Tape No. 9

490 to end of Side 1
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OREGON CRIMINAL LAW REVISION COMMISSION
309 Capitol Building
Salem, Oregon

July 19, 1968
9:30 a.m.

A G E N D A

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OREGON CRIMINAL LAW REVISION COMMISSION
Fifth Meeting, July 19, 1968

Minutes

Members Present: Senator Anthony Yturri, Chairman
Judge James M. Burns
Senator John D. Burns
Mr. Donald E. Clark
Mr. Frank D. Knight
Mr. David H. Blunt, Assistant Attorney General, representing Attorney General Robert Y. Thornton

Absent: Mr. Robert Chandler
Representative Edward W. Elder
Representative Dale M. Harlan
Representative Carrol B. Howe
Senator Thomas R. Mahoney
Representative James A. Redden
Mr. Bruce Spaulding

Staff: Mr. Donald L. Paillette, Project Director
Miss Kathleen Beaufait, Deputy Legislative Counsel

Reporters: Professor Courtney Arthur, Willamette University College of Law
Professor George M. Platt, University of Oregon School of Law

Also Present: Mr. Gary Babcock, Public Defender
Mr. Dave Neeb, Multnomah County Sheriff's Office
Justice Gordon Sloan, Chairman, Bar Committee on Criminal Law and Procedure

The meeting was convened at 10:00 a.m. by the Chairman, Senator Anthony Yturri, in Room 309 Capitol Building, Salem.

Chairman Yturri complimented Subcommittee No. 1 which under the chairmanship of Senator John D. Burns had worked diligently to prepare the drafts to be considered at today's meeting. He also thanked Justice Gordon Sloan for his contribution to the work of the subcommittee. He advised that two members of the subcommittee had indicated they would not be able to attend today's meeting. Mr. Spaulding was trying a lawsuit in Roseburg and Mr. Chandler was out of the state but they had given their approval in subcommittee meetings to the drafts to be discussed.

Because of the bulk of the material before the Commission, he announced that the drafts would not be read word by word which would only duplicate the efforts of the subcommittee, but the Commission members would be asked to consider policy questions. When the drafts had been approved by the Commission, he said, they would then be

circulated to interested members of the public for their criticisms and comments. Chairman Yturri turned the meeting over to Senator Burns, Chairman of Subcommittee No. 1, at this point.

Senator Burns expressed gratification at the number of hours the members of the subcommittee had spent in working on the drafts and their willingness to attend meetings. He indicated that the success of their efforts had depended largely on the quality of the staff working with them and commended Mr. Paillette's industry and diligence.

Unauthorized Use of a Vehicle; Preliminary Draft No. 2; April 1968
[Note: See Minutes, Subcommittee No. 1, April 6, 1968, pp. 12-14.]

Judge Burns asked if this draft would take care of situations where a man rented a car from a car rental agency and failed to return it in accordance with the terms of his contract. Mr. Paillette replied that the language pertinent to that situation was contained in subsection (c) and was intended to cover the circumstance where there was a gross deviation in the conduct of the bailee in that he did not return the car according to the agreement but he did not commit the crime of theft because his conduct did not come up to the standard specified by the theft draft.

Judge Burns asked if violation of that same type of contract would be criminal under the present law and Mr. Paillette replied that there was no statute to specifically cover that type of situation and the subcommittee felt it should be covered even though it was a less serious crime than one where there was intent to permanently deprive the owner of the vehicle.

Mr. Knight expressed concern over the use of the term "gross deviation" in subsection (c) because a gross deviation could reach the stature of theft. Mr. Paillette noted that the term was derived from the New York code. Senator Burns read Model Penal Code section 223.9 and indicated that the subcommittee felt the language of the Model Penal Code, "without consent," was too broad so in order to make it a question of fact, had employed "gross deviation."

Chairman Yturri commented that the investigation prior to the actual prosecution of the defendant would resolve many of the problems because officers would exercise discretion as to whether there was a gross deviation. Also, he said, during the course of the trial, the defense attorney would allege facts from which the jury could decide whether the conduct was a gross deviation. Mr. Knight observed there would be a great deal of discretion in the hands of the prosecutor as to whether the act had reached the point where a charge should be filed and he said he would prefer to see it become a question of fact for the jury as to whether the conduct actually amounted to a gross deviation rather than being interpreted to mean wilful and wanton conduct.

In response to a request by Senator Burns, Mr. Paillette explained that the commentary to the New York code indicated that New York was trying to cover situations incorporated in the Oregon draft as subsections (b) and (c) where there was legal possession followed by unauthorized use of the vehicle and it was their purpose, with which the subcommittee agreed, to exclude the frivolous charges.

Chairman Yturri commented that if the code were to say that gross deviation was to be a jury question, the court would have to instruct on the question and in that event, it might be necessary to define the term.

Senator Burns indicated that the subcommittee intended that by employing the term "gross deviation," it should be a matter left up to the jury in a particular situation to decide whether or not this act of deviation was such as to render the act criminal. Judge Burns commented that after this draft had been circulated to district attorneys and others particularly interested, the Commission would probably receive comments which would be helpful in resolving the problem.

Senator Burns called attention to the fact that the draft removed the tampering, injuring, breaking and entering aspect of the current statutes. Judge Burns expressed approval of this revision.

Mr. Clark asked if the subcommittee had considered the advisability of leaving the crimes in this category to civil recourse and was told by Senator Burns that it had been discussed but the members felt, in view of the vociferous lobbying which had occurred in the area of taking and using as well as the larceny by bailee statutes, they were obliged to attempt to resolve the problems. The trend of other revisions, he said, was toward downgrading the offense by making the proof less burdensome. Mr. Paillette advised that the subcommittee anticipated that these crimes would be classified as misdemeanors.

After further discussion, Judge Burns moved, seconded by Mr. Knight, that Preliminary Draft No. 2 on Unauthorized Use of a Vehicle be approved for circulation. The motion carried unanimously.

Theft of Services; Preliminary Draft No. 3; June 1968 [Note: See Minutes, Subcommittee No. 1, May 17, 1968, pp. 1-7; May 27, 1968, pp. 1-5.]

Mr. Paillette explained that the theft of services draft attempted to pick up and cover conduct that would not be embodied in the theft draft, principally because services are not property and they would not fall within the definition of "property" in the theft draft. He said the subcommittee had attempted to encompass a number of statutes in the existing law, as outlined on page 3 of the commentary to the draft, many of which were two-pronged in that they dealt not only with theft of services but also with interfering or

tampering. The tampering or interfering portions of those statutes, he pointed out, would be covered under the criminal mischief draft. The theft of services draft would continue to provide the sanctions of the criminal law and protection for service-rendering enterprises and would expand the scope of the law to encompass professional services and labor within the definition of "services." He pointed out that one of the early drafts included a specific section for protection of utilities such as gas, electricity and water but the subcommittee felt that the definition of "services" was broad enough to cover utilities as well as the other types of services they wanted to encompass in the statute.

Senator Burns called attention to the 16 statutes on page 3 of the draft which would be repealed and consolidated if this draft were adopted. He also noted that it was intended that theft of services would be classified as a misdemeanor. The draft, he said, was aimed primarily at the defrauding an innkeeper type of situation but many other circumstances would also be included.

Mr. Paillette read the following excerpt from the comment in Tentative Draft No. 2 to the Model Penal Code, p. 91:

> "There is widespread legislation imposing minor penalties for particular instances of cheating in obtaining service, e.g., obtaining service from hotels and restaurants without intent to pay, dropping slugs in coin machines. But in general it is no crime to induce a doctor, architect, engineer or lawyer by false representations to render services, since no 'property' is obtained."

He explained that the crime as proposed contained a mens rea element in that there had to be an intent to avoid payment.

Senator Burns noted that some of the revisions had made it prima facie evidence to refuse to pay for the service rendered. The subcommittee felt there should be an overt act and accordingly, in subsection (3), employed the word "absconding" to imply that an overt act or stealth would be required to constitute the crime as opposed to someone who walked out the front door and forgot to pay.

Subsection (1). Judge Burns referred to the last phrase of subsection (1), "the supplying of commodities of a public utility nature such as gas, electricity, steam and water." He said that if there were other types of services to be included -- for example, garbage service -- in addition to the four mentioned, the draft was too vague. If the intent was to limit the statute to the four utilities listed, the balance of the language should be eliminated.

Miss Beaufait commented that the subcommittee was considering other utilities which might develop in the future and made specific reference to community television cables which were public utilities in a sense but were not at this time regulated. Mr. Paillette

informed the Commission that the subcommittee had not intended to limit the proposed statute to the four utilities mentioned and Judge Burns replied that the courts were likely to apply the rule of strict construction and if someone wanted to prosecute a defendant for theft of services for a utility not named in the statute, he would have trouble doing so.

Professor Platt remarked that reference to the minutes of this Commission would clearly show that the intent was to include garbage, cable television and any other service that might develop in the future and expressed the view that specifically naming the four utilities in the statute might be unnecessarily limiting. He added that the language of the statute would prevail over legislative history and if there were no examples given in the statute, the court would be free to refer to legislative history for interpretation of the statute. Mr. Blunt commented that transportation and telephone might also be considered public utilities and agreed that the four utilities should not be delineated in the proposed statute.

Chairman Yturri suggested "including but not limited to" might be clearer than "such as" and Mr. Knight pointed out that the proposed phrase would then appear twice in the section. Chairman Yturri proposed subsection (1) read:

> " . . . 'services' includes, but is not limited to, labor, professional service, toll facilities, entertainment, the supplying of food, lodging or other accommodations in hotels, restaurants or elsewhere, the supplying of equipment for use, transportation, telephones, other communications services, and the supplying of public utility services."

The suggested language, he said, would retain the distinction that exists between telephone services and other types of utilities. Judge Burns asked what "public utility services" would mean under the suggested language and was told by the Chairman that it would at least include gas, electricity, steam and water. Judge Burns replied that in the absence of a definition in this code, the statute might be remitted to the definition in the public utilities code and he questioned the advisability of that possibility.

In reply to a question by Chairman Yturri, Miss Beaufait indicated it could be argued that "including but not limited to" meant the same as "such as."

Mr. Paillette commented that when the theft of services section was drafted, the subcommittee wanted to make it clear that they were including the public utilities within the draft and they were of the opinion that the rest of the definition was broad enough to include and encompass other services that would be rendered.

Chairman Yturri pointed out that the intent of the Commission would be stated clearly in the minutes and suggested that subsection (1) be adopted without revision.

Judge Burns moved that subsection (1) be approved for circulation. The motion was seconded and carried unanimously.

Subsection (2). Mr. Knight suggested that subsection (2) might be clearer if it read " . . . obtains by force, threat, deception, or other means services which are available only for compensation." Senator Burns responded that a fundamental decision had been made at the previous Commission meeting that, while recognizing that the drafts were not perfect, in the interest of saving time the Commission would deal with substance only and the tentative drafts would be grammatically polished by Legislative Counsel.

Judge Burns objected to the use of "or other means" in subsection (a). Whenever a phrase of this type was used, he said, it ran into three or four centuries of judicial rigidity which limited the statute to the descriptive language immediately preceding the phrase. He advised that if the language was intended to cover the crime of climbing out the window to avoid payment, he was not at all sure the court would say such act was a crime under the phraseology of this draft. Senator Burns said that the subcommittee had discussed this point at great length and had attempted to make it crystal clear that "other means" related to "intent to avoid payment." Judge Burns said the draft was perfectly clear that "other means" required the actor to possess the requisite intent but it did not solve the problem of the rule of construction. He suggested that questions of this type might be resolved in the preliminary articles by discarding the sometimes artificial rule of construction and Chairman Yturri expressed agreement.

Professor Arthur referred to subsection (b) and noted that the New York code said "commercial or other substantial benefit" rather than "commercial benefit." Mr. Paillette responded that the subcommittee had discussed this subject in detail and had concluded that "substantial" posed a construction and definition problem. The subcommittee was of the opinion that most acts in this category would be of an insignificant character and there were some things that should be left to the employer to correct as he saw fit. Professor Arthur expressed concurrence with this decision.

Judge Burns moved that subsection (2) be approved for circulation. The motion was seconded and carried unanimously.

Subsection (3). In response to a question by Mr. Knight, Senator Burns explained that the subcommittee had intended in subsection (3) to narrowly restrict conduct which would rise to the dignity of prima facie evidence. Judge Burns expressed approval of this policy decision which would not sweep into the net a wide range of conduct that shouldn't be bothering the criminal courts. He pointed out that the term "other services" raised the same problem of construction the Commission had discussed earlier but the minutes reflected the intent to control a fairly narrow set of circumstances and he said he would oppose removing the descriptive words because it would broaden the

scope of the section. Once the charge was proven in court, he said, the matter would become a jury question and depend entirely on the validity of the defense asserted. He asked if, in this narrow sense, absconding without payment was a jury question and received an affirmative reply from both Senator Burns and Mr. Paillette.

Judge Burns then moved that subsection (3) be adopted. The motion was seconded and carried unanimously.

Burglary and Criminal Trespass; Preliminary Draft No. 2; June 1968 [Note: See Minutes, Subcommittee No. 1, May 27, 1968, pp. 7-12.]

Section 1. Burglary and criminal trespass; definitions. Mr. Paillette pointed out that the definitions in section 1 of this draft were designed to apply to both burglary and criminal trespass. The definition of "building," he advised, was intended to cover structures of a nature that would be likely to have people in them for extended periods of time. The definition of "enter or remain unlawfully" contained a significant change from present law, Mr. Paillette said, in that there was no reference to "breaking." He mentioned that it was difficult to relate the definitions to the draft without first reading the subsequent sections and Senator Burns agreed that the best approach would be to go to the substantive sections before discussing the definitions.

Section 2. Burglary in the second degree; Section 3. Burglary in the first degree. Mr. Paillette explained that "building" as used in section 2 could mean a vehicle, boat or aircraft and burglary in the second degree could be committed if the defendant entered or remained with intent to commit a crime. He could conceivably enter lawfully and remain unlawfully and still fall under the sanctions of this section, he said. The section as drafted did away with the problem of proving whether or not the actor had the intent to commit a crime at the time he entered the building.

Senator Burns explained that if burglary was committed in any kind of building, whether a dwelling or a business, during the daytime, the charge would be burglary in the second degree. He noted that the definition of building stated "adapted for overnight accommodation" so the section probably would not include a shelter in a park, for example, but if that sort of place were broken into, it would be covered by the criminal mischief draft.

Mr. Knight commented that the definition of "enter or remain unlawfully" probably would exclude a telephone booth and Mr. Paillette replied that it might be argued that a telephone booth would be adapted for carrying on a business therein. Mr. Knight remarked that the draft removed all the constructive breaking situations and Mr. Paillette explained that the subcommittee felt "remaining unlawfully" eliminated problems of constructive breaking because the prosecutor would not need to show there was a breaking, constructive or otherwise.

Mr. Knight noted that burglary could not be committed in a laundromat which remained open all night and Mr. Paillette explained that such an act could be criminal tampering or it could be theft, but the subcommittee did not feel that it should rise to the stature of burglary.

Mr. Knight discussed State v. Keys, 244 Or 606, 419 P.2d 943 (1966), and said that the serious crime involved in that case could probably be taken care of in another type of statute dealing with some type of criminal syndicate.

Senator Burns asked if it was the feeling of the Commission that there should be a separate criminal statute relating to parking meters, coin machines, etc. Justice Sloan replied that there were many kinds of self-service operations, such as car washes, which remained open on a 24-hour basis. He asked if the problem raised in State v. Keys could be solved by stating the Commission's policy decision in like situations as a commentary rather than to specifically define all the unoccupied or self-service structures. Chairman Yturri suggested that the penalty sections might be amended to take care of cases such as Keys. Judge Burns asked if State v. Keys would be second degree burglary under the draft and Chairman Yturri replied that it did not fall under the definition of "entering or remaining unlawfully." Senator Burns remarked that the court could say that the telephone booth was open but the defendant wasn't privileged to enter or remain as he did. Chairman Yturri suggested that the conjunctive "and" in subsection (5) of section 1 could be changed to the disjunctive "or" so that it would not be necessary to prove both phases of the crime.

Professor Platt asked for an explanation of the distinction between a building adapted for overnight accommodation and a building usually occupied overnight and was told by Mr. Paillette that a trailer house adapted for overnight accommodation might not usually be occupied but if it were usually occupied, then it would be a dwelling; it would, however, be a building in either case. Mr. Clark asked what the charge would be if someone broke into a trailer house that was for sale in an obviously unoccupied condition and Mr. Knight replied that under the common law it would not be a dwelling until someone had lived in it. Senator Burns said that if it was a trailer in a park and people usually occupied it at night, it would be a dwelling but if it was a used trailer on a lot, it would be a building but not a dwelling.

Professor Platt asked if the term "usually occupied" in subsection (3) of section 1 applied to the kind of building or the specific building and Senator Burns responded that it was intended to mean the specific building.

Professor Platt contended that entering a dwelling should be first degree burglary whether the offense occurred in the daytime or the nighttime. Mr. Knight expressed concurrence with this contention

and pointed out that if a burglary occurred while the owners were away from their home sometime between 6:00 p.m. and 10:00 p.m., the prosecutor would have to prove what time the burglary occurred to determine whether it was during the daytime or nighttime and in addition would have to call in a meteorologist to testify at the trial as to what time the sun set on that particular date. He was of the opinion that no element of time should be involved in the crime of burglary in a dwelling.

Mr. Clark expressed the opposing view commenting that he was more fearsome of being bludgeoned in his sleep than of someone who entered his home when everyone was away and took the television set.

Senator Burns stated that his personal reaction in the subcommittee, where he was outvoted, was in line with Professor Platt's suggestion and he had suggested that section 3 (2) be amended by placing a period after "dwelling."

Mr. Knight stated that if the Commission did not want to make the crime first degree burglary when it occurred in a dwelling regardless of the hour, he would suggest that the act be first degree burglary if it occurred when someone was actually in the house. Judge Burns commented that this proposal would make all vacation house burglaries second degree crimes, and Mr. Knight replied that if the house was unoccupied, you couldn't prove the burglary occurred at night so it would be second degree in any event under the proposed draft. Professor Platt added that a burglar should not be accorded the opportunity to speculate on the degree of compensation he would have to serve if apprehended. As a deterrent factor, he said, burglary in a dwelling should be first degree whether or not the dwelling was occupied and whether or not the burglary occurred during the daytime or nighttime.

The Commission recessed for lunch at 12:30 p.m. and reconvened at 1:30 p.m. The same members were present as attended the morning session and also in attendance were: Professor Platt, Professor Arthur, Mr. Paillette, Miss Beaufait and Mr. Neeb.

Judge Burns called attention to subsections (a) and (c) of section 3 and asked if the subcommittee intended to make a distinction between "deadly weapon" and "dangerous weapon." Mr. Paillette replied that, while the terms had not yet been defined, a distinction was intended and "deadly weapon" would mean a gun and "dangerous weapon" had reference to, for example, a club. Judge Burns commented that if the Commission adopted that distinction, the legislature would want to consider whether they should change the presumption in Oregon law relating to a deadly weapon.

Mr. Knight commented that the manner in which a dangerous weapon, such as a club or a crowbar, was used could automatically bring the actor under the provisions of section 3 (a) if he wielded the weapon in a deadly manner. Mr. Paillette replied that the use the actor made

of the weapon was of little significance for the purposes of prosecuting him under section 3. Judge Burns expressed the view that an astute district attorney could turn almost every business entry into a first degree burglary charge by the language of the draft because nearly any weapon could be either deadly or dangerous. He asked if he was correct in assuming that the draft was aimed at the situation where a burglar who broke into a service station armed with a stick of dynamite or a pistol would be charged with first degree burglary; if he had a knife on him when he entered the service station, it would be second degree, but if he used or threatened the operator with the knife, the charge would be first degree.

Senator Burns replied that the subcommittee was afraid the burglar might use the weapon if he had it on his person when he made the entry so had intended that the charge would be first degree whether or not he used or threatened to use it. The intent was to discourage him from being armed. Judge Burns responded that if this was the purpose of the draft, subsection (c) was unnecessary. He advised that if the intent was to prevent the mere possession of a weapon, subsection (a) should be drafted to cover that situation and subsection (c) should be eliminated.

Chairman Yturri expressed the opposing view and said that if someone entered with a gun or a large butcher knife, there was no question that he was armed with a deadly weapon plus the element of placing the victim in fear, whereas if he entered with a pocketknife in his pocket, that would not be considered a deadly weapon.

Judge Burns remarked that if the Commission wished to draw a distinction between deadly and dangerous, the terms should be defined and Chairman Yturri agreed. Mr. Paillette advised that the subcommittee anticipated they would be defined in the general articles.

Judge Burns next referred to "uses or threatens the immediate use" in section 3 (c) as derived from the New York code and asked what was achieved by the use of "immediate." Senator Burns replied that point was not discussed in the subcommittee but the members felt the section should be tied down to the use or threat of the use of the weapon contemporaneously with the entering or remaining. Judge Burns was of the opinion that "immediate" would provide a defense attorney with grounds for argument and would complicate the problems of the prosecution. Since it would utlimately be a jury question whether the conviction was for first or second degree, he moved to delete "immediate" from section 3 (c). Mr. Knight seconded the motion and it carried unanimously.

Judge Burns moved that section 3, subsection (1), be approved as amended. The motion was seconded and carried unanimously.

Mr. Knight moved that subsection (2) of section 3 be amended by placing a period after "dwelling" and deleting the remainder of the subsection and that the subsection be approved as amended. Senator Burns seconded and the motion carried without opposition.

Judge Burns moved that subsection (4) of section 1, the definition of "night," be deleted in view of the previous motion of the Commission. The motion was seconded and carried unanimously.

Judge Burns next moved that section 2 be approved. Mr. Knight seconded and the motion carried without opposition.

Judge Burns moved that section 1 as amended be approved. The motion was seconded and carried unanimously.

Section 4. Possession of burglar's tools. Senator Burns noted that the possession of burglar's tools was not presently codified as a crime in Oregon although, as noted on page 14 of the commentary to the draft, ORS did proscribe the possession of certain instruments of crime. In most jurisdictions, he said, the crime was a violation of a city ordinance and pointed out that possession was codified as a crime in the New York and Michigan revisions.

Professor Platt asserted that possession closely resembled the law of attempt to be covered in the article on inchoate crimes. He noted that section 5.06 of the Model Penal Code was a part of the inchoate crime article and did not relate specifically to possession of burglar's tools but was phrased more broadly. He suggested the Commission delay consideration of section 4 until the inchoate crimes article had been prepared rather than singling out this particular kind of attempt statute.

Senator Burns replied that section 4 went beyond the general definition in inchoate crimes because burglar's tool was defined and narrowed down. The subcommittee was of the opinion, he said, that there was overriding social justification for specifying the crime of possession of burglar's tools.

Judge Burns said the best way to resolve the problem would be to approve section 4 conditionally and mark it for reevaluation at the time inchoate crimes were considered. He so moved and the motion carried unanimously.

Section 5. Criminal trespass in the second degree. Mr. Paillette pointed out that the same definitions applied to the criminal trespass sections as to the burglary draft and a defendant charged with first degree criminal trespass could plead guilty to or be convicted of second degree criminal trespass because of the broad definition of "premises" in section 1. He said the subcommittee was more concerned with ease of enforceability in framing the sections than with the severity of the punishment to be imposed. He also noted that the proposal would not make it a more severe crime to trespass on fenced property than on unfenced property.

Professor Arthur commented that he was disturbed by the absence of a statement of a mental element in the crime. Ultimately, he said, the Commission would have to express the mental element in every crime

and Professor Platt concurred with his contention. He pointed out that other recent revisions together with the Model Penal Code in section 2.02 said that it was necessary to include the element of purposely, knowingly, recklessly or negligently with respect to each material element of an offense and no criminal liability would attach unless the statute so stated.

Mr. Paillette noted that the first draft of the criminal trespass statutes contained the phrase "knowing that he is not licensed or privileged to do so" and called attention to pages 11 and 12 of the Minutes of Subcommittee No. 1 dated May 27, 1968, where this question was discussed. He suggested that "intentionally" be used to modify the act and Professor Arthur responded that "intentionally" would let too many defendants escape prosecution. Chairman Yturri said he would be inclined to leave the sections as they were drafted in Preliminary Draft No. 1.

Judge Burns was of the opinion that the problem could be taken care of in the definition of "enter or remain unlawfully" in section 1. Professor Platt expressed doubt that the definition touched upon the mental element and Chairman Yturri indicated his belief that the mental element should be contained in the criminal trespass statutes rather than the definition section.

Mr. Paillette suggested inserting "knowing or having good reason to know" and Senator Burns proposed to include "if he knowingly enters or remains" but Professor Arthur objected to this language because it would not cover "reckless" behavior. Mr. Paillette remarked that "knowingly" was not inconsistent with "reckless" or "intentional" in the Model Penal Code general definitions and MPC section 2.02 included "knowingly" as one of the kinds of culpability required. Professor Arthur was of the opinion that reckless trespass should be penalized but a person might not trespass "knowingly." Mr. Paillette replied that the subcommittee had deleted "knowing that he is not licensed or privileged to do so" for exactly that reason.

Mr. Clark asked what kind of penalties criminal trespass would warrant and Senator Burns replied that the subject had not been discussed. Mr. Knight was of the opinion that the crime should be in the misdemeanor category.

Chairman Yturri favored the insertion of knowingly or recklessly in section 5 and indicated that the Commission could reconsider the draft later if the terms did not fit after they had been defined. He was of the opinion that the possibilities of having to change the draft later would be reduced by including a mental element at this time. Judge Burns responded that the Commission would have to reconsider the sections whether or not an adjective was inserted.

A motion was made and seconded to insert "intentionally" in section 5. The motion failed.

Judge Burns moved that section 5 be adopted without revision and the motion carried with Chairman Yturri voting no.

Section 6. Criminal trespass in the first degree. Senator Burns asked that the Commission limit its discussion of section 6 to the distinction between first and second degree criminal trespass and not repeat the discussion regarding words of culpability. He pointed out that section 6 made the crime a higher degree of trespass if the actor entered or remained in a "dwelling" as opposed to entering or remaining on "premises" in section 5.

Judge Burns moved that section 6 be adopted. Mr. Clark seconded the motion and it carried with Chairman Yturri voting against the motion.

Criminal Mischief; Preliminary Draft No. 3; June 1968. [Note: See Minutes, Subcommittee No. 1, May 17, 1968, pp. 7-9; May 27, 1968, pp. 5-7; June 22, 1968, pp. 1-4.]

Senator Burns apprised the Commission that the subcommittee had initially had a separate statute for criminal tampering but had decided to combine criminal tampering with criminal mischief and make criminal tampering, in effect, criminal mischief in the third degree.

Section 1. Criminal mischief in the third degree. Section 1, Senator Burns said, referred to a crime which would undoubtedly be classified as a misdemeanor.

Mr. Clark moved, seconded by Mr. Knight, that section 1 be adopted and the motion carried unanimously.

Section 2. Criminal mischief in the second degree. Senator Burns explained that criminal mischief in the second degree would be applicable if someone tampered with property and damaged it accidentally and the damage exceeded $100; if he intentionally damaged property, regardless of the amount of the damage; or if he recklessly damaged the property and the damage exceeded $100.

Judge Burns moved, seconded by Mr. Clark, that section 2 be approved and the motion carried without opposition.

Section 3. Criminal mischief in the first degree. Senator Burns advised that the subcommittee, in considering criminal mischief in the first degree, was thinking in terms of a higher degree of offense than in sections 1 and 2 and first degree would probably be classified in the felony category.

Judge Burns asked if a definition of "explosives" was contemplated which would apply not only to this section but to the burglary draft. In response to this question, Chairman Yturri read from the Minutes of Subcommittee No. 1, June 22, 1968, pages 2 and 3:

> " . . . Miss Beaufait said that 'explosives' could be defined in the general articles if the committee so desired . . . Mr. Spaulding expressed the view that the court would say 'explosive' was an ordinary word and would not require a special definition."

Chairman Yturri suggested "explosive" be earmarked so it could later be determined whether a definition was needed.

Mr. Knight asked how the $1,000 figure was determined and Mr. Paillette replied that it had been arbitrarily chosen but was lower than the amount specified in the New York statute and the same as in the Michigan draft. The $100 figure in section 2, he said, was used because that amount would probably be the breaking point between petty theft and theft.

Judge Burns moved section 3 be approved. The motion was seconded and carried unanimously.

Robbery; Preliminary Draft No. 2; July 1968 [Note: See Minutes, Subcommittee No. 1, June 22, 1968, pp. 5-11.]

Senator Burns pointed out that robbery in the first degree used the same nomenclature with respect to deadly and dangerous weapons as was earlier discussed in the burglary draft and also employed "immediate use" in both sections 1 and 2.

With respect to second degree robbery, Senator Burns called attention to a significant departure from the present law where robbery and assault went hand-in-hand. Under the draft, he said, the ingredients of assault were not removed from the robbery concept but stated in terms of the immediate use of force, and it was anticipated that there would be a separate assault statute to cover situations in which force was employed without an intent to rob.

Mr. Paillette explained that in both of the degrees of robbery the draft was more concerned with the violence and the use of force on the victim than with the actual taking of the property which explained inclusion of the phrase "in the course of committing or attempting to commit theft he uses or threatens the immediate use of physical force." Under the proposed draft there would not have to be an actual taking of the property to constitute robbery, he said. Mr. Paillette indicated that such an approach was not as great a departure from present law as it might appear at first reading because State v. Broom, 135 Or 641, 297 P. 340 (1939), defined robbery as "open and violent larceny from the person" and in that case the court said that robbery could "only be consummated through an assault." Under the proposed draft, he said, there would not need to be a showing that property was actually taken to consummate robbery.

Mr. Knight asked if larceny from a person in the present law was one of the sections affected by this draft and was told by Mr. Paillette that crime would be covered under theft.

Judge Burns reviewed the problem with the use of "immediate" which had been discussed in connection with the burglary draft and Mr. Paillette indicated that the term became more significant as employed in the robbery draft because the subcommittee had attempted to

distinguish between the immediate threat that would make the crime robbery as opposed to a threat to do violence to the victim at a later time which would be theft by extortion. He also pointed out that the robbery draft would cover the situation where physical force was directed at a person other than the immediate victim of the robbery, and if there was a threat of immediate physical force upon such person, the crime would still constitute robbery.

Mr. Clark inquired concerning subsection (4) of section 2, "Is aided by another person actually present," and was told by Mr. Paillette that all of the aggravating elements in section 2 were inserted with the thought that they increased the danger to the victim and the rationale for subsection (4) was that having two robbers present increased the victim's peril.

Mr. Clark asked if "actually present" would exclude the "get-away car" and Senator Yturri pointed out that this very point was discussed in the Minutes of Subcommittee No. 1, June 22, 1968, on page 7 where the subcommittee had determined that the man driving the "get-away car" was not "actually present." The Chairman also pointed out that there was a question whether the victim would be aware of the driver's presence and if he was not, his fear would not be heightened by the fact that there was a second man in the car.

Professor Platt asked if it would be an improvement to say "physically present" rather than "actually present" and Senator Burns noted that both Michigan and New York used "actually present."

Judge Burns asked how the statute would be interpreted in the case of a second man who acted as a "look-out" and stood just outside or just inside a plate glass door while the robbery was underway. Chairman Yturri replied that the question would rest on whether or not the victim was aware of his presence and on the immediate availability of assistance to the robber.

Mr. Paillette commented that it was not so much a question of the fear created in the mind of the victim as it was the danger to the victim. He said the controlling factor would not be whether or not the victim knew about the second man's presence because the danger would still exist regardless of the victim's awareness of that fact.

Chairman Yturri commented that if the draft was aimed at the danger to the victim, one man alone armed with a gun was probably more dangerous than two men who were unarmed, and Senator Burns replied that the subcommittee felt they were equally dangerous.

Professor Platt asked if the conclusion of the subcommittee was that the driver of the automobile could not be a principle to first degree robbery and received a negative reply from Mr. Paillette who explained that if some other aggravating factor were present, he could be guilty of first degree robbery.

Senator Burns called attention to the first paragraph on page 6 of the minutes of Subcommittee No. 1, June 22, 1968. He noted that he was in error when he said that the draft would do away with the distinction between principles and accessories and the statement should not be considered as legislative intent. What the subcommittee intended, he said, was that if one man drove the "get-away car" and waited outside while another man went inside the store with a gun, under the draft the man in the car would not be considered actually present but would nevertheless be a principle under subsection (1) of section 2 because the man inside was armed with a deadly weapon. The subcommittee also decided, he said, that if the two men went in together and were unarmed, their act would create the same degree of danger to the victim as one man armed and the offense would be the same.

Professor Platt commented that if a single person planned a crime, he was more likely to withdraw or change his mind before the crime was actually committed than if he was part of a group where the likelihood of his changing his mind was much less because of the pressure he would be under from his cohorts. Whether or not they were both actually present, he said, they were just as dangerous because the crime was more likely to be committed. This, he remarked, was the basic philosophy behind the conspiracy statutes.

Senator Burns commented that if section 2 (4) were amended, the section would contain a possible conflict with the conspiracy statutes. The minutes of the subcommittee, he said, reflected the uneasiness the members felt concerning this provision. He noted that Mr. Spaulding had remarked, as set forth on page 7 of the minutes of June 22, 1968, that "subsection (4) obviously meant as much as the committee thought it should mean; the only possible argument was whether it might include more than they had intended."

Mr. Clark asked if under section 2 (2), "Uses or threatens the immediate use of a dangerous weapon," a person would actually have to have the weapon on his person and cited a situation where a man would say, "I have a gun in my pocket," but it was only his finger and he was actually unarmed. Senator Burns replied that he would not have to be in actual possession of the weapon to be covered by this section.

Judge Burns advised that sooner or later the Commission would have to decide whether a gun, loaded or unloaded, was a deadly weapon and Chairman Yturri concurred.

Mr. Clark pointed out that if an elderly lady said she had acid in her purse which she would use unless the victim complied with her request, and there was actually no acid there, she was much less dangerous than the person who physically attacked someone. Chairman Yturri asked if it would be helpful if the draft tied in the apparent ability of the defendant to carry out his threat by requiring that the weapon be visible to the victim.

Mr. Paillette called attention to the manner in which Michigan had approached this problem and read section 3305 (2) of that code:

> "(2) Possession then and there of an article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon or dangerous instrument, or any verbal or other representation by the defendant that he is then and there so armed, is prima facie evidence under subparagraph (1) that he was so armed."

Mr. Paillette explained that when he drafted subsection (2) of section 2, he had not intended it to apply to the finger-in-the-pocket type of situation but was looking at the actual danger to the victim. The threat of the use of a weapon which did not exist, he said, was intended to be taken care of in section 1, robbery in the second degree.

Judge Burns said that since the subcommittees looked to the full Commission for a policy declaration which might or might not override their judgments, the Commission was fully justified in referring any of the sections back to the subcommittee with or without specific instructions and suggested that the robbery draft be rereferred to Subcommittee No. 1. One of the problems they should consider, he said, was whether to draw a distinction and make it a higher degree of crime if the gun of the robber was loaded than if he carried an unloaded gun.

Mr. Clark said he would like the subcommittee to weigh the amount of actual danger involved to the victim and to use that factor as the criteria for their recommendations. Mr. Paillette replied that the degree of danger to the victim was the rationale that had been used in drafting the robbery sections. He noted that each of the factors listed in section 2 made the crime more serious because of the enhanced danger to the victim rather than the persuasive element. It was not his intent, he stated, to encompass the situation of the man with a finger in his coat pocket when he included "uses or threatens the immediate use of a dangerous weapon."

Judge Burns noted that classically robbery meant taking property by force or violence or by threat of either and said he had some doubt as to whether such a crime had been covered by the draft. Mr. Paillette expressed the view that the prosecutor would not actually have to prove that the robber had a gun. If the robber said he would shoot the victim, that would be a threat to use physical force and proof that he had a gun on his person would not be required to convict for second degree robbery.

Chairman Yturri indicated that the Commission would have to decide the policy question of whether it was better for society to deter a miscreant from using a dangerous weapon when committing robbery by making the crime robbery in the second degree if he was

unarmed, or to adopt a draft which would say that he would be charged with robbery in the first degree whether or not he was actually carrying a weapon.

Mr. Clark said he would favor a draft which required actual use of weapons of violence to make the crime first degree. He then moved that the robbery draft be rereferred to Subcommittee No. 1. Judge Burns seconded the motion and it carried with Senator Burns voting against the motion.

Miscellaneous Matters

Mr. Paillette informed the Commission that Subcommittee No. 3 would be meeting the following day to consider Professor Arthur's draft on classes of crimes and suggested that a second meeting date for that subcommittee be chosen as soon thereafter as feasible for the purpose of considering Professor Platt's draft on responsibility.

Chairman Yturri indicated that Judge Burns would replace Representative Howe on Subcommittee No. 3 and Representative Howe would, conversely, serve on Subcommittee No. 2. He also advised that it might become necessary for other members of the Commission to fill in for subcommittee members who were unable to attend meetings in order to keep the subcommittees operating at full capacity.

Chairman Yturri requested that Commission members make a special effort to be conversant with the minutes of subcommittee meetings and the drafts presented at Commission meetings in order to expedite policy decisions.

Mr. Paillette pointed out that until the general definitions and provisions were completed, the Commission and subcommittees would continue to be faced with problems in fitting the drafts together and asked if the Commission felt it would be advisable to channel all efforts in the direction of completing the preliminary provisions before continuing to draft the articles of specific crimes. Chairman Yturri replied that it would be advisable to begin work in that area as soon as possible but was opposed to halting the procedure already underway in the subcommittees and favored continuation of drafting in these areas concurrently with the preliminary provisions.

The meeting was adjourned at 3:45 p.m.

Respectfully submitted,

Mildred E. Carpenter

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission