being used synonymously with "intent".

Mr. Knight still did not think there was a difference in meaning between the two terms; rather, it was just a matter of not using the word "intent" twice in the same statute.

Representative Frost added that the word "intent" is well defined whereas "purpose" is not.

Mr. Paillette was of the opinion that it would be bad drafting to state in section 2 (1), "with intent to interfere substantially..." and then to go down to section 2 (2) (c) and state, "his sole intent is to assume control of that person...."

Chairman Yturri agreed and asked Mr. Tanzer his opinion.

Mr. Tanzer thought that the way the draft was set up that the word "intent" seems to mean what acts the person intends to commit and the word "purpose" seems to mean the reasons why he commits them. He noted, also, that there is a tie-in with "purpose" between one section and another. At first, he said, he did not think there was a difference between the terms but the more he thought about it, the less sure he was that there was not some difference.

Section 4. Custodial interference in the second degree.

Mr. Paillette explained that this provision covered a relative situation where the child has not reached his sixteenth birthday. He noted that the crime of custodial interference is a crime against the parent, interference with custody, rather than a crime against the person taken. Subsection (1) confines the crime to those situations involving a protracted period of time or where the intent is to hold the child permanently.

Representative Frost voiced the same objection to the language "to hold him permanently or for a protracted period" as he had before to subsection (2) of section 2, and even though he had been overruled, he thought the words "to assume control" would be better words to use here. His second objection was to subsection (2) of section 4; he wondered how this really differs from section 2 again. He felt it was essentially the same crime as kidnapping in the second degree and added that if it was designed to be a "cop-out" he was in favor of it, feeling there should be more of these in the statutes.

(Chairman Yturri left meeting.)

Mr. Knight understood that Representative Frost wanted to know how section 4 (2) differed from section 2, second degree kidnapping, other than that section 4 does not involve "taking the person from one place to another" or "secretly confining the person". He quoted from section 4 and asked how a person could "take, entice or keep a person from his lawful custodian" without in some way "taking the person from one place to another" or "secretly confining the person" someplace; thereby committing second degree kidnapping. He wondered if this did not almost create a Pirkey situation.

Mr. Paillette replied that from the standpoint of the intent required, second degree kidnapping would require an "intent to interfere substantially with another's personal liberty" and no such intent is required to commit custodial interference.

Representative Haas referred to section 4 (1), to the language, "Being a relative of a person who has not reached his sixteenth birthday...", and asked if it were clear enough that it meant "Being a relative of that person who has not reached his sixteenth birthday....

Mr. Chandler suggested the problem would be taken care of by changing "the" to "that" in the third line of subsection (1) so that it would read, "...entices or keeps that person from his lawful...."

Mr. Johnson asked if anyone else was having a problem in respect to the language, "Being a relative of a person...and knowing or having reason to know that he has no legal right to do so, he takes, entices..

Mr. Chandler observed that this was aimed at the result of an unhappy custody situation, really, and in this case the actor would know or have reason to know he had no legal right.

Representative Frost felt it covered the situation where a father decides to take a child even though he has no right of custody. The statute enables the attorney to advise him that there is a law against this kind of conduct; if there is no law on the books, this conduct would not be a crime. The statute serves as a deterrent in 90% of the cases.

Mr. Paillette advised that in the first two drafts on kidnapping the sections required actual knowledge by the defendant. The sub-committee felt this language too restrictive; that there would be instances where there would be a court order but the defendant would have had no actual knowledge but that he should have known because the order had been entered and filed. It was felt that actual knowledge should not be required--analogous to receiving stolen property, for example, where the recipient might not have actual knowledge that the property was stolen but he had good reason to know that it was.

Mr. Tanzer thought this seemed somewhat backwards; assuming someone planned to physically take a child away, should he not be under a duty to find out whether or not he has this legal right. He thought perhaps it should just read "Having no legal right to do so, he takes...."

Mr. Johnson asked the penalty anticipated for section 4 and Mr. Paillette thought it would be classed a misdemeanor.

Mr. Tanzer observed that misdemeanors often supply the leverage needed to settle things unofficially.

Representative Haas moved that in line three of section 4 (1), the word "the" be deleted and the word "that" be inserted. The motion carried unanimously.

Senator Burns felt that the section on custodial interference was necessary; that it was a lesser offense of kidnapping because it involves family situations. He noted that subsection (2) of section 4 was not intended to involve relatives and asked why it would not be

more appropriate to delete subsection (2) and permit the cases which would have come under this subsection to stand or fall in the face of the defense which exists in kidnapping in the second degree.

Representative Frost cited an instance where the provisions in section 4 (2) would operate--where a juvenile worker goes out to pick up a child and comes back and files a petition.

Mr. Tanzer asked if there was any other section covering the equivalent of the present ORS statute on the enticement of a child. He quoted from ORS 163.640: "Every person who maliciously, forcibly or fraudulently takes or entices away any child or minor under the age of 16 years, with intent to detain and conceal such child from its parent, guardian or other person having the lawful charge of such child, shall be punished...not more than 25 years or during the natural life of such person...."

Mr. Johnson referred to subsection (2) of section 4 and wondered if the subsection should contain the "sixteen year old limitation" contained in subsection (1).

Mr. Paillette referred the attention of the members to the draft commentary contained on page 8: "Subsection (2) is broader in its application and is intended to reach interference by a non-relative with the rights of a lawful custodian. Its coverage would not be limited to child custody situations, but would cover incompetents or others who are entrusted by authority of law to the custody of another person or institution."

Representative Haas asked if it would do violence to subsection (2) of section 4 to insert an age limit.

Mr. Paillette was of the opinion that it would do a great deal of violence to the section. He advised that the draft was patterned after that of New York. The MPC has a separate subsection on the custody of committed persons and provides for a misdemeanor penalty if a person "knowingly or recklessly takes or entices any committed person away from lawful custody when he is not privileged to do so." (MPC, §212.4 (2)) The earlier drafts of kidnapping were more in line with the MPC but the Commission felt that the approach was not broad enough, that it was not desirable to limit it to just committed persons. The draft has thus evolved so that it does not include just committed persons but also other incompetents.

Senator Burns recalled that originally custodial interference in the second degree had been one subsection and it related to people under sixteen and incompetents and committed people. The definitions of "incompetent" and "committed" people created some problems at the last Commission meeting and so the present draft is set up so that subsection (1) covers people not yet sixteen and subsection (2) is broadened to eliminate any reference to "committed" or "incompetent" people.

Mr. Chandler thought there was a reference contained in the language "no legal right to do so".

Mr. Paillette added that the term "lawful custodian" is also used in the draft and is defined in section 1.

Mr. Knight thought that the distinction contained in section 4, which is not contained in section 2 or section 3, is that the "taking" or "enticing" can be done with the consent of the victim. This, in effect, makes the victim the "parent" or "lawful custodian" under custodial interference. He noted that even with a twenty year old boy the parent is still his lawful custodian.

Mr. Paillette thought to understand the purpose of section 4 it was necessary to go back and look at what the Commission desired to do earlier. P.D. No. 3, considered by the Commission in March, handled custodial interference by talking about "...any child who has not yet reached his sixteenth birthday from the custody of its parent, guardian or lawful custodian, or takes or entices any incompetent or committed person from the lawful custody of another person or institution". The draft defined "committed person" as "anyone committed under judicial warrant, any orphan, neglected or delinquent child, mentally defective or insane person, or other dependent or incompetent person entrusted to another's custody by or through a recognized social agency or by authority of law. Mr. Paillette said it was thought this coverage was good but not broad enough. It was felt too restrictive because it was limited to "committed persons" and there might be instances where there was an interference with custody but no commitment, as such. This, he said, was the genesis of subsection (2) which deletes all references to "committed persons". It is aimed at the kind of situation which does not involve a relative and may not even involve the interference of a child-parent relationship but interference with the relationship with the custody of a state institution or a ward of the court.

(Chairman Yturri now present.)

Senator Burns referred to the discussion contained on page 9, Commission minutes, March 20, 1969, and stated that he thought the present draft was substantially broader than what was discussed. He made the point that if the intent is to make the draft provisions substantially broader, the intent should be made manifest and if the intent is only what was intended at the time of the Commission meeting, different language is needed. He was of the opinion that the "hang-up" was with the broadness of subsection (2) of section 4 and he felt that if it were permitted to go unchecked in its present form, it would create some real problems for section 2. He moved to entirely delete subsection (2) of section 4 and to direct that section 4 be returned to the drawing board with instructions to draft language directing that the case of mental incompetents and committed people

be covered in the section. He did not have any precise language ready but referred to that contained in earlier drafts and suggested this be brought forward and that the crime of custodial interference be restricted to the circumstances set out in subsection (1) and those instances relating to incompetents and committed people.

Representative Haas questioned that the "child enticing" situation would be covered after this amendment and asked if this would not be desirable.

Senator Burns wanted this type of situation covered and thought that if someone other than a relative interferes with a child by taking him, keeping him or enticing him away, it would be kidnapping rather than the misdemeanor of custodial interference in the second degree.

Mr. Knight brought up the example of the fifteen year old boy who is enticed into taking a trip to Mexico with a twenty-five year old neighbor. His personal liberty has not actually been taken away because he goes along willingly although it may constructively be interfered with because the boy cannot consent, legally, to himself going to Mexico. He did not think a case like this would probably be covered by the amendments.

Mr. Johnson cited an example where a five year old child is enticed by various promises to accompany the actor. The child goes along willingly and then the actor sends out a ransom note, etc. He asked how the child's liberty had been deprived, even though he had not legally been able to give consent. Mr. Johnson pointed out that without a definition of "personal liberty" he could not know what it is other than it is a separate element, the way the draft is written, from the consent element.

Chairman Yturri understood that Mr. Johnson thought the term "personal liberty" should be defined for the purpose of the proposed statute to the effect that it is the removal of a child under the age of sixteen from the parental or other control under which he is legally with whether or not he wishes to go. He asked if it would do violence to what the members had in mind to, for the purposes of this statute, say that "personal liberty" means removing a person under sixteen from the control of his parents or whoever has control of him, whether or not the child wishes to go along with the person taking him.

Senator Burns asked if this would be done by definition or by note.

Representative Frost repeated his contention that the words "assume control" are better words than "personal liberty" and "protracted period" or "to hold him permanently".

Mr. Johnson asked the reason for having the element of "to interfere substantially with another's personal liberty".

Chairman Yturri thought this was what kidnapping is.

Senator Burns was inclined to think that since ORS 163.640, child enticement, is of relatively the same level of punishment as second degree kidnapping in the present code, in that sense it is really duplicitous. He felt the problem would be approached in a more simple and concise manner if Chairman Yturri's suggestion were adopted stating that "interference of substantial personal liberty in the case of a child under sixteen years old means intent to detain and conceal, remove such person from his parent, guardian or other person having custody". Senator Burns thought that with this qualifying definition either in a note or in the definition section, it would do away with the need for a separate statute which in other particulars is duplicitous. He asked Mr. Tanzer's opinion on this.

Mr. Tanzer did not like to qualify something by stating that "In the case of X, the language above is defined as meaning something other than what it means...."

Chairman Yturri asked Mr. Tanzer if his objection was to placing this in the statute; if it were placed in the commentary would he have any objection.

Mr. Tanzer did not feel that the commentary would change the express meaning.

Chairman Yturri asked Mr. Tanzer how he would answer the question raised as to whether or not taking a fourteen year old boy who wants to go constitutes depriving a person of his personal liberties.

Mr. Tanzer replied that at best it would be ambiguous and he thought there was a legitimate objection. He just felt that if there was a specific problem to deal with, it should be dealt with specifically, giving it its own body of thought. For example, he said, right now there are problems in Portland and elsewhere with runaway children and with well meaning social agencies trying to deal with the problem. Some thought would have to be given as to whether their activity today would be within the provisions of the proposed statute or not. For these reasons, he was not quite satisfied with tossing in a qualification to a statute which, on its face, accomplishe its purpose in order to add to it another purpose. The individual problem needs individual thought and definition.

Senator Burns again read ORS 163.640 and commented that the statute said it much more concisely than how it is stated in the draft.

Chairman Yturri referred to the words "...detain and conceal..." employed in ORS 163.640 and stated that he did not like this language because it is conjunctive. It seemed to him that either one of the elements would be sufficient.

Mr. Tanzer commented that it would be very easy to take language of this sort and create a subsection under custodial interference in the first degree.

Mr. Johnson said he would be willing to make a motion to amend subsection (1) of section 1 to delete the reference to the age of sixteen and to prepare an additional section to deal with the problem of enticement as distinguished from the problem where there is a substantial interference with someone's personal liberty.

Representative Frost did not think "enticement" was much different from what was being talked of; it is just a method by which someone takes control and the sanctions are usually against the taking of control whether it is done forcibly or by enticement.

Mr. Chandler moved to send the draft back to subcommittee.

Mr. Johnson repeated his earlier observation that there were two elements set forth in section 2 (1), kidnapping in the second degree, and said he had not resolved in his own mind the necessity of having the two elements--the "intent to interfere substantially with another's personal liberty" and "without consent". He was not sure the first element could not be removed so that the subsection would read: "A person commits the crime of kidnapping in the second degree if, without consent or legal authority, he...." He added that it is the "consent" element that is giving trouble and asked if "liberty" and "consent" were not the same thing.

Mr. Paillette did not think they were and added that the draft attempt had been to distinguish kidnapping from incidental conduct that might accompany some other crime. He cited as an example the taking of a holdup victim from the front office to a back room against his will so that he might open a safe. If the reference to personal liberty were deleted from section 2, he felt there would be a potential of a kidnapping charge where kidnapping is not really the crime.

Mr. Johnson agreed with this comment and thought this was why it would be advisable to discuss a separate crime of enticement.

Senator Burns, Attorney General Johnson and Mr. Chandler withdrew their respective motions and the Commission adjourned at 12:15 p.m. for lunch.

The Commission members reconvened at 1:20 p.m. Those present were: Chairman Yturri, Senator Burns, Mr. Chandler, Mr. Clark, Representative Frost, Representative Haas, Mr. Knight, Mr. Paillette, Mr. Wallingford, Mr. Tanzer and Professor Platt.

Mr. Paillette understood that the problems concerning the members had to do with section 4, custodial interference, and asked if there was really any basic, fundamental disagreement on the kidnapping sections. There was general agreement that there was not.

Mr. Paillette noted that the suggestion that section 4 be made more precise and more definite directs attention back to the earlier drafts where this was what the intent had been. Section 5, Custodial interference in the second degree (P.D. No. 3), contained the language, "...child who has not yet reached his sixteenth birthday... or...any incompetent or committed person...." The section then went on to define what was meant by a "committed person".

Mr. Paillette advised that the New York approach to custodial interference breaks it down into first and second degree (as is done in the proposed draft), leaving first degree, as is done in section 5 of the draft, for the most serious situations. The only difference is that section 5 of the proposed draft has an added provision for the person taken from the state. This does not appear in the New York approach. He read from the New York Revised Penal Law, §135.45, Custodial interference in the second degree:

> "1. Being a relative of a child less than sixteen years old, intending to hold such child permanently or for a protracted period, and knowing that he has no legal right to do so, he takes or entices such child from his lawful custodian; or
>
> "2. Knowing that he has no legal right to do so, he takes or entices from lawful custody anyincompetent person or other person entrusted by authority of law to the custody of another person or institution."

Mr. Paillette noted that New York did not define what is meant by an "incompetent person" apparently feeling that it was not necessary

Mr. Paillette referred to the commentary, New York Revised Penal Law, pp. 323-324, and read:

> "...'custodial interference,' presented in two degrees, is the crime exclusively applicable to the taking or enticing of a child less than sixteen years old by a 'relative' from its lawful custodian purely for purposes of assuming custody or control.
>
> "Subdivision 1 defines the basic or second degree offense and grades it a class A misdemeanor. This represents a substantial reduction in punishment for such conduct when it is considered that it constituted kidnapping under the former Penal Law and was punishable by a prison term carrying a ten year maximum. That relatively light 'kidnapping' sentence, moreover, applied only in the case of a 'parent' defendant; an aunt or a grandparent, for example, was subject to the regular kidnapping sentence of twenty years to life or, if the child died, to the death penalty. The Revised Penal Law's 'custodial interference' section, on the other hand, in addition to its

drastic penalty reduction, accords the benefits of the new scheme not merely to a parent but to any 'relative'--defined as a 'parent, ancestor, brother, sister, uncle or aunt.'

"Subdivision 2 defines a related offense very similar to, if somewhat broader than, a former Penal Law offense penalizing as a misdemeanor the enticing or liberation of incompetents, juvenile delinquents and the like from institutions in which they are confined."

Mr. Paillette asked if it was felt that the language quoted was specific enough or if it was felt that it was still too broad.

Representative Frost thought the present draft language said much the same thing, if not exactly the same thing.

Mr. Paillette thought the proposed draft language was better because if defined "lawful custodian".

Mr. Chandler understood, then, that the section would not apply to anyone not having a "lawful custodian".

Senator Burns observed that a sixteen year old boy would have a "lawful custodian".

Representative Frost thought this problem arose with the draft definition of "without consent" appearing in section 1.

Mr. Knight thought it had almost been forgotten that a person could be charged under section 4 (2); a relative could have a good defense to second degree kidnapping but the good defense to second degree kidnapping would, in effect, plead him guilty to section 4 sub (2).

Chairman Yturri noted he had been absent for a short time and had missed some of the discussion. He asked why it was felt that subsection (2) of section 4 was too broad.

Mr. Knight replied that section 4 (2) would include aiding and abetting a runaway situation.

Mr. Chandler recalled that there had been concern that the provision would allow too many people to call the force of criminal law down when they really should not be entitled to use it.

Mr. Knight noted, also, that subsection (1) contains the language "...intent to hold him permanently or for a protracted period..." but this language does not appear in subsection (2). If a father, without permission, picked up his fifteen year old son and drove around a few minutes, the mother or whoever had custody could come in and charge the father under the provisions of section 4 (2).

Chairman Yturri wondered if someone who was a relative could be charged under subsection (2).

Senator Burns and Mr. Knight both thought he could be so charged presently, the way the draft is drawn.

Chairman Yturri suggested inserting the language "Not being a relative" at the beginning of subsection (2).

Senator Burns suggested adding a sub (3) to section 4 reading: "Subsection (2) of this section does not apply to relatives." He advised that he had missed this point previously in that he had not been reading sub (2) in the light of the words "lawful custodian" and its definition. He, therefore, withdrew his earlier objections, feeling that if it was felt that sub (2) should not apply to relatives, it could be remedied very easily by amendment.

Mr. Chandler could see where exempting relatives from the provisions in sub (2) could cause problems. He posed the situation where the State Hospital is legal custodian of someone (such as Brudos) and his wife comes up and takes him out. The Hospital is his legal custodian but she is a relative.

Senator Burns wondered if this might not also negate a criminal charge of attempting to aid in an escape.

Mr. Clark asked what harm would be done if the reference to "sixteenth birthday" were deleted in section 4 (1). He felt this made the years between sixteen and eighteen a "never, never land".

(Representative Haas left meeting.)

Mr. Paillette advised that some of the states go further down as far as the age is concerned; Illinois, for example, uses the age of thirteen.

Senator Burns suggested deleting the first clause down to the comma in sub (1) of section 4 and the word "and" so that the subsection will read:

> "A person commits the crime of custodial interference in the second degree if knowing or having reason to know that he has no legal right to do so, he takes, entices or keeps a person from his lawful custodian with intent to hold him permanently or for a protracted period."

Senator Burns felt this amendment would do away with the arbitrary sixteen year old situation, the problem when a father takes his child out of school to go fishing and returns him voluntarily that afternoon or the next day and other similar cases.

Representative Frost asked if this would not wipe out any criminal sanction for the father who does take a child away from a mother who has been given custody.

Senator Burns replied that the sanction would be there only if the child were taken for a protracted period. He noted that there would be a civil remedy available for the mother in that she could file a motion to show cause why the father should not be held for contempt for violating a custody decree.

Representative Frost really saw nothing wrong with section 4 except the language he had pointed out ("to hold him permanently or for a protracted period") and felt it was a great place for a "cop-out" and thought some safety valves were needed in this law. He did not see that the draft provision would give a district attorney any great problem.

Mr. Clark moved the amendment to section 4 suggested by Senator Burns.

Professor Platt asked if the phrase "or having reason to know" was being voted on now.

Chairman Yturri advised that the language was in the amendment now being considered.

Professor Platt was of the opinion that the language should be deleted because it inserted a culpability problem he thought ought not to be built into the code. "Knowing", he said, meant one thing; "having reason to know" definitely suggested to him that the crime could be committed negligently and he did not think it was the intent to get into a situation where a crime could be committed negligently.

Mr. Paillette advised that the only place where this language has been used (and it was retained from the existing code) is with respect to Theft by Receiving Stolen Property.

Mr. Tanzer observed that there comes a point where employing this language might not be a bad idea because he felt that before someone takes someone away he has a certain duty to look into his rights. The other thing is, he continued, that you get into the "proof of knowledge" problem and frequently this is impossible to prove.

Chairman Yturri reviewed the motion and stated that if the motion carried, section 4 would read as follows: "A person commits the crime of custodial interference in the second degree if knowing or having reason to know that he has no legal right to do so, he takes, entices or keeps a person from his lawful custodian with intent to hold him permanently or for a protracted period." Subsection (2) would be deleted. The motion carried; Representative Frost voting "no"; Representative Haas not present.

Section 5. Custodial interference in the first degree.

Mr. Paillette advised that this section is basically the same as section 6 in P.D. No. 3, considered in March, except that it now requires "a substantial risk of illness or physical injury" to the person taken instead of "a risk that the person's safety will be endangered or that his health will be materially impaired". He thought the new language was clearer and recognizes that there is some risk in almost any situation and therefore requires a "substantial" risk. He noted, also, that the section could involve a relative; it would apply to any class of defendant. It is anticipated that the section would be classed as a felony offense, although it would be a lesser degree felony than would kidnapping.

Senator Burns moved the adoption of section 5. The motion carried unanimously; Representative Haas not present.

Optional Section 6. Coercion.

Mr. Paillette advised that there were two other optional sections which the subcommittee referred to the Commission since the Commission last considered kidnapping. These are: Section 6, Coercion and Section 7, Coercion; defense.

Mr. Paillette explained that originally the draft on Assault and Related Offenses contained a section on Coercion. The subcommittee (No. 2) decided to delete the sections on coercion from the Assault Draft. It subsequently decided that the Coercion Sections should not be buried without Commission consideration and it was felt that for purposes of placement in the code, they could fit just as well with Kidnapping and Related Offenses as they did with Assault. At first it was thought the conduct proscribed by the coercion sections was covered elsewhere but this might not necessarily be the case. The Theft Draft, for example, contains a section on Theft by Extortion, which partly supplants the present extortion law, but Theft by Extortion requires the obtaining of property by this conduct. If an attempt were made to obtain property, then the conduct would be covered by an Attempt to Obtain Property by Extortion. There was concern, however, about the problem arising where the actor compels another to engage in conduct that he has a right not to engage in where the actor has no motive to obtain property.

Senator Burns thought the subcommittee discussion regarding this section might provide helpful information to the Commission members and read from the minutes of subcommittee No. 2, February 20, 1969, pp. 25-27.

Mr. Paillette recalled that subcommittee No. 2 also discussed this on April 24, 1969, and at that time it was felt that a "hole" might be left in the code if a separate section on coercion were not provided.

(Chairman Yturri left meeting.)

Mr. Paillette explained that the present statute is a two-pronged thing--it requires coercion with an intent to obtain property or pecuniary benefit or to compel the person to do something against his will. Part of this statute is picked up by Theft by Extortion but the other means of committing this crime is not covered.

Mr. Paillette advised that the MPC has a section on Coercion, §212.5; New York has Coercion in the first degree and in the second degree; Illinois has a crime called Intimidation. (He understood the Illinois statute is presently before the Supreme Court.) All of these codes are framed in terms of either an intent to force someone to do something against his will or the act of compelling or inducing a person to perform against his will.

Mr. Paillette explained that subsections (1) through (9) of section 6 are the same as the acts prohibited under Theft by Extortion, the only difference is in the lead paragraph where there is no element of obtaining property.

(Chairman Yturri now present.)

Senator Burns advised that he originally was of the opinion that it was dangerous to employ the same language as used in Theft by Extortion, in the particulars, but he was not now so sure. He observed that the draft uses the same defense as the MPC does (see Optional Section 7).

Mr. Paillette agreed, adding that the same defense was used in the Theft Draft, also.

Mr. Chandler moved the approval of section 6 and the motion carried unanimously, Representative Haas not present.

(Senator Burns left meeting.)

Optional Section 7. Coercion; defense.

Chairman Yturri understood that this section is similar to that in Theft.

Mr. Paillette agreed that it was the same defense.

Mr. Chandler moved the approval of section 7.

Representative Frost questioned the reason for the language "...his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of the threatened charge" contained in section 7. He thought it looked like the condonation of a criminal offense.

Mr. Paillette referred to the draft commentary on page 12 which set out the example of this defense where the defendant was accused of coercion for having compelled a youth, under threat of charging him with criminal mischief, to paint defendant's fence which the youth had marked up in an act of vandalism.

Chairman Yturri observed that the MPC uses the language "...making good a wrong done...".

Professor Platt again raised the issue of the use of the word "reasonably". He felt a crime of negligence would be committed with respect to the element of "knowing or having reason to know" and he thought this contrary to the basic policy on culpability. He was of the opinion that section 7 raised the same issue by stating "...that the defendant reasonably believed...." It was Professor Platt's contention (and he thought the clearly stated intention of the MPC) not to impose criminal liability, except in the rarest instance, based on negligence. If a defense is created that is of no use to a defendant by saying he should have known but did not in fact know something, then the crime of negligence is being inserted; some problem with mens rea are being inserted in the code that have not previously been inserted. Professor Platt pointed out that the MPC definition of Criminal Coercion does not use the language "reasonably believed"; it simply says "the actor believed...", which is all the difference in the world in respect to culpability. If the defendant believes, honestly, he said, that he has a defense, whether or not it is reasonable, he ought to have a successful defense if the jury believes him.

Mr. Chandler wondered if Professor Platt's amendment were to be adopted if it would necessitate going back to change the Theft Draft.

(Tape 2 begins here)

Professor Platt thought this involved a basic policy decision--should the revisionists inject negligence into crime; where should negligence be injected; where should it be said that a man can negligently be guilty of a crime. The only place the MPC says this is possible is in respect to the public welfare offenses and the homicide offense, such as the negligent operation of an automobile. It is a rarity in the MPC and Professor Platt thought justifiably so; if the mens rea means anything then the code should relate to the person before the bar of justice to find out what was in his mind, not what should have been in his mind. The jury will determine whether or not they believe the defendant; this is the safety measure.

Representative Frost thought this policy went too far for even his "defense oriented" tendencies.

(Senator Burns now present.)

Mr. Paillette asked if there was not a distinction between drafting a statement of a crime which says a person is guilty of the crime

if he negligently does an act and stating that the defendant is going to be allowed a defense to a charge but only if it is a reasonable defense.

Professor Platt replied that there might be a distinction but the end result is the same. If a man is given a defense and the defense is not what he believed, not what was in his own mind, then he is being convicted on something less than mens rea.

Mr. Knight thought that what the draft was trying to do was to place upon the individual some responsibility for not only what he knows but for what he should know. He cannot go out and do anything by just closing his mind and ears--he must act in a reasonable manner.

Professor Platt thought the "reasonable man" standard would come in in regard to what the jury, as reasonable people faced with the facts would believe about the defendant's particular defense; it is not a standard expressed in a statute.

Mr. Knight thought the jury would do all right but his concern with the criminal statutes was with what a judge would do with a motion for judgment of acquittal. If the language read "knew" rather than "had good reason", in order to get past the judgment for acquittal stage, it will be necessary to have some evidence that the defendant "knew". It is possible to get past the judgment for acquitt stage under a "had good reason to know" basis by having sufficient circumstances so that the judge will say the person had good reason to believe something and then the jury can determine what they think is right under the circumstances.

Mr. Paillette referred to the MPC section on Ignorance or Mistake (§2.04) and noted that one of the defenses set out is when the defendant "acts in reasonable reliance upon an official statement of the law...."

Professor Platt thought the cases coming under a mistake as to law were significantly different. He noted that this is one of the very few places the MPC inserts the word "reasonable" because it is such a very unusual kind of a defense--it means the defendant is ignorant of the printed statute.

Chairman Yturri called for a decision on this policy question--or the question of deleting the word "reasonably" appearing in section 7, coercion; defense. The motion to delete the term failed unanimously, Representative Haas not present.

Mr. Chandler's motion to approve section 7 carried unanimously, Representative Haas not present.

Senator Burns moved the adoption of the Kidnapping Article as a whole. The motion was adopted unanimously, Representative Haas not present.

Forgery and Related Offenses; Amendments to P.D. No. 2 (As proposed by Commission 2/22/69).

Mr. Paillette noted that P.D. No. 2 went back to subcommittee mainly for the purposes of checking out the draft since nothing appears in the amendments that was not recommended by the full Commission at its meeting on February 22, 1969.

Section 3. Forgery in the first degree.

Mr. Paillette advised that what had appeared as sub (5) in P.D. No. 2 had been deleted by the amendments: "(5) A written instrument officially issued or created by a public office, public servant or government agency."

Mr. Knight asked why it was thought desirable to remove this subsection.

Mr. Paillette recalled that the example discussed by the Commission was that of a press release cited by Senator Lent. While the release might be officially issued, he did not feel it should amount to forgery. Mr. Paillette referred the members to the Commissio minutes of February 22, 1969, pp. 11-13, observing that there had also been discussion in regard to forged prescriptions. He advised the members that he had sent an inquiry to the Oregon Medical Association and the Pharmaceutical Association asking whether or not they felt there was a need in the forgery draft for specific coverage of prescriptions not related to dangerous drugs or narcotics. Copies of the statutes covering forged prescriptions from New York and Michigan were sent to the Associations for review, also. No reply has been received from either organization so that their views are not known. The subcommittee felt that since there was no specific request to include forged prescriptions in the statute, that it would be covered anyway, but it would not be forgery in the first degree.

Section 4. Criminal possession of a forged instrument in the second degree.

Section 5. Criminal possession of a forged instrument in the first degree.

Section 6. Criminal possession of a forgery device.

Sections 4, 5 and 6 were deleted from P.D. No. 2 and this action was based upon Professor Platt's suggestion that they were not necessary in view of his draft on Inchoate Crimes. The conduct covered by the sections was preparatory for the commission of another crime.

Senator Burns asked if this action was not taken prior to the submission of the Inchoate Crimes Article to the subcommittee. He asked if the subcommittee had approved the Article and if its action had been commensurate with what had been expected so that it would cove the conduct that had been set out in sections 4 through 6.

Mr. Paillette advised that the subcommittee has not yet approved the draft because it has not yet considered all of the sections.

Professor Platt added that there were still four sections to be considered and while there had been no approval as yet, there had been no disagreement as to the fact that the Inchoate Crimes Article was the proper place for the placement of this type of crime. One other question, that in respect to possession of instruments, deadly weapons, burglar's tools, has not been discussed by the subcommittee.

Senator Burns assumed there would be some dialogue about the statute already passed by subcommittee No. 1 which had to do with the possession of stolen property.

Professor Platt agreed--on the policy question of whether there should be just one possession section contained in Inchoate Crimes as possession is an inchoate crime. That is, should "possession" be treated generally in the general definition of terms in the Inchoate Crimes Draft or should it remain throughout the code in separate sections in regard to completed, specific crimes.

Senator Burns understood that it had been agreed that in respect to sections 4 through 6, Forgery and Related Offenses, P.D. No. 2, it should be treated generally in the Inchoate Crimes section but that it previously had been decided that "possession of stolen property" should be a separate crime.

Professor Platt recalled that the decision regarding possession of stolen property had been made before there was any consideration of the Inchoate Article. It may be that the Commission will want to back up and reconsider this or they may just want to leave it as it is. The subcommittee, he said, has not yet arrived at any conclusion on this and he would hope that when it does that it will make a recommendation to the full Commission in this regard.

Section 7. Criminal simulation.

Mr. Paillette explained that the deletion of sections 4-6 necessitated the renumbering of the remaining sections in the draft and this section is now renumbered as "Section 4".

Section 8. Fraudulently obtaining a signature.

Mr. Paillette stated that Section 8 is renumbered as Section 5 and is amended. The amendment was voted upon and approved by the Commission because it was felt the previous language was awkward.

Section 9. Unlawfully using slugs.

Section 10. Fraudulent use of a credit card.

Mr. Paillette advised that these two sections are renumbered as Section 6 and Section 7.

Section 11. Negotiating a worthless negotiable instrument.

Mr. Paillette noted that this section is renumbered as"Section 8" and is amended. This section contains the biggest change in the previous draft.

Mr. Paillette pointed out that the title to the section had been changed to read "Negotiating a bad check" and that the language "negotiable instrument" had been deleted and the words "check or similar sight order" inserted in their place. There is no change in the criminal knowledge--"knowing that it will not be honored by the drawee." The prima facie provisions with respect to presentation of the check and to the time in which the drawer can make good the check (for the purposes of raising the prima facie evidence that he knew it would not be honored) are basically the same. The references to the Uniform Commercial Code definitions have been deleted by the amendments.

Mr. Chandler referred to Section 8 sub (2) on page 2 of the amendments and understood from this language that if he postdated some checks and they were accepted he could not be prosecuted even though they were bad checks because they had been postdated.

Mr. Paillette explained that if the check were postdated it would prevent the prosecution from having a prima facie case.

Mr. Clark asked how much consideration had been given to not even having this conduct as a crime.

Mr. Paillette replied that it had been discussed at length.

Mr. Chandler added that he felt most Commission members would have felt very comfortable about leaving the whole problem of bad checks out of the criminal code except that it was felt there would be so much controversy raised when the code appeared before the Legislature that it might never get through.

Mr. Knight thought there would be great objection from commercial operations, banks, etc., because they want checks to be treated, basically, as money, and if the proscriptions were removed from the criminal statutes, there would be problems as far as checks not being cashed, etc.

Professor Platt referred to U. S. v. Leary case and to the extensive discussion on "presumption" in the Supreme Court opinion which he felt had ramifications in any modern criminal law code. The Court, he said, takes a very jaundiced view of presumptions of any sort although he thought that set out in section 8 would be all right under the Leary case as the general rule was that the fact presumed has to be very reasonably connected with the fact proved.

The Commission should be aware of the Court view, however, whenever the proposed statutes "presume" something.

Mr. Paillette recalled that the question of prima facie provisions had been discussed at the last Commission meeting and he thought it had been the Commission's feeling all along that they should tread very lightly in the area of creating prima facie evidence of guilt or guilty knowledge. He thought that every place where prima facie evidence has been considered it has been watered down from existing law. For example, on the question of Theft of Services, the prima facie provisions under the existing Defrauding an Innkeeper statute have been practically eliminated except in the case where there is absconding.

Mr. Clark wondered if leaving something like section 8 in the criminal code was not shirking the Commission's responsibility to be somewhat forward looking. He thought the greatest opportunity to leave something out of the Criminal Code would be that of the Commission not that of the Oregon Legislature at some future time. If it was the general concensus of the Commission that this section did not really belong in the Criminal Code but that it was just expedient to put it in, he wondered if perhaps the wrong decision was not being made.

Chairman Yturri thought the draft approach was the best one to take since not everyone was in favor of taking out the bad check provisions.

Mr. Knight did not think the provisions could be removed from the criminal code and Senator Burns voiced the opinion that the professional, hard-core check burglar who negotiates bad checks for a living is deserving of incarceration to the fullest degree.

Mr. Paillette advised that the MPC points out, and sme of the other states have adopted this, too, that any special statute on bad checks could probably be eliminated by having the conduct covered by Theft by Deception. The MPC points out that there is the advantage of not having to prove that any property was obtained by the use of the check and also the prima facie evidence provisions can be in it.

Senator Burns stated that he planned to move the adoption of the amendments to P.D. No. 2 because the Commission went over the draft extensively and the amendments are the specific directives made by the Commission when it sent the draft back for revision, but he wondered, from a drafting standpoint, if there was not some rather poor drafting in subsection (2) of section 8. He referred to the language, "For purposes of this section, as well as in any prosecution for theft committed by means of a bad check..." and wondered, from a structural standpoint, if this prima facie provision was to apply to all such "purposes", if it should be tucked away in subsection (2) of a section dealing only with negotiating a bad check. He advised, also, that he had checked through the approved draft on Theft and

noted that there was no crime called "Theft committed by means of a bad check" and the draft now being considered by the Commission is entitled "Foregery and Related Offenses", not "Theft Committed by a Bad Check". He felt, therefore, that the draft was employing a new term that could be confusing.

Chairman Yturri asked the derivation of the language, "For the purposes of this section, as well as in any prosecution for theft committed by means of a bad check", contained in sub (2) of section 8.

Mr. Paillette said the language came from the MPC and quoted MPC Section 224.5.

Chairman Yturri asked if the Theft Draft had provisions for a crime entitled "Theft by means of a bad check".

Mr. Paillette said no--there was "Theft by Deception".

Senator Burns suggested using the language, "For purposes of this section, as well as in any prosecution for forgery and related offenses...."

Mr. Paillette objected to this language noting that the only place under Forgery and Related Offenses that this would come into play is in the section with respect to negotiating a bad check.

Senator Burns then suggested using the wording, "For the purposes of this section," and deleting the language, "as well as in any prosecution for theft committed by means of a bad check,...."

Mr. Paillette did not think this suggestion should be adopted because it would be desired that the same prima facie provisions apply if it was decided to prosecute the defendant for theft by deception by means of a bad check.

Senator Burns did not think the prosecutor should be given the discretion to prosecute under the draft section or under the Theft section for the same conduct.

Mr. Knight thought the separate section on negotiating a bad check was to cover certain types of situations where the actor writes a bad check that would not come within Theft by Deception because property is not obtained.

Mr. Paillette did not think Senator Burns' objection that the district attorney is given too much discretion was well taken because section 8 is intended to be a misdemeanor section.

Chairman Yturri agreed with this but did feel that the same language used in the section should be in Theft by Deception.

Senator Burns moved the deletion of the language, "as well as in any prosecution for theft committed by means of a bad check", contained in sub (2) of amended section 8 with the notation that it be added in the appropriate place in the Tentative Draft on Theft which has already been approved and that the Tentative Draft be brought back to the next Commission or subcommittee meeting for consideration.

Senator Burns stated that the amended section 8 (2) would read: "For purposes of this section, unless the check or order is post-dated it is prima facie evidence...."

Senator Burns' motion carried unanimously, Representative Haas not present.

Senator Burns moved the adoption of the amendments to P.D. No. 2, Forgery and Related Offenses, as amended by Commission action. The motion carried unanimously, Representative Haas not present.

Purposes; Principles of Construction; P.D. No. 1; July 1968.

Section 2. Purposes; principles of construction.

Chairman Yturri asked if Judge Burns had approved of P.D. No. 1 on Principles of Construction in subcommittee and Mr. Paillette advised that he had.

Mr. Paillette explained that the draft sets out the objectives of the revised code and is very similar to the statement of principles set out in the MPC. Professor Arthur's commentary noted that the section is based on the Michigan Revised Criminal Code, the New York Penal Law, the Illinois Criminal Code, on Article I, section 15, of the Oregon Constitution and on ORS 161.050 and also on the Model Penal Code, §1.02.

The draft includes deterrence and protection of the public; these statements appear in the New York and Michigan statutes but do not appear in the MPC or the Illinois statute.

Replying to a question, Mr. Paillette advised that the draft began with Section 2 because the draft is a part of a general Article on Preliminary Provisions and will appear as Section 2 in that Article Section 1 is reserved, at this stage, for a short title.

Mr. Paillette read the general purposes set out in subsections (a) through (g) of section 2 and mentioned that while the section was approved in subcommittee, the statement had been made that perhaps sub (e) should be moved up to sub (a), with the subsequent sub-paragraphs redesignated.

Mr. Clark asked the meaning of subsection (2).

Mr. Paillette replied that it meant that the courts in determining the intent of the statute will not apply the common law rule which was that a statute in derogation of the common law shall be strictly construed. A penal statute is not to be strictly construed but is to be construed, as near as the court can determine, to prohibit the type of conduct that the legislature is trying to prohibit. He noted that the present statute, ORS 161.050, has very similar language:

> "The rule of the common law that penal statutes are to be strictly construed has no application to the criminal and criminal procedure statutes of this state."

Mr. Paillette noted that Professor Arthur in his commentary points out that: "While some courts have in effect closed their eyes to statutes abolishing the common law rule of strict construction, the Oregon Supreme Court has given the statute a liberal rather than a narrow construction. It is not intended that the draft should make any change in that regard."

Chairman Yturri noted that the language was in essence that contained in the other new codes; he could not see how anyone could find too much to object to in the draft.

Mr. Knight moved to amend subsection (1) of the draft by moving sub (e) up to sub (a), then redesignating the present sub (a) as (b), the present sub (b) as (c), etc., in the present order. The motion carried unanimously, Representative Haas not present.

Senator Burns moved the adoption of the entire draft as amended. The motion carried unanimously, Representative Haas not present.

General Definitions; P.D. No. 2.

Mr. Paillette explained that the purpose was to include in the terms defined all those the subcommittee felt should be defined for general application throughout the revision. Up to now certain assumptions have been made in line with general Commission policy and with respect to definition of terms the draftsman had followed, if not the exact language, at least the thrust of the definitions of the Model Penal Code. It is realized that it may be necessary to amend the list of general definitions and add to it before the revision project is completed.

Mr. Paillette noted that the definition of "person" contained in subsection (1) is similar to existing law, ORS 161.010 (11), which, in effect, includes corporations, partnerships and other entities within the definition of "person".

Mr. Clark recalled that the coercion statute referred to a "person" and asked if this statute would apply to a corporation.

Mr. Chandler understood that it would although he did not think that the definition of "person" meant that the sanctions would apply to a corporation in every place. In some cases the conduct could only apply to human beings and in other cases it could only apply to corporations.

Mr. Paillette agreed adding that the draft would allow the legislature and the courts to look at each case and each statute on its individual merits. It was felt that the adoption of such a definition would avoid the necessity, each time a draft is drawn, of stating that the provisions of the statute apply to a person, firm or corporation.

Senator Burns felt the definition improved on the present definition of "person". He recalled that some of the draft definitions such as "deadly physical force", "deadly weapon" and "dangerous weapon" have already been discussed in Commission meetings as they relate to robbery and burglary and other substantive crimes and he felt that in adopting the General Definitions draft the subcommittee was guided, in large part, by these discussions in the full Commission.

Mr. Knight asked the derivation of the word "protracted" and Representative Frost advised that it had been used in the MPC.

Senator Burns moved the adoption of Section 3, General Definitions The motion carried unanimously, Representative Haas not present.

General Principles of Criminal Liability, Culpability; P.D. No. 4.

Section 1. Culpability; definitions.

Mr. Paillette stated that the Culpability Draft tries to do what the Commission states is its intent in the draft on Principles and Purposes: "To define the act...and the accompanying mental state... and limit the condemnation of conduct...when it is without fault." The proposed draft attempts to define the culpable mental states of "intentionally", "knowingly", "recklessly" or "criminal negligence". The use of "criminal negligence" has been limited so that it will not generally apply; in fact, it is specifically said that it will not apply unless it clearly appears by the wording of the statute defining the crime. This does not depart from the MPC, he said, for they provide for "criminal negligence".

Professor Platt agreed that there was a definite need for a definition of "criminal negligence" in the code.

Mr. Paillette advised that the real substance of the draft is contained in subsections (7) through (10). The terms defined have been used up to now in the drafts with the assumption that they would have certain meanings. The proposed draft now states what those meanings are.

Mr. Paillette advised that the MPC uses the word "purposely" in place of the term "intentionally" and the draft follows the New York proposal in this respect.

Chairman Yturri referred to the definition of the term "omission" and asked if the other codes limit this to "a failure to perform an act the performance of which is required by law". He asked if some codes did not state it as "where one has a duty to perform" and if there were not crimes in statutes the Commission has adopted which relate to the "duty to perform" rather than a requirement by law to perform.

Mr. Chandler observed that this subject had been discussed in his last subcommittee meeting and he had felt there should be a provision of this type if there was not already one. The subcommittee had felt, however, that the duties the citizen is expected to perform should be spelled out because if they are not it would give a judge, a district attorney, etc., the discretion to decide what they are.

Mr. Paillette quoted from the MPC, §2.01 (3): "Liability for the commission of an offense may not be based on an omission unaccompanied by action unless: (a) the omission is expressly made sufficient by the law defining the offense; or (b) a duty to perform the omitted act is otherwise imposed by law."

Chairman Yturri asked if this was not broader than the draft definition. He wondered if there might be a crime where there is no requirement by law that a certain act be performed but where there may be a requirement or provision in the statute that is something short of a requirement that it be performed. He asked the reason the MPC included sub (a) in its definition.

Mr. Paillette thought that what the MPC said was if the penal statute itself states that an omission or a failure to act constitutes a crime, criminal liability will attach; otherwise, it will not. In other words, it would be on a statute by statute basis, unless someplace else in the law, outside of the penal code, a duty is imposed upon a person to act.

Chairman Yturri understood, then, that if elsewhere a duty is imposed, then it constitutes a requirement by law and so would be included by the draft definition.

Mr. Paillette agreed, noting that the MPC approached it from the other direction. The proposed draft definition states what an "omission" means and the MPC states that there is not to be criminal liability for an omission unless one of the two elements listed in the MPC definition exists--it is specifically provided for in the penal statute or there is a duty of performance otherwise imposed. He advised that the MPC placed "omission" in their Culpability Section but the term itself is not defined in that section.

Professor Platt cited a case where a mother allows her children to starve to death in an attic. It is an act of omission. She is charged with manslaughter and it is decided that she can be charged with manslaughter because the mother is under a legal duty of support and therefore a legal duty is imposed upon her which she omitted to do. The difficult area, he continued, is depicted by the case where a man takes his mistress for the weekend to a hotel and allows her to die because she is a diabetic and he does nothing to help her. The question is what kind of a duty the man is under--a legal or moral one only. The cases, he said, are rather split on those kind of cases when one comes up. He understood that the draft definition would go along the line of a legal duty.

Mr. Chandler moved the adoption of the Article, General Principles of Criminal Liability, Culpability.

Professor Platt recalled that P.D. No. 3, Culpability, had contained a section 5 which dealt with Ignorance or Mistake. He noted that the present draft commentary stated: "The MPC, New York Revised Penal Law, Michigan Revised Criminal Code and the California draft contain sections relating to ignorance or mistake of fact or law as a defense. P.D. No. 3 included a similar section. The subcommittee, while not disagreeing with the legal proposition behind such a section, was of the opinion that a specific statute was probably unnecessary in view of the broad culpability provisions already formulated by the draft. A factual mistake that supports a defense of justification will be covered by a separate Article." Professor Platt observed that, omitted, then, by choice of the Commission, this is an area that by specific decision is being left to the courts. He thought this an area where the courts will have to legislate and he could see no reason for not adopting the minimal provisions of MPC §2.04 on which he thought all could pretty well agree.

Professor Platt stated that he also wanted to insert, by reference, his earlier remarks with respect to defenses based on "reasonable belief" as contrasted to "pure belief" or "honest belief". He still objected to this even though the Commission decided otherwise earlier.

Mr. Paillette replied that with respect to the section on Ignorance or Mistake, he agreed with Professor Platt. He had drafted the section in the earlier draft because he thought there was a need for it in the code.

The Commission recessed at 3:30 p.m., reconvening at 4:05 p.m.

Attorney General Johnson now present.

Professor Platt summarized his concern about whether the Code should contain a section defining mistake as to a matter of fact or

law. The subcommittee chose not to have such a section and he raised the issue that he thought the code ought to have such a section, at least in the areas where there is pretty obvious agreement.

Mr. Paillette read Section 5, Ignorance or Mistake, as it had appeared in P.D. No. 3, Culpability, p. 6.

Senator Burns recalled the subcommittee had deleted the section because it was felt it should not be tied down in the statute and it would be a defense anyway if the defendant could show it.

Professor Platt noted that the section had not contained a lot of the material contained in MPC §2.04, that relating to the official advice of an attorney general, district attorney, administrative agency or a statute that has been declared unconstitutional, etc.

Mr. Tanzer noted there were two separate problems--mistake as to fact and mistake as to law. He was surprised, he said, that they were dealt with together.

Professor Platt thought it was a matter of allowing the courts of Oregon to make the law rather than the legislature and, generally speaking, this has not previously been Commission policy.

Senator Burns wondered if there is a defense if it does not turn on a case by case situation and so should not properly be left to judicial construction or interpretation or a fact finding process by the trier of fact. He thought this had been done time and again, in determining what is a "protracted period", for example. He asked for the question on Mr. Chandler's motion to approve section 1, culpability, definitions.

Professor Platt advised that there is a situation on which there is a lot of case law throughout the country (although he did not know that there was case law in Oregon on it) and this has to do with the crime of bigamy. Where the bigamist partner through reliance on a divorce court order marries again, it has frequently been held that there is absolute liability on the bigamist; the excuse of mistak as to fact or the law in this case, based on a judge's opinion, does not excuse in a prosecution of bigamy. The minority view is that this is ridiculous and that an individual ought to be able to rely on the opinion of a judge. There is substantial authority however, which might lead an Oregon court to hold that an individual cannot rely on a judge in Reno to say that he has a divorce when the individual returns to Oregon and remarries.

Mr. Tanzer thought this kind of thing should be taken care of in the definition of a bigamy offense.

Professor Platt wondered if this was not a problem with all offenses which should be dealt with in respect to the whole code rather than with one particular crime.

Mr. Paillette noted that the real area of discussion with the problem comes with respect to ignorance or mistake as to law; not so much so with mistake as to fact because here the defendant would probably not have the culpability required or would have the defense of justification.

Professor Platt agreed it would occur in bigamy or in the particular, odd crimes where the law has traditionally been that mistake of any sort is not extenuating.

Mr. Paillette advised that no Oregon cases were found where this defense was attempted, bigamy cases or others. The MPC commentary with respect to the question of reliance upon an official statement of the law, reliance on an invalid or repealed statute, or an administrative order states: "There is some statutory and decisional support for such defenses though the principles have not been generalized to the extent presented here and there is, of course, much contrary authority on the question." He observed that on the question of reasonable reliance on the law, the California commentators have not yet decided on this and some feel that in this area, this is the one area where there is more of a chance of a spurious defense being raised

Professor Platt pointed out that this is one of the very rare occasions in the MPC where the evidence must be proved by the defendant by a preponderance.

Mr. Chandler's motion to approve section 1, Culpability, P.D. No.4 carried unanimously, Representative Haas not present.

Section 2. General requirements of culpability.

Mr. Paillette explained that sub (1) sets out the minimal requirements for criminal liability and sub (2) provides that "a person is not guilty of a crime unless he acts with a culpable mental state with respect to each material element of the crime that necessarily requires a culpable mental state." Subsection (3) provides for the strict liability type of situation if it is a violation rather than a crime, unless the statute specifically so designates or the statute defining the crime clearly indicates a legislative intent to dispense with culpability requirements.

Mr. Paillette advised that the subcommittee did not feel it wanted to go so far as to state that there would not be any strict liability defenses. He pointed out that there were a number of arguments in favor of eliminating entirely from the penal code any strict liability crimes. He thought it was a very important Commission policy decision to decide whether to have limited criminal liability without culpable mental state or whether to provide that a crime cannot be committed under any circumstances unless there is one of the culpable mental states set out in the draft--intentionally, knowingly, recklessly

or with criminal negligence. The draft, he advised, takes a middle of the road approach, stating that in some instances there may be statutes that provide for strict liability.

Mr. Tanzer asked what these would be.

Mr. Paillette replied that all or a good part of the regulatory statutes do not require a culpable mental state.

Professor Platt added that they may impose a loss of liberty for up to six months.

Chairman Yturri remarked that it was not possible to foresee what the legislature may want to do but that the door should be left open to what evolves eventually, as to the strict liability crime.

Professor Platt noted that the MPC provides that where statutes outside the code (the regulatory statutes, in other words) provide for imprisonment, the state may exact that sanction but only if it proves, at least minimally, that there is negligence, even though the statute does not require it. Otherwise, only a violation may exist and only a fine may be imposed. Professor Platt thought this made sense because there is a good deal of criticism about sending someone to jail for something for which he had absolutely no criminal mens rea about.

Chairman Yturri asked if incorporating this MPC approach into the Oregon code was considered at all.

Mr. Paillette replied that the MPC approach had been discussed in subcommittee but the specific provision with respect that there be no imprisonment for regulatory violations unless there is a minimal element of negligence was not discussed.

Mr. Tanzer commented that there has been some recent case law where the courts have recognized that it is just too harsh to impose a criminal penalty in a situation where there is no actual negligence on the part of the violator.

Chairman Yturri asked how these violations that are outside of the code would be classified or categorized.

Professor Platt advised that if the Commission adopted a policy similar to that of the MPC, as he had sketchily outlined, for the state, if a city has a conflicting provision requiring imprisonment, it would not be valid because a city cannot have a criminal law that is contrary or in conflict with the state. He suggested the members might find §2.05 (2) of the MPC helpful in this regard.

Chairman Yturri summarized by stating that Professor Platt wanted to go beyond the criminal code and have section 2 apply to all regulations of agencies where imprisonment may be inflicted.

Senator Burns said that he did not disagree with the suggestion. One of the things he thought the Legislature must address itself to is the bringing into some sort of reasonable conformity all the various statutory penalties in all of the chapters of the ORS. He wondered, however, if what Professor Platt suggested was something separate and apart from that which was chargedthe Commission and something which should be handled as a separate thing.

Professor Platt did not think this was so at all; he felt it was a vital issue and anytime there was a loss of liberty statute involved, he felt it was a very crucial criminal law question. He noted, also, that where proof of negligence could not be proved, the state could still levy a fine against a violator.

Mr. Clark moved that the policy approach set out by Professor Platt be adopted as the Commission policy. Chairman Yturri noted that only 7 of 13 Commission members were present to vote on what he considered a crucial policy question. Mr. Clark was willing to put the question over until a more representative group was present. Chairman Yturri thought this was the thing to do but noted that it must not be forgotten because he thought it important that the Commission act on the policy. He asked that Mr. Paillette place this on the agenda for the next Commission meeting.

Senator Burns asked Professor Platt if he contemplated that the exact language contained in MPC §2.05 (2) be used.

Professor Platt could see no reason why it should not be as he saw no conflicts with what had already been approved by the Commission.

Mr. Johnson suggested that it could be stated more simply.

Senator Burns agreed that the issue should be carried over for the next Commission meeting. He had no personal objection to the policy and the more he thought about it, the more he thought perhaps the Commission should consider the problem.

Section 3. Construction of statutes with respect to culpability requirements.

Mr. Paillette explained that section 3 sets out the guidelines for construing the statute with respect to culpability.

Chairman Yturri asked if Mr. Paillette could recall any substantive provisions adopted by the Commission wherein the proposed statute does not make clear the element of the crime to which the culpable mental state applies.

Mr. Paillette could not think of any in the statutes drafted up until now.

Professor Platt added that the section provisions were intended to guard against bad draftsmanship.

Mr. Paillette noted that sub (2) also would take care of an omission in drafting in that if the statute does not prescribe a culpable mental state, one is nonetheless required.

Mr. Paillette explained that sub (3) was a lesser-included type of culpability and states that if the statute prescribes that a person could commit a crime by acting with criminal negligence, the person can violate the statute by acting with a greater degree of culpability--intentionally, knowingly or recklessly. The section then states that if recklessness is a "culpable mental state, it is also established that a person acts intentionally or knowingly. When acting knowingly suffices to establish a culpable mental state, it is also established if a person acts intentionally." Sub (4) provides that the defendant is not required to know the conduct is an offense. Mr. Paillette noted that going back to the subject of "Mistake as to Law", it would really amount to a limited exception to the draft statement.

Section 4. Intoxication.

Mr. Paillette advised that this section is pretty much a re-statement of the existing law on intoxication.

Senator Burns was of the opinion that the draft was a little more liberal.

Mr. Paillette pointed out that the MPC goes much farther than the draft intoxication provisions. The MPC uses the term "self-induced intoxication" and defines this and uses the term "pathological intoxication" which gets to the question of the chronic drunk.

Professor Platt commented that the "pathological intoxication" concept has been adopted by one of the Circuits just recently in the Federal system.

Mr. Paillette explained that P.D. No. 3, Culpability, had followed the MPC approach on intoxication and that this was done because when subcommittee No. 3 had discussed the insanity defense, the decision had been that the section on intoxication should not be a part of the Responsibility Draft. In line with the direction of subcommittee No. 3, the intoxication section in P.D. No. 3 had followed the MPC and this was what was considered by subcommittee No. 1. Subcommittee No. 1 felt it was desirable to follow existing statute.

Senator Burns moved the adoption of section 2 (subject to modification after the MPC approach as to proof of minimum of negligence before incarceration has been considered by the Commission

at its next meeting), section 3 and section 4. The motion carried unanimously, Representative Haas and Mr. Knight not present.

General discussion of Commission policy regarding placement of provisions relating to time limitations, jurisdiction, place of trial, etc.

Mr. Paillette advised that Article I of the MPC, beginning with section 1.06, Time Limitations, and going through section 1.11, Former Prosecution Before Court Lacking Jurisdiction or When Fraudulently Procured by the Defendant, are sections the counterparts of which now appear as part of the Commission's Criminal Procedures. Mr. Paillette asked whether or not the Commission wished to follow the MPC in this respect and in the substantive code include sections that now appear as part of the Criminal Procedure Code or whether the Commission wished to defer action in this area until it got to procedure. The Commission, he said, might feel there are some sections that should be dealt with now because in the absence of the provisions between sections 1.06 and 1.11, the Preliminary Sections under Article I would be drafted. He stated that he felt the sections should be dealt with as part of the Procedural Code.

Chairman Yturri asked if items covered in MPC sections 1.06 through 1.11 would be considered first under procedure. Mr. Paillette replied that they certainly could be. Chairman Yturri asked if there were any objections to pursuing this course and receiving none, announced that this was what would be done.

Mr. Clark said that he would like in some way to obtain official recognition for subcommittee No. 1 to look into the possibility of making it a duty for citizens to come to the aid of persons in immediate peril.

Mr. Tanzer thought that the main resistance to this idea is simply in the lawyer's mind--thinking negatively about something different.

Senator Burns advised that this subject had been discussed a number of times by subcommittee No. 1 and advised that Mr. Spaulding felt rather strongly that this should not be made a crime. Senator Burns posed a situation where he failed to notify someone of another driver's speeding, erratic driving and a short time later comes upon an accident caused by that driver. The driver is later charged with negligent homicide. Senator Burns asked if he would be liable to prosecution for violating his duty to report the driver's conduct.

Mr. Tanzer thought there were two separate questions--one being the failure to report the commission of a crime and the other being the failure to come to the assistance or to seek assistance for a

person in danger. He thought the problem dealing with the furnishing of witnesses to the state was the question apparently not approved by Mr. Spaulding. The second question, though, is essentially a rescue situation.

Chairman Yturri asked Mr. Clark if he had in mind cases where a request has been made for aid.

Mr. Clark cited three instances where people stood by and failed to help someone in immediate peril: one where a child is floundering in the water and no one attempts to aid; one where the mistress is dying of a diabetic attack and the man fails to call for help for her; and one where a number of people watch a girl being repeatedly attacked and stabbed without calling for help. He felt there should be a statutory duty for people to come to the aid of persons in immediate peril. He said that the situation he was concerned with was the one involving an immediate threat to someone's life. The aid required of the citizen would be that which could be expected of a reasonable person under the circumstances.

Senator Burns said that a criminal sanction would be imposed, then, for a person's lack of judgment.

Chairman Yturri added that a criminal sanction would be imposed where a person is frightened and unaware of what he should do or where he is just ignorant. He felt that if this were to go back to culpability, it would have to be broadened so that there would be liability if the citizen was aware of what he should do.

Mr. Chandler said that the thing that he was concerned about was the basic attitude people have of not wanting to become involved. Replying to a question by Mr. Johnson, Mr. Chandler said he did not think having a statute would solve the problem but he thought it would do some good to make this conduct a crime.

Mr. Clark thought it would be a policy statement from the State of Oregon that it expected citizens to do this.

Mr. Chandler agreed, adding that the citizen of the state has an affirmative duty--if he wishes to enjoy the benefits of the state, to assist and protect others.

Mr. Tanzer asked if there was a "Good Samaritan" statute and Senator Burns replied that there was; it was passed in 1967.

Mr. Johnson was not sure that this type of conduct was not more in the area of civil law rather than criminal law.

Senator Burns suggested that Mr. Paillette prepare a rough draft to be presented to the Commission so that a consensus can be obtained

as to whether subcommittee No. 1 should pursue it. It was agreed that this would be the approach taken.

Mr. Chandler noted that the Commission had approximately 12-15 months to complete its work in order to get it before various groups before it was considered by the Legislature. He suggested, therefore, setting up two consecutive days each month for meetings, one day to be devoted to subcommittee meetings and one day to be devoted to a Commission meeting.

Chairman Yturri advised that he and Mr. Paillette had been discussing this problem recently. He thought Mr. Chandler's idea a good one and said he would like to implement it as soon as possible.

Mr. Paillette advised that subcommittee No. 1 has a backlog of drafts to work on and the staff work is about three drafts ahead of subcommittee No. 2. He advised that as far as the staff is concerned, it could meet whatever meeting schedule is desired. His only concern was with the drafts being worked on by Professor Platt; whether or not this would be a feasible meeting arrangement for subcommittee No. 3. He noted that Professor Platt was not a full time reporter and he would not want to impose an unconscionable burden on him.

Professor Platt advised that the Responsibility Draft would be ready for the Commission in another week. The Inchoate Crimes Article is awaiting subcommittee action.

Senator Burns advised that subcommittee No. 1, beginning in July, will meet every third Friday at 1:30 p.m. He suggested it might be best, then, to have a Commission meeting on the next day, Saturday.

Chairman Yturri suggested Mr. Paillette prepare a memorandum advising all Commission members of the discussion and stating that unless there is objection, henceforth the subcommittees will meet on the third Friday of each month and the Commission will meet on the next day, Saturday. The next meeting will be the 18th and 19th of July.

The meeting was adjourned at 5:05 p.m.

Respectfully submitted,

Maxine Bartruff, Clerk
Criminal Law Revision Commission