Tapes #38 and 39

#38 - 69 to end of Side 1 and all of Side 2
#39 - Side 1 only

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

November 7, 1969

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OREGON CRIMINAL LAW REVISION COMMISSION
Fourteenth Meeting, November 7, 1969

Minutes

Members Present: Senator Anthony Yturri, Chairman
Judge James M. Burns
Representative Wallace P. Carson, Jr.
Mr. Robert Chandler
Representative David G. Frost
Representative Harl H. Haas
Attorney General Lee Johnson
Mr. Frank D. Knight
Mr. Bruce Spaulding
Representative Thomas F. Young

Delayed: Senator John D. Burns, Vice Chairman

Absent: Mr. Donald E. Clark
Senator Kenneth A. Jernstedt

Staff Present: Mr. Donald L. Paillette, Project Director
Professor George Platt, Reporter
Mr. Roger D. Wallingford, Research Counsel

Also Present: Mr. Thomas D. Kerrigan, Portland; Member, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Ray D. Robinett, District Attorney, Washington County
Mr. Jacob B. Tanzer, Solicitor General, Justice Department; Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Marvin J. Weiser, Dallas; Member, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Clarence Zaitz, UPI

Agenda: OFFENSES INVOLVING NARCOTICS AND DANGEROUS DRUGS (Discussion on inclusion of this area of the law in proposed criminal code revision)

PERJURY AND RELATED OFFENSES (Section 6 to end)
Preliminary Draft No. 2; October 1969

PARTIES TO CRIME
Preliminary Draft No. 2; July 1969

JUSTIFICATION
Preliminary Draft No. 2; November 1969

The meeting was called to order by the Chairman, Senator Anthony Yturri, at 9:45 a.m. in Room 315, Capitol Building, Salem.

Approval of Minutes of Commission Meeting of October 10, 1969

Representative Frost moved that the minutes of the Commission meeting of October 10, 1969, be approved as submitted. The motion carried unanimously.

Offenses Involving Narcotics and Dangerous Drugs

Chairman Yturri indicated that Subcommittee No. 3 had requested the Commission to discuss whether to include the area of the law dealing with narcotics and dangerous drugs in the proposed criminal code revision. An Article on this subject had been drafted but the subcommittee had pointed out that since the 1969 session of the legislature had dealt with the topic, the Commission might not wish to make any further changes in the law and they preferred not to spend time on the draft without first receiving a directive from the full Commission.

Chairman Yturri asked Mr. Paillette to outline the revisions to ORS chapters 474 and 475 enacted by the 1969 legislature and was told that House Bill 1838 was passed and contained amendments to the following ORS sections:

ORS 475.625, prohibiting a person from using or being under the influence of narcotic drugs, was amended to include dangerous drugs.

ORS 475.635 deleted the mandatory 90 day jail sentence for violation of ORS 475.625 but left the penalty a misdemeanor.

ORS 475.990 (2) was amended to increase the penalty for violation of ORS 475.100 prohibiting the sale or possession of dangerous drugs. The maximum fine was increased from $200 to $5,000 while the maximum jail sentence was increased from six months to either one year or ten years.

ORS 474.990 (2) was amended to reduce the penalty for violation of ORS 474.020 (1) prohibiting the sale or possession of narcotics. The amendment liberalized sentencing alternatives for the sale or possession of marihuana by reducing the penalty from a felony to an indictable misdemeanor.

Judge Burns, Chairman of Subcommittee No. 3, designated the four alternative approaches which the staff had determined were available to the Commission with respect to the treatment of narcotics and dangerous drugs in the proposed criminal code:

(1) Revise all criminal law applicable to the sale and possession of drugs for incorporation into the proposed criminal code. Make no substantive change in the statement of the crimes. Leave regulatory provisions relating to narcotics and dangerous drugs, with required amendments, in ORS chapters 474 and 475.

(2) Incorporate ORS chapters 474 and 475 into the criminal code making only minor structural changes.

(3) Leave both criminal and regulatory procedures in ORS chapters 474 and 475 and amend the penalty provisions to conform to the penalty structure ultimately adopted by the Commission.

(4) Do nothing with respect to narcotic and drug offenses.

Judge Burns reported that it was Representative Frost's suggestion which brought this matter before the full Commission and asked him to relate his views on the subject.

Representative Frost stated that the 1969 session of the legislature had spent a great deal of time on the subject of narcotics and dangerous drugs and the House Judiciary Committee held lengthy public hearings on the topic. The wisdom of the approach adopted by that session, he said, had been borne out not only by the fact that President Nixon had adopted the Oregon approach to the drug problem but also by the fact that the changes had received a good reception from judges and lawyers throughout the state. He contended that it would be difficult, unpopular and unwise to rework a law which the legislature had so recently revised. He advocated that suggestion (4) -- the "do nothing" approach -- be adopted by the Commission.

Judge Burns expressed disagreement with Representative Frost's point of view. Narcotics and dangerous drugs, he said, was a subject which was part of the criminal code and should be included not just from the structural standpoint but also to give recognition to the fact that narcotics and drugs presented two problem areas in the law -- one concerning criminal penalties and procedures and the other concerning the regulatory phase. Inasmuch as the Commission's directive was to revise and simplify the whole criminal code, his recommendation was that the Commission should face up to the problem and adopt the approach of suggestion (1) as set forth above. He noted that the draft prepared by Mr. Wallingford basically retained the penalty structure adopted by enactment of House Bill 1838. Sale or possession would continue to be a felony-misdemeanor option with the addition of degrees of the crime which were included for certain extenuating acts such as sale to minors or sale in unusual quantities.

Mr. Johnson pointed out that under the Dangerous Drug Act, the Board of Pharmacy could designate a drug as a narcotic and thereby increase the penalty from a misdemeanor to a felony. He objected to

this procedure and advocated that the proposed Article be considered with a view to amending the administrative procedures if for no other reason. He further maintained that ORS chapters 474 and 475 should be consolidated since there was no reason to call one type a "narcotic" and another a "dangerous drug." He indicated approval of the approach suggested by Judge Burns.

Mr. Knight also favored inclusion of narcotics and dangerous drugs in the proposed criminal code. The language and definition of terms were being revised throughout the code, he said, and this area of the law should conform to the general format.

Chairman Yturri asked Representative Frost if he would object to inclusion of narcotics and dangerous drugs in the criminal code if the Commission were to retain the provisions of House Bill 1838. Representative Frost replied that if the "do nothing" approach were not adopted, he would suggest that ORS chapters 474 and 475 be transferred into the criminal code intact.

Chairman Yturri was of the opinion that the subject belonged in the criminal code. However, he said, there was merit in the viewpoint expressed by Representative Frost and in light of the work done by the 1969 session of the legislature and the widespread acceptance of the provisions of House Bill 1838, the subcommittee and the Commission should do as little violence to that revision as possible.

Mr. Johnson moved that the Article on Offenses Involving Narcotics and Dangerous Drugs be referred to Subcommittee No. 3 for incorporation into the proposed criminal code.

Mr. Frost moved to amend the motion by including the directive that the subcommittee incorporate ORS chapters 474 and 475 into the code without doing substantial violence to the provisions of House Bill 1838. His amended motion, he explained, would embody the approach contained in suggestion (2) as set forth on page 3 of these minutes.

Judge Burns noted that Mr. Frost's amended motion would bring the regulatory phases of ORS chapters 474 and 475 into the criminal code and he questioned the wisdom of transferring those portions. Chairman Yturri observed that the motion left the subcommittee with considerable latitude to determine which portions should be transferred.

Mr. Johnson accepted Representative Frost's amendment to his motion. Vote was then taken on the motion directing Subcommittee No. 3 to incorporate ORS chapters 474 and 475 into the proposed criminal code without doing substantial violence to the provisions of House Bill 1838. The motion carried unanimously. Voting: Judge Burns, Carson, Chandler, Frost, Haas, Johnson, Knight, Spaulding, Young and Mr. Chairman.

Perjury and Related Offenses; Proposed Amendment to Preliminary Draft No. 2

Section 6. Perjury and false swearing; retraction. Mr. Paillette reviewed the action of the October Commission meeting when the staff had been directed to prepare a section dealing with retraction inasmuch as the subcommittee had not originally included such a provision in the draft. Accordingly, Mr. Wallingford had prepared a proposed section 6 dealing with this subject which was designed to fulfill the Commission's instructions.

Mr. Wallingford pointed out that the federal rule did not allow retraction under any circumstances while New York had employed a retraction statute for many years. To focus on the policy behind these diametrically opposed viewpoints, he read the following excerpt from 64 ALR 2d 276:

> "The difference between the federal and New York rule may perhaps be explained by a difference in judicial policy. The federal rule requires a witness to testify truthfully at all times, and subjects him to punishment for perjury if he intentionally falsifies his testimony, without regard for any chage of heart by the witness, on the theory that to do otherwise is to encourage false swearing.
>
> "The policy behind the New York rule, however, seems to be that it is highly important that the tribunal receiving the testimony know that truth and, as a means of achieving this end, it may be wise to encourage even one who wilfully testifies falsely to come forward with the truth, so that justice may be done.
>
> "Under the New York rule the recantation must be prompt and must come before harm has been done to the inquiry under way, and before the witness has learned that his falsehood has been discovered by others. . . . Under the federal rule, recantation may be effective to show an absence of criminal intent on the part of a witness offering false testimony. . . . It may well be that these two rules tend to coalesce, producing similar results under a similar set of circumstances."

Mr. Spaulding contended that retraction made no sense. Even though a person intentionally committed perjury, he said, he could later say he was sorry and under a retraction statute would thereby have committed no crime when actually a crime had been committed when he perjured himself.

Representative Haas expressed the opposing view, commenting that a retraction statute would place a premium on obtaining the final

truth. If a witness lied, he would not have to stand by his lie forever but could retract and tell the truth.

Mr. Chandler summed up the problem by saying it posed a question of whether the statute was most interested in arriving at the unvarnished truth in a given procedure or whether it was most interested in saying that a person could not lie under oath without being punished. He expressed the view that if a person were permitted to defend himself from a charge of perjury by later telling the truth, he was more likely at some stage of the proceedings to be willing to admit that he lied in the first place.

Mr. Spaulding pointed out that the courts had consistently held that a person was not entitled to a new trial after a verdict or judgment because a material witness admitted he had lied. The courts had said that it was up to the jury to weigh the quality and truth of the evidence.

Judge Burns called attention to the line of cases setting aside convictions in a criminal proceeding if there had been falsification which was known to the prosecution. Mr. Spaulding commented that this was a different rationale because in those cases the prosecution had not given the defendant the benefit of that knowledge.

Chairman Yturri asked if New York had experienced any problem with its retraction statute on the question of recantation before it became manifest that the falsification was or would be exposed. Mr. Wallingford replied that the New York statute had been very narrowly construed and it was therefore difficult for the defendant to take advantage of it. New York's retraction statute, he said, was based on the Model Penal Code language and imposed upon the defendant the burden to prove that the retraction was made before the prior falsification substantially affected the proceeding and "before it became manifest" that the falsification was or would be exposed. For this reason he had not included the Model Penal Code language in the draft but had followed the Michigan approach which did not require proof that the correction was made before the lie was exposed.

Judge Burns noted that the proposed section 6 began with the statement "It is a defense . . . " and asked if this meant that the burden of proof was on the defendant. Mr. Wallingford answered that the model for the section was the proposed Michigan section 4930 and the last sentence of that section read:

> "The burden of injecting the issue of retraction is on the defendant, but this does not shift the burden of proof."

This, he said, was what was meant in the proposed section 6. Mr. Paillette added that by stating the provision as a defense rather than as an affirmative defense, the burden was not shifted to the defendant; it would still be up to him to raise the issue.

Chairman Yturri asked if Oregon presently had any type of retraction statute and was told it did not. Mr. Paillette said that inclusion of a retraction statute would represent the minority view in the United States and Mr. Wallingford added that to his knowledge only four states presently had such a statute -- Florida, Missouri, New York and Pennsylvania.

Mr. Johnson moved that the proposed section 6 be deleted.

Professor Platt indicated that the Article on Inchoate Crimes contained a provision permitting withdrawal from the crimes of attempt, solicitation and conspiracy. In a sense, he said, perjury was also an inchoate crime because until the actual judgment was entered, the harm had not occurred or was still incomplete. The Inchoate Crimes Article also provided that the burden of proof was on the defendant -- not only the persuasion burden but also the burden of introduction of the issue. He suggested that the withdrawal philosophy in the Inchoate Crimes Article should be considered in conjunction with the retraction statute and maintained that a retraction provision would be a beneficial and constructive section to add to the Perjury Article.

Mr. Paillette commented that there was one distinction included in the Inchoate Crimes Article which was not contained in this Perjury Article and that was that the withdrawal by the defendant had to be a completely voluntary act; he would not be allowed to withdraw after he found that he had been discovered.

Mr. Tanzer commented that the role of the criminal code should not be simply to punish wrongful conduct but also to insure the integrity of the trial process and a retraction section would aid in accomplishing that purpose. His only concern with the proposed section was that it was too broad in that it did not state at what stage of a proceeding retraction would be permitted. He expressed a preference for Model Penal Code section 241.1 over the proposed section as drafted.

Mr. Chandler expressed agreement with Mr. Tanzer's position. He urged that the section be drawn to require that retraction take place before the defendant was caught in the act of perjury.

Mr. Johnson commented that the Model Penal Code language overcame his principal objection to the section and withdrew his motion to delete the proposed section 6.

Mr. Chandler moved that the Commission approve the principle of the proposed retraction section. The motion carried.

Senator Burns arrived at this point.

Mr. Chandler next moved that the Commission approve the retraction section essentially as set forth in Model Penal Code section 241.1 with any amendments necessary to conform the language to the form and style of the proposed code:

> "No person shall be guilty of an offense under this Section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding."

Chairman Yturri called attention to the difficulty, as explained earlier by Mr. Wallingford, which existed with the use of the phrase "before it became manifest" in that it did not state explicitly when the retraction affected the outcome of the proceeding or at what stage it became apparent that the falsification was about to be exposed.

Judge Burns agreed with the Chairman's reservations concerning the Model Penal Code language. If the burden were placed on the prosecution to prove that the retraction was made after it became manifest that the falsification would be exposed, this was an extremely difficult fact to establish. Furthermore, he said, if the burden were placed on the defendant, it was equally difficult for him to prove when it became manifest to the defendant that the falsification was about to be exposed.

Mr. Spaulding suggested the problem might be solved by saying that the retraction was to be made before a decision had been made by either the court or jury on a question of fact to which the testimony was material. Others agreed that language to this effect was the intent of the Commission. Judge Burns further explained that if a man committed perjury and polluted the initial process at, for example, an administrative hearing so that a decision was reached in his favor, he should not be able to evade a perjury charge by retracting his testimony in the later stages of the proceeding.

After further discussion, the Commission agreed to adopt Mr. Spaulding's suggestion requiring that the retraction be made before the question was submitted to the trier of fact and to refer the retraction section to the reporter for redrafting.

<u>Perjury and Related Offenses; Preliminary Draft No. 2; October 1969</u>

[For discussion of sections 1 to 5 of Perjury Article, see Commission Minutes, October 10, 1969, pp. 17 - 25.]

Section 6. Perjury and false swearing; corroboration required. Mr. Knight stated he was continually bothered by the two witness rule in present Oregon law which was being continued in this section 6. Existing law, he said, permitted very few perjury prosecutions because of the provision in ORS 162.160 requiring either two witnesses or one witness and corroborating circumstances to prove perjury. In some cases, he said, a police officer knew for certain that a witness was lying but his testimony alone was not sufficient for a perjury conviction.

Chairman Yturri expressed the view that it was better to have the corroboration rule in the law than to try to segregate all the different types of cases which might arise and provide different rules for isolated instances.

Senator Burns asked if the corroboration rule in existing law related to false swearing as well as to perjury and was told by Mr. Wallingford that it related only to perjury which meant that section 6 expanded the law by adding false swearing. He said he could see no rational basis for distinguishing between the number of witnesses required to prove perjury and the number required to prove false swearing. The Commission agreed with this premise.

Senator Burns inquired why "statement" was used rather than "testimony" in section 6. Mr. Wallingford replied that the subcommittee had recommended that section 4920 of the Michigan Revised Criminal Code be adopted verbatim and "statement" was used therein. Judge Burns observed that sections 2 and 3 of the Perjury Article defined perjury and false swearing as "false sworn statements."

Mr. Chandler moved that section 6 be renumbered section 7 inasmuch as the retraction section was to be inserted as section 6 and that the section be approved as drafted. The motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Chandler, Haas, Johnson, Knight, Spaulding, Young, Mr. Chairman.

Section 7. Perjury and false swearing; inconsistent statements. Mr. Wallingford explained that Oregon did not presently have a statute on inconsistent statements in Oregon and his research indicated that section 7 was probably contrary to Oregon case law. He read the section and observed that the highest offense of which a person could be convicted under section 7 was false swearing. The policy embodied in section 7 was advanced by the Model Penal Code and had been accepted in New York, Michigan and New Jersey.

Mr. Spaulding questioned the meaning of the clause "by hypothetically assuming each statement to be false" as used in subsection (2). Mr. Knight suggested that "hypothetically" be deleted and Mr. Wallingford agreed that the subsection would probably have the same effect if the deletion were made. The term "hypothetically" was used, he said, because an assumption was being made at that time.

Judge Burns said he could see a number of problems arising with the wording used in section 7 and asked the following questions:

(1) On an indictment to allege two inconsistent statements, would the prosecutor call the indictment an "indictment for perjury" or an "indictment for false swearing?"

(2) What penalty would be imposed, assuming there were different penalties for perjury and false swearing?

(3) Who makes the hypothetical assumptions, at what stage of the proceedings and on what basis?

(4) How would the court instruct the jury under section 7?

Judge Burns said he had serious question that section 7 was needed and expressed the view that the difficulties in perjury prosecutions had not been so great as to call for this type of relaxation of the requirements for proving perjury.

Mr. Knight said he had been involved in situations where he knew the witness was lying but was unable to do anything about it in the absence of this type of statute. Mr. Spaulding agreed that there was merit in section 7 even though the jury could only convict the defendant of the lesser crime of false swearing if they were uncertain whether he had committed perjury or false swearing.

Mr. Paillette pointed out that retraction would be a defense to a charge under section 7. Judge Burns asked if the state's problems would be any different than they were under existing law if section 7 were adopted in view of the retraction section which the Commission had approved. If the defendant simply said he recanted his earlier statement, he could not then be charged under section 7.

Mr. Tanzer suggested this problem might be solved by making section 7 applicable only where the sworn statements were made in different hearings or in different proceedings.

Representative Frost expressed agreement with Judge Burns that section 7 was unnecessary because no great problems existed in this area. He believed the section might be too strong a tool to place in the hands of certain prosecutors.

Chairman Yturri posed a hypothetical situation where a person said in a deposition that the traffic light was red at a given time and at trial, he said he had thought it over and he then knew positively that the light was green. In that situation he would be indictable under section 7 and his only salvation at that point would be to recant under section 6. Judge Burns agreed that the district attorney could indict and prosecute him in those circumstances.

Chairman Yturri pointed out that the situation could occur where two inconsistent statements would not be discovered until after the verdict had been entered. The witness would not have made a retraction and the opposing statements in the deposition and in the trial transcript would make him guilty of false swearing under section 7. Had the inconsistent statements been called to the witness's attention earlier, perhaps he would have retracted one of the statements and could very well have had a logical explanation for doing so.

Judge Burns indicated that the term "inconsistent statement" was not precise. The Commission, he said, had been discussing situations which were clear cut, but circumstances would arise where the deposition said, for example "8:45 a.m." and at the time of trial the witness said "9:00 a.m." Another example would be where he said in the deposition that the light was yellow and at trial said it was just turning red. Would these, he asked, constitute "inconsistent statements?" Mr. Spaulding said indictment for this type of statement would depend upon how important the inconsistent statements were to the outcome of the trial.

Mr. Johnson moved that section 7 be tabled and the motion carried. Voting for the motion: Judge Burns, Senator Burns, Frost, Haas, Johnson, Young, Mr. Chairman. Voting no: Chandler, Knight, Spaulding.

Section 8. Initiating a false report. Judge Burns asked if the phrase "other organization that deals with emergencies" would cover agencies such as the Sunshine Division of the Portland Fire Department which distributed food to underprivileged families at Christmas time. Senator Burns inquired if it would cover a self-imposed vigilante committee organized to protect a given neighborhood from a child molester who had been operating in the area. Mr. Paillette's answer was that the language was intended to cover unofficial as well as official organizations and he advised that this subject had been discussed by the subcommittee. The rationale was that it was as dangerous to the members of a volunteer organization as to members of an official organization when they were called without justification by a false report to respond to an emergency alarm involving perilous circumstances.

Mr. Chandler moved that section 8 be adopted.

Representative Frost moved to amend the motion to adopt section 8 by revising section 8 to delete reference to unknown organizations such as the Sunshine Division.

Chairman Yturri pointed out that such organizations as a mountain rescue team, Civil Defense and a Forest Protective Association would be covered by section 8 as drafted and expressed the view that these organizations should be entitled to the protection offered by this section.

After further discussion, Representative Frost withdrew his motion to amend. Vote was then taken on the motion to adopt section 8 without amendment and the motion carried unanimously. Voting: Judge Burns, Senator Burns, Chandler, Frost, Haas, Johnson, Knight, Spaulding, Young and Mr. Chairman.

Section 9. Criminal impersonation. Mr. Wallingford called attention to the list of existing statutes set forth on page 56 of the draft. Many of these statutes, he said, were a proliferation of special interest statutes which would not be continued in the criminal law, particularly those referring to members of a private organization such as the Elks, Moose or American Legion.

Mr. Chandler said that persons who represented themselves to be members of a private organization and who sold advertising in newspapers or periodicals with virtually no circulation should be prosecuted. Senator Burns pointed out that they could be prosecuted under the section on theft by deception in the proposed criminal code.

Chairman Yturri asked if passage of section 9 would result in repeal of the ORS sections listed on page 56 of the draft and received an affirmative reply from Mr. Wallingford. Section 9, he said, would not apply to anyone who represented himself to be a member of a private organization so long as that person had no intent to defraud. In reply to a further question by the Chairman Mr. Wallingford stated it would not be a crime for a person to represent himself to be a member of the Elks even if he used the representation for the purpose of gaining entry to the premises. When the manager of the Elks Club discovered the person was not a member, he would undoubtedly ask him to leave but no crime would have been committed under this section.

Judge Burns asked if the definition of "public servant" as used in section 9 would be the same as the definition of that term in the Bribery Article and received an affirmative reply from Mr. Paillette.

Senator Burns asked why section 9 referred only to a public servant. Mr. Paillette explained that the Forgery Article had originally contained a section dealing with criminal impersonation. Subcommittee No. 1 decided, and the Commission agreed, that this subject should be covered in the Perjury Article and that the criminal law should be concerned only with impersonation of a peace officer or some type of public servant. In reply to a question by Representative Frost, Mr. Paillette said there was no draft section which covered impersonation of a member of a private or fraternal organization because of the earlier decision made by the Commission. [See Minutes, Subcommittee No. 1, November 15, 1969, pp. 9, 10.]

Representative Haas asked Mr. Paillette to read the definition of "public servant" as approved by the Commission in the Bribery Article.

Mr. Paillette read from section 1 of Tentative Draft No. 1 of Bribery and Corrupt Influences which had not yet been printed:

"(2) 'Public servant' includes:

"(a) A public officer or employe of the state or of any political subdivision thereof or of any governmental instrumentality within the state;

"(b) A person serving as an advisor, consultant or assistant at the request or direction of the state, any political subdivision thereof or of any governmental instrumentality within the state;

"(c) A person nominated, elected or appointed to become a public servant, although not yet occupying the position; and

"(d) Jurors."

Mr. Johnson expressed the view that any situation which might arise involving section 9 would be covered by another statute and said he failed to see the necessity for its inclusion. If a person obtained property or a benefit by his impersonation, the offense would be covered by another statute. Judge Burns pointed out that if someone intended to injure another by impersonating a police officer, for example, he could then be charged under section 9. If, on the other hand, he were merely dressed as a policeman but did not injure, defraud or obtain a benefit from anyone, he was actually doing no harm.

Senator Burns moved that section 9 be approved and the motion carried. Voting for the motion: Judge Burns, Senator Burns, Chandler, Frost, Knight, Spaulding, Young, Mr. Chairman. Voting no: Haas, Johnson.

The Commission recessed for lunch at this point and resumed at 1:00 p.m.

Afternoon Session

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Judge James M. Burns
Mr. Robert Chandler
Mr. David G. Frost
Representative Harl H. Haas
Senator Kenneth A. Jernstedt
Attorney General Lee Johnson
Mr. Frank D. Knight
Mr. Bruce Spaulding
Representative Thomas F. Young

Delayed: Representative Wallace P. Carson, Jr.

Absent: Mr. Donald E. Clark

Staff Present: Mr. Donald L. Paillette, Project Director
Professor George Platt, Reporter
Mr. Roger D. Wallingford, Research Counsel

Also Present: Mr. Thomas D. Kerrigan
Mr. Ray D. Robinett
Mr. Jacob B. Tanzer

Parties to Crime; Preliminary Draft No. 2; July 1969

Mr. Paillette explained that the Article on Parties to Crime set out the principles relating to criminal liability through complicity and dealt with accomplices. The draft, he said, did not treat the matter of accessories after the fact which was dealt with in the Article on Obstructing Governmental Administration. The Parties to Crime Article was complimentary to the draft on criminal liability and set out not the principles relating to conduct on the part of the individual being charged with the crime but rather the manner in which a person could become criminally liable for a criminal act committed by someone else.

Section 1. Criminal liability based upon conduct. Section 2. Criminal liability for conduct of another; complicity. Mr. Paillette explained that section 1 did not work any change on what had been the law in Oregon for many years with respect to principals and made no distinction between a principal and an accessory before the fact. The common law did recognize that distinction but this was abolished by statute in Oregon many years ago. This draft continued the concept that there was no distinction between a principal and an accessory before the fact.

Mr. Paillette said that Subcommittee No. 1 had raised the question of whether the draft worked a change in the law with respect to misdemeanor offenses and the answer was that it did not. ORS 161.210 provided that there were no accessories in misdemeanors and this was not changed by the draft. He recommended that section 1 be read in conjunction with section 2 which set forth the manner in which a person became criminally liable for the conduct of another.

Mr. Paillette indicated the language of this draft was very similar to the language with respect to soliciting or commanding in the Article on Inchoate Crimes, the distinction being that although the defendant's conduct in soliciting or commanding might be the same, under the Inchoate Crimes Article there was not a completed crime as such whereas the Parties to Crime Article dealt with a situation where, as a result of the solicitation or the assistance given by an individual, another person had committed a completed crime.

The derivation of sections 1 and 2, Mr. Paillette said, was the Model Penal Code, the difference being that the Model Penal Code used the term "criminally liable" whereas the draft said "legally acceptable." He felt the latter term was more precise since the sections dealt with criminal liability and a person might be legally accountable for another's conduct without getting into the area of criminal conduct.

Mr. Knight asked if "conduct" had been defined and was told by Mr. Paillette that it was defined in the Article entitled General Principles of Criminal Liability, Preliminary Draft No. 2, section 1:

> "(4) 'Conduct' means an act or omission and its accompanying mental state."

Mr. Paillette pointed out that "mental state" was further defined in that same Article as meaning "intentionally, knowingly, recklessly or with criminal negligence."

In reply to a question by Mr. Johnson, Chairman Yturri indicated that "solicits" was defined in the Article on Inchoate Crimes, Preliminary Draft No. 2, section 4, which had not yet been before the Commission:

> "A person commits the crime of solicitation if with the intent of causing another to engage in specific conduct constituting a crime [felony] or an attempt to commit such crime [felony] he commands or solicits such other person to engage in that conduct."

Mr. Paillette noted that "aids" and "abets" had not been defined in the Parties to Crime Article because those terms had been interpreted a number of times in Oregon case law. [See commentary on page 5 of draft.]

Representative Haas commented that Subcommittee No. 2, when discussing the Sexual Offenses Article, had considered increasing the age of consent to 18. If a 17 year old girl and a 19 year old boy then engaged in sexual intercourse with the acquiescence of the parents of the girl, he asked if those parents would have a legal duty to prevent that act because of the provision of section 2 (2) (c) of the Parties to Crime Article. Mr. Tanzer commented that the situation of a rape on a daughter while the wife stood idly by was quite common and would embody the same principle.

Chairman Yturri asked if the Parties to Crime Article actually said there was a legal duty to prevent this type of act and Mr. Tanzer replied that the parent had a statutory duty to protect the welfare of his children.

Professor Platt remarked that with respect to Representative Haas' example there was a difference between acquiescence and intent. In acquiescence, he said, the intent was not to promote or facilitate the commission of a crime.

Mr. Johnson asked if this draft was a "Good Samaritan" statute and was told by Mr. Paillette that it was not nor was it intended to be; the Article did not create any crimes.

Mr. Chandler called attention to pages 2 to 15 of the Minutes of Subcommittee No. 1 dated June 13, 1969, where sections 1 and 2 of the Parties to Crime Article were discussed in considerable detail. He contended that a statute was needed to create a legal duty on the part of the citizenry to assist in the prevention of a crime when they knew a crime was being or about to be committed.

Chairman Yturri pointed out that Representative Haas and other members were concerned about the legal duty which existed. Because section 2 (2) (c) read "having a legal duty," whether or not there was actually a legal duty described in another statute was a separate question which would first have to be established in court. This Article, he said, was not the place for discussing the definition of "legal duty" since the legal duty as such was not involved with this section.

Mr. Johnson's understanding was that section 2 would impose criminal liability on inaction. Chairman Yturri further explained that if it were assumed that the law contained no legal duties of any kind to prevent the commission of a crime, this Article would impose no criminal liability whatever. If, however, a law were then passed imposing a legal duty upon a person to prevent the commission of a specific crime, this Article would come into play. Senator Burns added that the Article was not related to substantive crime but was concerned with principles under which parties to crime could be punished.

Mr. Spaulding asked if there was any danger of confusing the legal duty referred to in this Article with the legal duty in tort law and was told by Chairman Yturri that the Article was intended to refer only to criminal law. Mr. Spaulding said he had in mind a person's duty to use reasonable care not to injure another party and the Chairman pointed out that Mr. Spaulding's concern was not related to a legal duty to prevent the commission of a crime as required by section 2 but instead referred to a legal duty to prevent someone from being negligent. Mr. Paillette agreed that the duty relating to a tort was unlike the duty relating to prevention of the commission of a crime. Mr. Spaulding commented that everyone had a duty to use reasonable care not to injure his fellow man "by either doing that which a reasonably prudent person would not do or failing to do that which a reasonably prudent person would have done under the same or similar circumstances as of the time of the act."

Representative Haas again raised the question of a parent who acquiesced to sexual intercourse between a male and a daughter under the age of consent and asked if that parent would be committing a crime under this Article by permitting this act. Mr. Paillette explained that there were other sections in this Article relating to persons who were not within the class of persons covered by the statute and called particular attention to section 3 (2).

Chairman Yturri suggested that the Commission consider the subsequent sections and return to sections 1 and 2 later. Some of the questions being raised at this point would be answered by the following sections, he said. [See page 22 of these minutes for further action on sections 1 and 2.]

<u>Section 3. Criminal liability for conduct of another; no defense.</u> Mr. Paillette explained that section 3 set out two situations where no defense was available in a prosecution for a crime in which criminal liability was based upon the conduct of another person pursuant to section 2.

Mr. Knight commented that the section did not mention whether the principal had been convicted. Mr. Spaulding replied, and Chairman Yturri agreed, that situation was covered in subsection (1) when it said the other person had not been convicted.

Senator Burns moved that section 3 be approved and the motion carried unanimously. Voting on the motion: Judge Burns, Senator Burns, Chandler, Frost, Haas, Jernstedt, Johnson, Knight, Spaulding, Young and Mr. Chairman.

<u>Section 4. Exemptions to criminal liability for conduct of another.</u> Mr. Paillette read section 4 and called attention to the commentary which said:

"Under subsection (1), unless the statute defining the crime provides to the contrary, a 'victim' of the criminal act does not share the guilt of the actor. Thus, a victim of a blackmail plot who pays over money, even though he 'aids' the commission of the crime, or the girl under the age of consent in statutory rape, even though she 'solicits' the criminal act, are not deemed guilty of the substantive offense."

Mr. Spaulding commented that in the case of statutory rape the girl was not guilty of the substantive offense because she was deemed to be unable to consent. A person might be guilty in certain circumstances, he said, if he didn't know he was the victim when he committed the act and the fact that he was the victim should not necessarily excuse his guilty act.

Mr. Paillette said this type of act was omitted from the proposed statute with the thought in mind that if the legislature wanted to say there were specific instances in which an individual in a certain type of situation should be guilty, they could pass a statute to provide for that precise situation.

Mr. Tanzer referred to a woman upon whom a criminal abortion was performed who might be considered to have aided and abetted the crime and also recalled the situation cited by Representative Young earlier where a girl below the age of consent voluntarily participated in statutory rape and might thereby be charged under section 2. He remarked that a statutory rape victim or an aborted woman could refuse to testify under the Fifth Amendment if they were charged as accomplices to the crime. He said, however, he was not too worried about prosecuting individuals in these categories because it was most unlikely that a charge would be filed against them. His concern in this area was that justice be done in the courtroom and he expressed approval of section 4 because it would furnish the defendant with an "out." He called attention to and expressed agreement with the commentary from the Model Penal Code cited on page 9 of the draft.

Mr. Paillette noted the discussion of the case of State v. Barnett on page 10 of the commentary to the draft and said the language in subsection (2) was designed specifically to take care of that type of situation.

Mr. Chandler observed that the subcommittee had wrestled with the problem of who was the victim and who was not and cited the example of the aborted woman who was as close to being an accomplice to the crime as she was to being a victim.

Judge Burns asked if section 4 (1) equated "victim" with the status of a "non-accomplice" as that term had been defined by case law. Normally, he said, in a sodomy case involving a 12 year old boy,

that boy would be the victim, but State v. Nice, 240 Or 343, 401 P2d 296 (1965), held that it was a jury question whether he was an accomplice in a sodomy prosecution. He wanted to make clear whether section 4 was doing away with, reaffirming or changing the rulings in the decisions in this line of cases. Would the fact that a jury found a person to be an accomplice prevent that person from being a victim, he asked.

Professor Platt was of the opinion that this draft would place the 12 year old boy to whom Judge Burns referred in a protected class so that he could not be an accomplice to the crime of sodomy.

Mr. Knight said his understanding was that in a sodomy case, the younger boy could be tried for any acts he committed himself but he could not be tried for an older man's acts upon him and would therefore not be an accomplice to the older man's acts. Section 4, he said, would do away with any question that might arise in cases of that kind by stating clearly that the victim was not an accomplice. Chairman Yturri expressed agreement with the analysis of section 4 as stated by Mr. Knight.

Judge Burns observed that the section was, therefore, doing away with the case law in, for example, State v. Nice. Mr. Paillette said this was true as it concerned sodomy cases but the Article on Sexual Offenses would retain a form of statutory sodomy because of the age limitation. If he were above a certain age and the act were consensual, under the Sexual Offenses Article the act would not be criminal in any event. On the other hand if he were below a certain age, even though the act were consensual, it would be a crime because he would be deemed incapable of consenting to the act and would therefore be the victim of that crime.

Senator Burns moved that section 4 be approved and the motion carried unanimously. Voting on the motion: Judge Burns, Senator Burns, Chandler, Frost, Haas, Jernstedt, Johnson, Knight, Spaulding, Young and Mr. Chairman.

Renunciation as a defense. Mr. Paillette noted that Preliminary Draft No. 1 of the Parties to Crime Article contained a section allowing the affirmative defense of renunciation and the section was deleted by the subcommittee. This deletion in his opinion did not upset the format of the Article on Inchoate Crimes which contained a similar provision and it was unnecessary to have both. Professor Platt expressed agreement with Mr. Paillette's statement and the Commission made no objection to this deletion.

Section 5. Criminal liability of corporations. Mr. Paillette explained that section 5 was derived principally from the laws of New York, Michigan and the Model Penal Code. At the present time, he said, Oregon had no statute dealing generally with criminal liability of corporations although there were some specific statutes and cases as outlined on page 17 of the commentary to the draft.

The draft, he said, was not intended to change the law expressed in the case of State v. Pacific Powder Co., 226 Or 502, 360 P2d 530 (1961), but attempted to set forth some guidelines to assist the courts in construing circumstances involving criminal liability on the part of corporations.

Mr. Paillette explained that subsection (2) of section 5 contained the vicarious liability concept of respondeat superior.

Judge Burns referred to the phrase "affirmative performance" in subsection (2) (b) and said the term would encompass, for example, a requirement for a corporation to file an annual report. He asked if section 5 would also cover situations in which the duty would not be to do something affirmative but rather to refrain from doing something. Mr. Paillette replied that the definition of "conduct" included an omission.

Mr. Paillette noted that the Model Penal Code drafters had spent a great deal of time on criminal liability of corporations and the draft on pages 14 through 16 set out much of their commentary with respect to the rationale behind this kind of penal provision. They looked at the deterrent effect of corporate fines and felt that when a corporation was fined, the penalty was in effect passed on to the stockholders and in most cases the shareholders were not the ones who had participated in the criminal conduct since they did not have the practical means of supervising the day to day activities of corporate management to prevent misconduct. The ultimate rationale was that corporate offenses could be more effectively punished and deterred by proscriptions directed against the guilty individuals.

Mr. Johnson called attention to the definition of "high managerial agent" in subsection (1) (b) and asked if there was anyone in a corporation who had comparable authority to a nominal officer. Mr. Chandler replied that the by-laws of the corporation would answer that question. Mr. Johnson said he wanted to make certain that the section was not imposing liability on persons who were not responsible for corporate policy.

Chairman Yturri said the definition clearly excluded nominal officers and Mr. Spaulding agreed. The definition, he said, was aimed at the person who ran the corporation regardless of what title he held.

Chairman Yturri posed an example of a corporation consisting of three people, two of whom held a million shares, with the third holding one share plus the title of vice president. The by-laws further provided that the vice president would perform as president in his absence. The vice president had never attended a board meeting,

yet under the definition of "high managerial agent" he would have a voice and be in a position of authority comparable to the other two shareholders with respect to formulation of corporate policy.

Senator Burns called attention to subsection (2) (c) which would provide that if such a person held only one share and attended no meetings, he would not be acting in behalf of the corporation.

Mr. Tanzer suggested that subsection (1) (b) could be improved by stating it in the following manner:

> "'High managerial agent' means an officer of a corporation who exercises authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employes, or any other agent in a position of comparable authority."

Senator Burns moved adoption of the revision of subsection (1) (b) of section 5 as suggested by Mr. Tanzer and the motion carried unanimously.

Mr. Johnson then moved that section 5 as amended be adopted and the motion carried without opposition. Voting on both motions: Judge Burns, Senator Burns, Chandler, Frost, Haas, Jernstedt, Johnson, Knight, Spaulding, Young, Mr. Chairman.

Tape 2 begins here:

Section 6. Criminal liability of an individual for corporate conduct. Judge Burns asked if section 6 would expand individual criminal liability. He had in mind a situation where a corporation was required to file an annual report and the president failed to do so. If the corporation code did not affix misdemeanor liability for this failure to act, could section 6 be used to indict the president, he asked. Mr. Paillette replied that it could not.

In reply to a question by Mr. Johnson, Mr. Paillette explained that section 6 would not excuse an individual, presumably acting on behalf of the corporation, from criminal liability when he was acting on his own. That person would not be able to say he was not guilty in his own right because under respondeat superior the corporation was guilty.

Mr. Johnson said that because corporate crimes were defined in terms of "any person," section 6 might enhance the liability of someone whom the legislature did not intend to catch. He contended that the purpose of the proposed statute was already covered by other laws.

Mr. Spaulding remarked that under section 6 if a corporation established a time table for a Greyhound bus which forced the driver to violate speed limits in order to maintain that schedule, the corporation which fixed that schedule would be as guilty as the driver

who violated the speed limit. Mr. Chandler explained that section 6 would make the man who drew up the schedule and caused it to be performed in the name of and on behalf of the corporation subject to penalty along with the driver.

Mr. Johnson maintained that the one who drew the schedule would be liable without section 6 and believed section 6 to be surplusage. Chairman Yturri did not agree that it was surplusage. He explained that the statute said a person was liable for criminal conduct if it constituted an offense which he performed or caused to be performed in the name of the corporation. If he did that or had it done, that conduct itself was criminal and he could not escape responsibility simply by saying that he acted in behalf of the corporation. Mr. Spaulding added that section 6 was merely a codification of an old concept in the criminal law.

Senator Burns moved the adoption of section 6 and the motion carried unanimously. Voting: Judge Burns, Senator Burns, Chandler, Frost, Haas, Jernstedt, Johnson, Knight, Spaulding, Young, Mr. Chairman.

Section 2. Criminal liability for conduct of another; complicity. Mr. Johnson moved adoption of section 2 through subsection (2) (b). The motion carried unanimously.

Mr. Knight moved adoption of subsection (2) (c) of section 2. The motion carried. Voting for the motion: Senator Burns, Chandler, Jernstedt, Knight, Spaulding, Mr. Chairman. Voting no: Judge Burns, Frost, Haas, Johnson and Young.

Section 1. Criminal liability based upon conduct. Mr. Knight moved that section 1 be adopted and the motion carried unanimously with the same eleven members voting.

A brief recess was taken at this point. Mr. Tanzer left the meeting and Representative Carson arrived.

Justification; Preliminary Draft No. 2; November 1969

Mr. Paillette explained that the Article on Justification dealt basically with self-defense although there were some sections at the end having to do with duress and entrapment. The balance of the sections concerned defense of self, defense of another person, defense of property or defense of premises. It attempted to set forth the concepts of justification and to establish the circumstances under which a person could use force and what type of force could be used. It codified common law and case law concepts and in some instances made new law.

Section 1. Justification; a defense. Section 1, Mr. Paillette said, framed justification in terms of a defense for the reason that there was no intent to place the burden of proof on the defendant. This did not change existing Oregon law which was quite explicit in holding that it was not up to the defendant to prove self-defense. He called attention to the Oregon cases cited in the commentary on pages 1 and 2 of the draft.

Chairman Yturri stated that inasmuch as section 1 contained reference to sections 2 to 18 of this Article, it would be impossible to approve section 1 until the subsequent sections had been approved.

Section 2. Justification; generally. Mr. Paillette read section 2 and explained that persons using physical force as distinguished from deadly force and acting within or under any of the circumstances outlined in subsection (2) would be exempt from criminal liability; i.e., there would be justification for their actions. Oregon did not have a statute covering justification generally at the present time but there were certain specific statutes relating to duties of public servants which were set forth on pages 4, 5 and 6 of the draft.

Chairman Yturri asked if adoption of section 2 would cover all the statutes listed in the commentary, with the exception of justifiable homicide, or permit the degree of force justified therein and received an affirmative reply from Mr. Paillette.

Judge Burns asked if the term "public servant" as used in section 2 was intended to be defined the same as in the Bribery Article and was told by Mr. Paillette that it was. Judge Burns suggested that the definition be made explicit and others agreed that section 2 should describe a "public servant" as one defined in Article ____, Bribery and Corrupt Influences.

Mr. Johnson noted that the definition of public servant in the Bribery Article included candidates as well as jurors. [The definition of public servant as contained in the Bribery Article is set forth on page 13 of these minutes.] He suggested that the term in the Justification Article be confined to subsection (2) (a) of the definition in the Bribery Article:

> "A public officer or employe of the state or of any political subdivision thereof or of any governmental instrumentality within the state."

Judge Burns noted that section 2 of the Justification Article referred to a public servant exercising "his official powers, duties or functions" and a candidate would not have official powers, duties or functions during the period of his candidacy.

Mr. Johnson contended that subsections (2) (b), (c) and (d) of section 1 of the Bribery Article were special definitions appended specifically to cover bribery situations. Mr. Chandler agreed that the persons in these categories would have no need to draw upon provisions of the Justification Article.

Mr. Paillette explained that "public servant" had not been defined in the Justification Article because justification was stated in terms of a defense and it would be up to the defendant to establish that (1) he was a public servant and (2) if there was a statute dealing with a certain kind of public servant such as a peace officer, that statute in and of itself would be directed toward the peace officer and he would clearly fall within the definition of that term.

Judge Burns felt it would be helpful to have some explanation of how the term was defined in this Article and suggested that the commentary state that the definition of "public servant" as used in the Bribery Article would generally apply to the Justification Article, but not necessarily so.

Mr. Paillette commented that the most obvious type of public servant which the Justification Article would deal with would not be a county clerk, for example, but would be a policeman, fireman or someone dealing in emergency services. He concurred that some commentary on the subject might be helpful. The Commission was in general agreement that section 2 as drafted would do no harm and there might be instances where a broader definition than envisioned at this time would be useful.

Mr. Knight inquired if there was a difference between physical force and deadly physical force and was told by Mr. Paillette that there was. Mr. Knight then asked if under section 2 a police officer affecting an arrest could use deadly force. Mr. Paillette explained that section 2 generally stated the broad principles of justification but there was a specific section later in the draft defining the kind of force a police officer could use.

Senator Burns pointed out that "conduct" was defined in the Article on Culpability and asked if that definition should be incorporated in section 2. Judge Burns pointed out that "conduct" as defined in the Culpability Article was broader than encompassed in the Justification Article where conduct referred to action or nonaction. He suggested that an explanation of "conduct" be inserted in the commentary to the Justification Article.

Following the discussion of section 3, Senator Burns moved that section 2 be adopted and the motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Chandler, Frost, Jernstedt, Johnson, Knight, Spaulding, Young and Mr. Chairman.

Section 3. Justification; choice of evils. Mr. Paillette read subsection (1) of section 3 and explained that it meant, in essence, that it was all right for the fireman to chop a door down or wreck a house in order to prevent further injury or to save the rest of the houses in the block. Another example would be where a person saw a crime being committed and needed to call a peace officer in a hurry. In that situation it would be permissible for him to force his way into a house to get access to a telephone. He called attention to further examples cited in the commentary on page 8 of the draft.

Mr. Paillette explained that subsection (2) went on to qualify subsection (1) by saying that a person could not pick and choose which law he thought was good and which bad or which law he felt he should obey and called attention to the example cited in the commentary wherein a person could not claim that a mercy killing should not be viewed as a crime.

Subsection (1) (b), he stated, attempted to weigh the equities and said that the emergency circumstance had to clearly outweigh the desirability of avoiding the injury prohibited by the statute.

Chairman Yturri asked if the "morality and advisability of the statute" referred to in subsection (2) was the one that was being violated by the conduct and received an affirmative reply from Mr. Paillette. He then explained that because section 3 would pose difficult questions to answer under the guidelines set forth, subsection (3) was included. Chairman Yturri pointed out that subsection (3) would make the court the trier of fact even in a jury trial. Mr. Chandler related that the subcommittee had discussed that point and decided to adopt subsection (3) in its present form simply to expedite the trial process.

Judge Burns said he understood subsection (3) to mean that if the defendant said, "I have a defense of choice of evils and I propose to show facts (a), (b), (c), etc.", the court would then hold a voir dire hearing, similar to a hearing on a confession, and perhaps make some preliminary findings as to whether the facts would constitute justification, providing the jury found the facts to be true.

Mr. Spaulding affirmed Judge Burns' understanding of the subsection and said that if the jury believed the facts as presented by the defendant, justification would then be a defense. However, the judge could also say that even though all the facts were proven, justification was not a defense in that particular instance.

Judge Burns commented that facts were often illusive and to perfect a record he would expect the defendant to call witnesses to establish the facts because he might want an appellate court to examine the record to make sure the trial judge had not erred in saying there was no justification for his conduct. There would be situations, he said, where question would arise as a result of cross

examination by the defense of the prosecution's witnesses and it was difficult to have a voir dire hearing on that aspect.

Mr. Paillette remarked that the subcommittee had discussed that problem and for the reason cited by Judge Burns had included in subsection (3) the language "evidence . . . is offered by the defendant." Judge Burns said that there would be cases that would be so clear cut that the defense lawyer could prove his facts without calling witnesses and the judge could then make a ruling that justification was or was not a defense. On the other hand, there would be instances where the defense would want to call witnesses and in these cases, Judge Burns said he wanted to make sure that the court would know by reading the statute whether it would or would not be required to have a voir dire hearing.

Mr. Paillette said the subcommittee did not anticipate a requirement for a hearing but at the same time did not want to prevent one if the judge wanted to have a hearing on the issue. Chairman Yturri suggested the subsection be amended to give the court discretion to have a hearing or to submit the question to the jury.

Judge Burns said the other problem which might arise under subsection (3) was where the judge said the ruling was not a matter of law. He asked whether this would get into the problem of denial of trial by jury. Senator Burns recalled that the subcommittee had discussed whether the court should rule on this subject as a matter of law. [See Minutes, Subcommittee No. 1, August 15, 1969, pp. 5, 6.] Mr. Spaulding commented that the materiality of the issue was the subject under discussion; the court was merely giving a prior ruling on whether the facts were material.

Senator Burns, reading the minutes of Subcommittee No. 1 dated August 15, 1969, page 6, discovered a correction had not been made in the draft which was approved by the subcommittee. The second line of subsection (3) should read " . . . this section is <u>raised</u> by the defendant . . . "

Chairman Yturri asked the reason for requiring the judge to make the determination required in subsection (3). Mr. Chandler replied that the sole reason was to shorten the trial process. Mr. Spaulding explained that subsection (3) related to the "morality and advisability of the statute" as set forth in subsection (2), and subsection (3) was included so the court could say that it was not going to waste time on that sort of thing. Chairman Yturri noted that a record would be made of that part of the proceeding and the defendant could appeal from the court's ruling.

Chairman Yturri asked if other states had included a provision similar to subsection (3) and was told by Mr. Paillette that they had.

Because this was such a complicated area, Mr. Paillette explained, other states had included this to avoid opening up possible misuse of the defense of choice of evils and had included a buffer to let the judge rule on the matter preliminarily.

Chairman Yturri asked if other states had provided for a different method of handling the problem. Mr. Paillette replied that both New York and Michigan treated it the same way while the Model Penal Code did not require this ruling by the court.

Judge Burns asked if the jury would be instructed in the language of subsection (1) (b) requiring them to consider the "ordinary standards of intelligence and morality", etc. Mr. Spaulding replied that they would be so instructed if the court felt the evidence was sufficient to bring that issue in.

Mr. Spaulding called attention to the clause in subsection (1) (b) which said "by reason of a situation caused or developed through no fault of the actor." This meant, he noted, that if a simple act of negligence on the part of the actor was brought about by some emergency, he could not rely on the defense of justification.

Chairman Yturri explained that the clause referred to a situation where a negligent act by the actor initiated a chain of circumstances requiring some criminal act to be performed in order to break the chain. In that situation, the defense of justification would not be available to the actor. Mr. Spaulding questioned the wisdom of including a provision of this kind. He contended that the provision was talking about some horrendous thing which had become necessary to perform because of some small mistake the actor had made.

Mr. Paillette pointed out that section 3.02 of the Model Penal Code said in subsection (2):

> "When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability."

Mr. Spaulding suggested that the Model Penal Code language be substituted for subsection (1) (a) and that "gross negligence" be added thereto. Mr. Paillette explained that the term "gross negligence" was not employed in the proposed Oregon criminal code, the closest thing to that term being "recklessness."

Chairman Yturri remarked that there were situations where a person's negligent act gave cause to use of emergency measures and in those situations he would not be judged on the question of whether he initiated and brought about the circumstances but rather he would be judged on the steps he took when the emergency arose -- whether or not it was his fault -- and at that point whether he performed an act that would otherwise be criminal. Mr. Spaulding commented that his original negligence was really immaterial. The Chairman suggested that inclusion of "recklessness" in the subsection might be adequate to make this clear. Mr. Spaulding contended that it was inconsistent to deprive anyone of the defense of justification because of the fault of the actor.

Senator Burns remarked that there was no counterpart to this provision in existing Oregon law and the subcommittee had agreed that the likelihood of application of the section would be somewhat remote. He suggested the possibility of deleting subsection (3). Mr. Spaulding agreed that a person would rarely, if ever, be prosecuted for performing a valiant act.

Mr. Knight observed that to him subsection (1) seemed to recognize and give statutory authority to a jury's bargaining power. Chairman Yturri advised that when subsection (3) was considered, the court was given the bargaining power.

Mr. Knight said he did not picture at the close of the defense's case that the court would rule as a matter of law that this was justifiable conduct without sending the case to the jury; it would ultimately be up to the jury whether they accepted this defense, he said, so subsection (1) (a) would allow the jury to say, "The defendant has committed a crime but because of the circumstances he should not be convicted so we will find him not guilty."

Judge Burns expressed the opinion that subsection (3) would be used so rarely that it was hardly worthwhile to include it. Chairman Yturri agreed and suggested that the question be submitted to the jury in the usual fashion. Subsection (1) (a) should then clearly state that the justification defense was not available to a person who had committed either a criminal act or an act of recklessness giving rise to the situation. Mr. Johnson observed that with deletion of subsection (3) the judge could still throw the defense out by saying the matter was irrelevant or immaterial. Mr. Spaulding suggested the commentary contain a statement that the judge had the authority to rule on the materiality and relevance of the evidence even though subsection (3) had been deleted.

Mr. Paillette read the following commentary from Tentative Draft No. 8 of the Model Penal Code, page 6:

"The draft does not attempt, however, to resolve how far the issue raised by the defense should be determined by the court as one of law or submitted to the verdict of the jury. The Council thought this question best remitted to the law that generally governs the respective functions of the court and jury."

Mr. Johnson moved to strike the following language in subsection (1) (a): "by reason of a situation caused or developed through no fault of the actor".

Chairman Yturri asked if the Commission wanted the defendant to have the benefit of the justification defense available to him when his criminal act had given rise to an emergency situation. Suppose, he said, that he was guilty of a felony. Mr. Spaulding replied that his punishment could be based on the result of his act.

Representative Carson said that to be consistent with what the Commission had approved that morning by adopting a retraction defense in the Perjury Article to allow a man who attempted to lie under oath to absolve himself of responsibility by retracting his falsification under the guise of furthering justice, the Commission surely should permit a man who committed a crime through no fault of his own -- the actor who started the chain of circumstances -- to then reduce the amount of his injury by some further subsidy. The Chairman expressed approval of this analogy.

Mr. Chandler moved to amend Mr. Johnson's motion by deleting the language in subsection (1) (a) after the word "injury". Mr. Johnson accepted the amendment.

Chairman Yturri asked Mr. Paillette for his views on the proposed amendment. Mr. Paillette said he did not agree with the amendment but if the Commission adopted it, the draft would not be greatly affected.

Vote was then taken on the motion to delete the following language from subsection (1) (a) of section 3: "which reasonably appears about to occur by reason of a situation caused or developed through no fault of the actor". The motion carried.

Mr. Johnson next moved that subsection (3) of section 3 be deleted. His motion included the directive that the commentary would state that the Commission's action in deleting the subsection was not to be interpreted by anyone as prohibiting a judge from holding, if he wished to do so, a preliminary hearing to rule on the materiality and relevancy of the evidence. The motion carried.

Senator Burns moved that section 3 as amended be approved. The motion carried. Voting for the motion: Judge Burns, Senator Burns,

Carson, Chandler, Frost, Jernstedt, Johnson, Spaulding, Young and Mr. Chairman.

The meeting was adjourned at 4:15 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission