Tapes #39, 40, 41 and 42

#39 - Side 2
#40 - Both sides
#41 - Both sides
#42 - Side 1 only

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

December 12 and 13, 1969

A G E N D A

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OREGON CRIMINAL LAW REVISION COMMISSION
Fifteenth Meeting, December 12 and 13, 1969

Minutes

December 12, 1969

Members Present: Senator John D. Burns, Vice Chairman
Judge James M. Burns
Representative Wallace P. Carson, Jr.
Mr. Robert W. Chandler
Representative David G. Frost
Representative Harl H. Haas
Senator Kenneth A. Jernstedt
Attorney General Lee Johnson
Mr. Frank D. Knight
Mr. Bruce Spaulding

Absent: Mr. Donald E. Clark
Representative Thomas F. Young
Senator Anthony Yturri, Chairman

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

Also Present: Judge Edward O. Stadter, Jr., District Judges Association, Committee on Criminal Law Revision

Agenda: Friday, December 12, 1969

PERJURY AND RELATED OFFENSES
Amendment No. 2 to section on
Perjury and false swearing; retraction

JUSTIFICATION, Sections 1 to 17
Preliminary Draft No. 2; November 1969

Saturday, December 13, 1969

JUSTIFICATION, Sections 17 and 18
Preliminary Draft No. 2; November 1969

INCHOATE CRIMES
Preliminary Draft No. 2; December 1969

SEXUAL OFFENSES, Sections 5, 14, 15 and 16
Preliminary Draft No. 3; December 1969

Senator Anthony Yturri, Chairman, was ill and therefore unable to be in attendance. In his absence Senator John D. Burns, Vice Chairman, presided and called the meeting to order at 9:40 a.m. in Room 315, Capitol Building, Salem.

Approval of Minutes of Commission Meeting of November 7, 1969

Mr. Chandler moved that the minutes of the Commission meeting of November 7, 1969, be approved as submitted. The motion was seconded by Judge Burns and carried unanimously.

Perjury and Related Offenses; Proposed Amendment No. 2 Relating to Section Dealing with Retraction Defense

[Note: See Commission Minutes, November 7, 1969, pp. 5 - 8.]

Mr. Wallingford reviewed the action of the Commission at its November meeting when the members had voted to incorporate in the Perjury Article a section dealing with retraction. As redrafted, he said it contained certain safeguards not included in the section first presented to the Commission.

Judge Burns posed a situation where a person committed perjury before a hearings officer in a workman's compensation case, appealed the resulting decision to the circuit court and at that time recanted his earlier testimony given at the hearing. He asked if this would constitute a successful retraction. Mr. Chandler said it would not be a successful retraction because the hearings officer would be a "trier of fact" under subsection (c).

Mr. Paillette commented that a lie stated at a preliminary hearing which was retracted before the grand jury or at a later trial would not be a retraction in the same proceeding under the definition of "official proceeding" in subsection (2). In order to be able to advance the defense of retraction in that instance, he would have to retract the lie at the preliminary hearing.

Judge Burns said that the rationale for inclusion of the section was to encourage the truth by giving a bonus to the person who decided to tell the truth and if he failed to retract at any stage which he had polluted by his lie, he should be punished. Mr. Knight pointed out that the argument previously advanced for inclusion of a retraction defense was to remove the necessity for forcing a witness to stick with a false statement throughout the entire proceeding. If it would not benefit him to retract at the trial a false statement he had made at the preliminary hearing, he would then be wedded to his lie and the purpose of the statute -- to get the truth to the trier of fact -- would not be accomplished.

Chairman Burns stated that if the retraction statute were to permit the witness sufficient latitude to retract at later stages of the proceeding, cases could arise where a witness would lie for his friend in a preliminary hearing and lie again to the grand jury, knowing full well that if his lie did not succeed in freeing the defendant, he would retract to save himself from a perjury charge before the case went to the jury. Mr. Spaulding pointed out that under the section as written, he could be prosecuted for perjury if he followed that course of action.

Mr. Wallingford called attention to the commentary to the section at the bottom of page 4 which indicated that a person acting in the manner described by Chairman Burns would still have the retraction defense available to him:

> "It is intended that statements made in separate hearings at separate stages of the same proceeding shall be deemed to have been made in the course of the same proceeding, until such time as the issues framed by the proceedings have been submitted to the trier of fact."

Judge Burns indicated there was an inconsistency between the commentary and the proposed section. He suggested that subsection (c) be amended to read the "ultimate trier of fact" which would better achieve the intent of the Commission. Where a proceeding went through several segmented stages, the person would then be required to recant prior to the time the matter was submitted to the ultimate trier of fact.

Mr. Johnson contended that the person who was caught in a lie in the courtroom could voluntarily recant that lie and have available to him the defense of retraction. Mr. Wallingford noted that "voluntary" was defined in law to mean "acting or done without compulsion or persuasion." Judge Burns observed that the voluntariness of the retraction would be a jury question.

Chairman Burns read a sentence contained in the text of the Michigan Revised Criminal Code, section 4930:

> "Statements made in separate hearings at separate stages of the same trial or administrative proceeding shall be deemed to have been made in the course of the same proceeding."

He suggested this statement be added to the definition of "official proceeding" contained in subsection (2).

Representative Frost moved that the proposed retraction section be adopted without amendment. The motion carried but the action was subsequently reconsidered.

Mr. Paillette asked Representative Frost if it was his understanding that the definition of "official proceeding" contained in subsection (2) was sufficiently clear with respect to whether separate stages of the same proceeding were to be considered as part of one proceeding. Representative Frost replied that he understood the section to say that the various stages of a proceeding were considered to be separate proceedings. Mr. Chandler pointed out that this was at variance with the statement in the commentary on pages 4 and 5 of the draft as forth on page 3 of these minutes.

Representative Frost, having voted on the prevailing side, moved that the Commission reconsider the action by which the retraction section was approved and the motion carried.

Judge Burns moved that the commentary be amended on page 5, line 2, to insert "ultimate" before "trier of fact" and that the same amendment be made in line 2 of subsection (1) (c). The motion, he said, was intended to incorporate the decision of the Commission that a retraction at any stage of a proceeding was acceptable where the proceeding consisted of several stages. The motion was seconded by Mr. Chandler.

Mr. Paillette pointed out that the decision of the Commission would be clarified by including in the definition of "official proceeding" the sentence read by Senator Burns from section 4930 of the Michigan Revised Criminal Code.

Judge Burns moved to include that sentence in subsection (2) with the substitution of "considered" for "deemed" so that the sentence would read:

> "Statements made in separate hearings at separate stages of the same trial or administrative proceeding shall be considered to have been made in the course of the same proceeding."

Vote was then taken on Judge Burns' combined motions to amend the commentary, subsection (1) (c) and subsection (2). Motion carried. Voting for the motion: Judge Burns, Chandler, Haas, Jernstedt, Johnson, Spaulding, Chairman Burns. Voting no: Carson, Frost, Knight.

Mr. Johnson moved that the following language be substituted for that contained in subsection (1) (a):

> "Before it became manifest that the falsification was or would be exposed."

The motion failed. Voting for the motion: Carson, Haas, Jernstedt, Johnson, Knight. Voting no: Judge Burns, Chandler, Frost, Spaulding, Chairman Burns.

Mr. Johnson urged that the commentary contain a statement to the effect that "voluntary" as used in subsection (1) (a) would encompass the situation where it had become manifest that the falsification was going to be exposed. Mr. Spaulding asked Mr. Johnson if he would interpret "manifest" to mean that the exposure was certain to take place. Mr. Johnson indicated that although the Commission had discussed both at this meeting and at the previous meeting [see page 8 of Commission Minutes of November 7, 1969] the fact that the Model Penal Code language he favored would cause difficulty because of problems of proof, not everyone agreed that a retraction could be considered to be "voluntary" when it was obvious that the untruth was about to be exposed. He urged that the commentary state that the judge should instruct the jury that "voluntary" was defined in terms of the Model Penal Code language, namely, that the retraction should be made "before it became manifest that the falsification was or would be exposed." The commentary should further state, he said, that it was relevant evidence to the voluntariness of the retraction if the prosecutor could show that the witness made his retraction after it became evident that his lie would be exposed. Judge Burns said he would not object to making the evidence relevant to the voluntariness of the recantation but he would not want the jury to be instructed in the manner Mr. Johnson had suggested.

Mr. Paillette pointed out that the Inchoate Crimes Article contained several sections permitting the defense of renunciation and section 3 of that Article allowed renunciation "under circumstances manifesting a voluntary and complete renunciation of his criminal intent." The commentary to that section said:

> "To qualify for the defense of renunciation, the section requires that the renunciation must be completely voluntary. It is not sufficient if the actor is frightened into abandoning his conduct . . . "

Mr. Paillette asked Mr. Johnson if he would approve of inserting similar language in the commentary to the retraction section along with some examples of the type of voluntariness the Commission had in mind in adopting this section. Mr. Johnson said the commentary should indicate that when a witness was caught in a lie, a retraction at that point would no longer be considered voluntary.

Mr. Johnson then moved that language be incorporated into the commentary to say that it was not sufficient if the actor was frightened into retracting because of the imminence of exposure of his falsification. Mr. Chandler seconded the motion.

Representative Frost said he thought the motion was going farther that the Commission intended. Every impeachment by a prior inconsistent statement, he said, would be relevant evidence if the motion

carried. Chairman Burns advised that it would only be relevant if there were some evidence that the retraction was made because of the imminence of exposure.

Vote was then taken on Mr. Johnson's motion and it carried.

Mr. Frost commented that in his opinion the Commission had just removed the likelihood of a retraction being made in a proceeding before it went to the trier of fact. The purpose of the retraction, he said, was to get at the truth of the matter before the court and the interpretation just adopted would so overburden the basic concept that it was unlikely to be effective.

Judge Burns moved that the retraction section and the commentary be approved as amended. The motion carried. Voting for the motion: Judge Burns, Chandler, Haas, Jernstedt, Johnson, Spaulding, Chairman Burns. Voting no: Carson, Frost, Knight.

Justification; Preliminary Draft No. 2; November 1969

[Note: For discussion of sections 1 through 3, see Commission Minutes, November 7, 1969, pp. 22 - 30.]

Section 4. Justification; use of physical force generally. Mr. Paillette explained that section 4 outlined the circumstances under which the use of physical force would be justified. The first five subsections discussed specific types of individuals while subsection (6) was a general statement coordinating section 4 with the subsequent sections.

Subsection (1). Mr. Johnson referred to the phrase in subsection (1) " . . . to the extent that he reasonably believes it necessary to maintain discipline . . . " and asked if this was an objective standard. Judge Burns replied that it referred to the reasonable man standard which was the theory pervading this entire area of law.

Mr. Knight asked if "reasonable physical force" and "deadly physical force" were defined anywhere in the criminal code. Mr. Paillette replied that the Article on General Definitions as approved by the Commission stated in section 3:

> "(5) 'Deadly physical force' means physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury."

"Reasonable," he said, was not defined nor was "physical force" because the Commission was of the opinion that force not falling within the definition of "deadly physical force" would be "physical force." Chairman Burns commented that the Minutes of Subcommittee No. 1 dated August 15, 1969, pp. 7 - 9, made it quite clear that deadly

physical force would not be permitted under subsection (1). See page 9 and page 10 for amendments to subsection (1). Also see pages 15 and 16 for further discussion of the Commission's interpretation of "reasonable physical force."

Subsection (2). With respect to subsection (2), Mr. Spaulding said it made no sense to him to say that the law was that an official could do what the law allowed him to do. Mr. Paillette explained that subsection (2) was stated in this manner in an attempt to integrate it with existing statutes. As an example of the type of statute referred to, he read ORS 421.105 which dealt with custody of inmates in correctional institutions:

> "The warden may enforce obedience to the rules for the government of the inmates by appropriate punishment but neither the warden nor any other prison official or employe may strike or inflict physical violence except in self-defense, or inflict any cruel or unusual punishment."

Mr. Johnson was opposed to inclusion of a subsection that was dependent upon other statutes which might be changed by the legislature to impose an entirely different standard upon this provision. To avoid this possibility he suggested the subsection be amended to read " . . . use such physical force to the extent he believes reasonably necessary to maintain order and is authorized by law." Mr. Chandler contended that subsection (2) was clear as drafted.

Judge Burns asked if the subsection would conflict with ORS 421.105 if it were amended as suggested by Mr. Johnson. He commented that penitentiary inmates read statutes extremely carefully and he didn't want to change the law so that it could be used by an inmate to sue or harass a guard on the ground that there was no specific authorization in law for use of physical force except in self-defense situations.

Mr. Johnson then moved to amend subsection (2) of section 4 to read:

> "An authorized official of a jail, prison or correctional institution may use reasonable physical force when and to the extent that he reasonably believes it necessary to maintain order and discipline and as is authorized by law."

Mr. Chandler stated he would vote against Mr. Johnson's motion and if it failed, he would then move to amend subsection (2) to read:

> "An authorized official of a jail, prison or correctional institution may, in order to maintain order and discipline, use such physical force as may reasonably be necessary or as is authorized by law."

Judge Burns commented that the intent was to permit the warden to exercise such degree of physical force as authorized by existing law or by future law and to whatever extent the law might contain gaps, he should be authorized to use reasonable physical force to maintain order and discipline. For this reason, he said, he would prefer the language proposed by Mr. Chandler. Mr. Johnson contended that the language should be consistent throughout the section and the amendment he had proposed was consistent with subsections (1) and (3).

Mr. Spaulding commented that section 4 was not intended to include deadly physical force. Mr. Paillette agreed and further explained that "reasonable" had not been included in subsection (2) for the reason that the degree of force and the use of force by correction officials had always been controlled by a specific statute in the corrections code. If "reasonable" force were inserted in this subsection, he said, and particularly if the subsection were stated in the disjunctive as in Mr. Chandler's proposal, the Commission should be aware that this language would expand the discretion and authority of the warden over existing law. On the other hand, if the subsection were to state "and is authorized by law," it would not accomplish more than the draft section because it would still be necessary to consult the corrections code which specifically limited a prison official to a self-defense situation for disciplinary purposes.

Following Mr. Paillette's comment, Mr. Johnson amended his motion so that subsection (2) would be stated in the disjunctive:

> " . . . reasonably believes it is necessary to maintain order and discipline or as is authorized by law."

Vote was then taken on Mr. Johnson's amended motion which carried. Voting for the motion: Judge Burns, Carson, Frost, Haas, Jernstedt, Johnson, Knight. Voting no: Chandler, Spaulding, Chairman Burns. See pages 9, 10 and 14 for further amendments to subsection (2).

Subsection (3). Mr. Paillette explained that subsection (3) of section 4 would permit railroad conductors and bus drivers, for example, to use reasonable physical force to maintain order. There was no comparable section in present law, he said, although ORS 764.160 said that railroad conductors and engineers were vested with the powers of a sheriff.

Mr. Knight noted that "reasonable" was not used to modify physical force in subsection (3) and Mr. Paillette explained that the section was framed in this manner because the last clause said he "may use deadly physical force only when he reasonably believes it necessary to prevent death or serious physical injury."

Mr. Knight asserted that by omitting "reasonable" not only in subsection (3) but also in subsections (4) and (5), the subsections were saying that it was all right to use any amount of physical force so long as it was not deadly. In other words, the subsections could

be construed to mean that it was all right to hit a man five times when once would have obtained the same result. Representative Carson asked if there was a difference inferred by using "reasonable physical force" in one subsection and "physical force" in another. He was of the opinion the courts would find that the two phrases were intended to impose different standards.

Tape 2 begins here:

After further discussion of this point, the Commission recessed briefly. Upon resumption of the meeting, Representative Haas moved that subsection (3) of section 4 be amended to read:

> " . . . may use reasonable physical force when he reasonably believes it necessary to maintain order . . . "

Mr. Chandler commented that "to the extent that" which was deleted by Representative Haas' motion limited the amount of force and Representative Haas replied that "reasonable" before physical force also limited the amount of force. "To the extent that" appeared to him to modify (1) the decision to use force and (2) the amount of force.

Mr. Paillette was of the opinion that "reasonable" was needed to modify "physical force" and "reasonably" was needed to modify the individual's belief.

Vote was then taken on Representative Haas' motion to amend subsection (3) of section 4 and it carried. Voting for the motion: Judge Burns, Carson, Chandler, Haas, Jernstedt, Johnson, Knight, Spaulding, Chairman Burns. Voting no: Frost. See pages 10 and 14 for further amendments to subsection (3).

Subsections (1) and (2). Representative Haas moved that subsections (1) and (2) be amended to conform to the wording just approved for subsection (3):

> " . . . may use reasonable physical force when he reasonably believes it necessary . . . "

The motion carried with the same members voting as on the previous motion. Voting no: Frost.

Subsection (4). Mr. Johnson moved that for the sake of consistency subsection (4) be amended to read:

> " . . . may use reasonable physical force upon that person when he reasonably believes it necessary to thwart the result."

Mr. Spaulding commented that the proposed amendment made no change in the meaning of the subsection. Chairman Burns asked if there was a specific reason for deleting "to the extent that" from

subsections (1) through (4) in view of the fact that they read more smoothly when that phrase was retained.

Mr. Chandler moved to amend Mr. Johnson's motion to revise subsection (4) to read:

> " . . . may use reasonable physical force upon that person to the extent that he reasonably believes . . . "

The motion carried with Representative Frost voting no. See page 14 of these minutes for further amendment to subsection (4).

Subsections (1), (2) and (3). Mr. Spaulding moved to render the language uniform in subsections (1), (2) and (3) by restoring the phrase "and to the extent that" in all three sections. The motion carried unanimously.

Subsection (5). Mr. Johnson observed that under existing law the term "duly licensed physician" was not clearly defined and it was unclear whether the term included chiropractors.

Mr. Spaulding commented that a doctor or dentist under present law had an implied consent to use whatever force was necessary to carry out the treatment he had been employed to perform in his professional capacity.

Representative Carson asked how subsection (5) would affect emergency situations where the doctor was forbidden to touch the patient because of the patient's religious beliefs. Chairman Burns replied that would be a civil rather than a criminal matter.

Representative Carson then asked if the implied contractual relationship discussed by Mr. Spaulding would cover all the situations which might arise. If it did, subsection (5) was unnecessary. Mr. Spaulding replied that it would not cover every case.

Mr. Paillette explained that subsection (5) was designed to cover two situations: (1) Where consent had been given by the patient or, if the patient were a minor, the guardian or parent had consented, and the treatment consented to turned out to involve some kind of physical force employed against the patient either because it was implicit in the nature of the treatment or in the course of giving the treatment, the situation arose in which the doctor felt he needed to use force to continue the treatment that had been consented to. In situations of this kind there would be no criminal liability on the part of the doctor; and (2) To cover emergency situations where there was no consent but where the doctor could reasonably believe that someone would consent under the circumstances if he were available or able to do so.

Senator Jernstedt asked if this justification would extend to ambulance attendants. In his county, he said, volunteer firemen often served as ambulance attendants and this protection should be extended to them. Mr. Paillette noted that ORS 30.800, the so-called "Good Samaritan statute" passed by the 1967 legislature, defined a "medically trained person" as "a person licensed . . . to practice medicine and surgery, professional nursing, osteopathy or chiropractic." Subsection (5), by referring to a person acting under the direction of a duly licensed physician, could apply to an ambulance attendant if he were acting under such direction.

Judge Burns expressed the view that subsection (5) would apply to a very limited number of cases. Traditionally, he said, cases of this type had not been grist for the criminal mill. Chairman Burns said the subcommittee had recognized this point and because the provision would undoubtedly be lobbied by the members of the healing arts when it reached the legislature, the subcommittee had tried to keep it as concise as possible.

Representative Frost expressed the view that if it were to be included, it should be made applicable not only to physicians but to dentists, physical therapists, chiropractors, etc. Mr. Spaulding and Mr. Johnson expressed agreement.

Mr. Chandler moved that subsection (5) be deleted. The motion carried.

Subsection (6). Mr. Paillette explained that subsection (6) was included principally to call attention to the fact that there were subsequent specific sections dealing with making an arrest, preventing an escape, etc.

Mr. Chandler moved that subsection (6) be renumbered subsection (5). The motion carried unanimously.

Mr. Chandler next moved that section 4 as amended be approved and the motion carried without opposition. Voting: Judge Burns, Carson, Chandler, Frost, Haas, Jernstedt, Johnson, Knight, Spaulding, Chairman Burns. Section 4, as finally adopted, is set forth on page 16.

Section 5. Justification; use of physical force in defense of a person. Section 6. Justification; limitations on use of deadly physical force in defense of a person. Section 7. Justification; limitations on use of physical force in defense of a person. Mr. Paillette explained that section 5 permitted a person to use physical force upon another except as limited by sections 6 and 7. Section 6 limited the use of deadly physical force and section 7 limited the use of physical force of any kind.

Judge Burns asked why section 6, subsection (2), singled out the crime of burglary in a dwelling. Mr. Paillette replied that it used the "man's home is his castle" concept. Ordinarily, he said, under the Justification Article a person would not be allowed to use deadly physical force against a person who was using mere physical force against him or another. However, he would be allowed to go so far as to kill the burglar in his own dwelling.

Judge Burns said section 6 obviously applied to what were commonly considered serious crimes, such as rape or armed robbery, and asked what the rationale was for omitting arson from this section. Mr. Paillette replied that arson was covered under section 8.

Judge Burns asked if section 6 essentially restated present Oregon law and received an affirmative reply from Mr. Paillette. He added, however, that the question of retreat was slightly changed.

Representative Frost asked what constituted provocation under section 7 (1) and was told by Mr. Paillette that if the individual had the intent to provoke an altercation with the idea he could then claim self-defense, the section intended to say that provocation was not limited to physical action on the part of the aggressor; he could provoke by the use of words. Representative Frost asked if this was contrary to present law and Mr. Spaulding replied that if a person provoked a fight, even by the use of words, he could not claim self-defense under existing law. To support Mr. Spaulding's statement, Mr. Paillette called attention to the cases cited in the third paragraph on page 22 of the commentary.

Mr. Knight asked whether section 5 should refer to "reasonable physical force" in view of the Commission's decision with respect to the earlier sections. Mr. Paillette replied that "reasonable" had not been included here because section 6 contained a limitation on deadly physical force and section 7 then went on to limit other force which was less than deadly. This was one place, he said, where "reasonable" should not be included. Mr. Johnson called attention to the last clause in section 5 which, he said, limited physical force in the section to reasonable force.

Representative Frost asked if subsection (1) of section 6 would apply to a situation where an individual was driving away with a person's car after having broken into the garage to steal the car. Judge Burns responded that even though force had been used to open the garage, it would not be applicable because the section was talking about physical force or violence to a person and involved crimes such as armed robbery or rape involving force or violence.

Mr. Johnson moved that sections 5, 6 and 7 be adopted and the motion carried unanimously. Voting: Judge Burns, Carson, Chandler, Frost, Haas, Johnson, Knight, Spaulding, Chairman Burns.

The Commission recessed for lunch at this point and resumed at 1:00 p.m. The same Commission and staff members were present for the afternoon session as had been in attendance in the morning. Judge Stadter was also present and was joined by Judge Walter Foster, a member of the District Judge Association's Committee on Criminal Law Revision.

Section 8. Justification; use of physical force in defense of premises. Mr. Johnson referred to the phrase in subsection (1) of section 8 "or a person who is licensed or privileged to be thereon" and asked if inclusion of this class of individual served a valid public protection policy. Mr. Knight observed that if a group entered a restaurant for the purpose of holding a sit-in demonstration, a person who was in that restaurant eating lunch would be permitted to throw the demonstrators off the premises. He was of the opinion that this provision was too broad.

Mr. Paillette explained that "premises" as used in this section would be defined the same as in the Burglary Article and would include real property and any vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein. The subcommittee, he said, was attempting to reach the individual in a dwelling house who was a guest or a relative but did not actually live there. In that situation he would be extended the same privilege to use force in defense of those premises as if he were in lawful possession or control of the premises.

Mr. Knight pointed out that the section would also refer to a person who was not, for example, burglarizing the premises but was merely a trespasser who refused to leave. Mr. Johnson agreed with Mr. Knight that the owner or licensee of the restaurant should be the one who accomplished the eviction rather than a customer or one who was not acting at the direction of the person in control of the premises.

Mr. Chandler held the opposing view that a person should be able to evict a trespasser or one who was causing trouble even though he was not in possession or control of the premises. Under circumstances where the owner had fainted or been injured as a result of the trespass, the owner himself would be unable to act and the wisest course appeared to him to be to permit the person privileged to be on the premises to defend those premises.

After further discussion, Mr. Johnson moved to delete from subsection (1) the phrase ", or a person who is licensed or privileged to be thereon,". The motion carried.

Mr. Knight moved to insert "reasonable" before "physical force" in the fourth line of subsection (1).

Mr. Chandler objected to the motion inasmuch as subsection (2) used the term "deadly physical force" and referred back to subsection (1) thereby causing an inconsistency if the motion were adopted. Mr. Paillette agreed with Mr. Chandler and further explained that subsection (2) specifically stated that deadly physical force could only be used under certain limited circumstances. In this instance, he advocated that "reasonable" should not be used to modify "physical force" because physical force was anything less than deadly physical force.

In support of his motion Mr. Knight argued that there were many kinds of physical force. An individual could twist a person's arm or he could club him five times and the first could be reasonable force while the latter would not. Mr. Paillette advised that this was why the phrase "to the extent that he reasonably believes it necessary" was included in subsection (1).

Vote was then taken on Mr. Knight's motion which failed. Voting for the motion: Carson, Johnson and Knight. Voting no: Judge Burns, Chandler, Frost, Jernstedt, Spaulding, Chairman Burns.

Representative Carson was of the opinion that "reasonable physical force" should not be used in one place in the Justification Article and "physical force" in another unless the intent was to define two different kinds of force. When the language was inconsistent, he said, the draft was permitting anyone to draw the conclusion that reasonable physical force was permissible in one area and what constituted unreasonable physical force was permissible in all other areas where "reasonable" did not modify "physical force."

Representative Frost agreed that the use of the two terms constituted an inconsistency and suggested that the problem might be solved by including a definition of "physical force" Mr. Knight concurred and proposed that "physical force" be defined as force which was reasonable under the circumstances.

Mr. Chandler observed that the Commission had earlier determined that "physical force" was anything less than "deadly physical force" as defined in the General Definitions Article. Mr. Paillette stated it was virtually impossible to define "physical force" and Mr. Spaulding commented that the term defined itself.

Mr. Carson proposed that "reasonable," when defining "physical force," should therefore be deleted throughout the draft if Mr. Spaulding was correct in saying that "physical force" by its own definition meant "reasonable."

Mr. Johnson pointed out that subsection (1) stated "when and to the extent that he reasonably believes it necessary" and maintained that this language made the subsection sufficiently clear that only reasonable force would be permitted under those circumstances. He urged that all the sections of the draft should be framed in consistent language and was of the opinion that all the earlier sections should be made to conform to the language in section 8.

Section 4. Subsections (2), (3) and (4). Mr. Chandler moved that "reasonable" be deleted in section 4, subsections (2), (3) and (4), where it was inserted at today's meeting to modify "physical force."

In reply to a question by Mr. Knight, Mr. Chandler explained that Subcommittee No. 1, when working on this draft, had decided that

deadly physical force was force which either killed someone, could kill him or which caused or could cause serious physical injury. Mr. Johnson asked why the subcommittee had inserted "reasonable" only in subsection (1) of section 4. Mr. Paillette explained that Preliminary Draft No. 1 did not use "reasonable" to modify "physical force" any place in the draft. The original version of subsection (1) said that a parent, teacher, etc. could use physical force but not deadly physical force. The subcommittee objected to that phraseology because some of the members felt the implication was that anything which fell short of killing a child would be authorized. The subcommittee then inserted "reasonable physical force" in subsection (1) of section 4. The same objection, he said, was not raised with respect to the subsequent provisions and "reasonable" was accordingly not inserted.

Chairman Burns explained that Mr. Chandler's motion as stated would not delete "reasonable" on the third line of subsection (1), section 4, inasmuch as that word had not been inserted at today's meeting. Vote was then taken on the motion and it carried.

Section 4. Subsection (1). Mr. Johnson moved to delete "reasonable" in the third line of subsection (1).

Mr. Chandler opposed the motion. "Reasonable," he said, added another test to this particular subsection and since it referred to child beating, he urged that "reasonable" be retained. Mr. Knight agreed that child beating was a difficult area and also urged retention of "reasonable" physical force in this one subsection.

Judge Burns asked Mr. Chandler why he felt that another test should be added to child beating and not to the beating of, for example, a passenger on a bus and was told that people generally looked upon child beating as a more heinous crime than, for instance, hitting a drunken passenger over the head. Representative Frost noted that Mr. Chandler had earlier told the Commission that "physical force" was anything less than "deadly physical force" and was now saying that "reasonable physical force" was something less than "physical force." Judge Burns commented that Mr. Chandler had described an emotional reaction but not a reason why beating a child was any different than beating a passenger.

Mr. Knight contended that "reasonable physical force" imposed a more objective standard than did the phrase "to the extent he reasonably believes it necessary." Representative Frost pointed out that that this section was also talking about incompetents, some of whom might be considerably stronger than the parent or teacher who was attempting to control him.

Mr. Johnson maintained that "to the extent he reasonably believes it necessary" imposed a standard of reasonableness and it was a redundancy to say "reasonable physical force." A court in interpreting

this section, he said, would say that inclusion of "reasonable" was either a drafting error or was intended to impose a different standard.

Chairman Burns commented that PTA groups would be particularly concerned with this section and it should not be left open to the interpretation that a teacher would be able to use physical force upon a child which was just short of deadly physical force.

After further discussion, vote was taken on Mr. Johnson's motion to delete "reasonable" from the third line of section 4, subsection (1). The motion failed on a tie vote. Voting for the motion: Judge Burns, Carson, Frost, Jernstedt, Johnson. Voting no: Chandler, Haas, Knight, Spaulding, Chairman Burns.

Section 4 as finally adopted by the Commission was amended to read:

Subsection (1). No change from draft.

Subsection (2). An authorized official of a jail, prison or correctional institution may use physical force when and to the extent that he reasonably believes it necessary to maintain order and discipline or as is authorized by law.

Subsection (3). No change from draft.

Subsection (4). No change from draft.

Section 8. Subsection (2). In response to a question by Chairman Burns, Mr. Paillette explained that "reasonably" was used twice in subsection (2) (b) because one related to the state of mind of the individual that there was an attempt being made to commit arson and the other related to the extent of the force being used.

Judge Burns suggested language similar to that used in section 6 (2) might be preferable; i.e., " . . . to prevent the commission or the attempted commission of the crime of arson." The subsection as drafted, he said, would limit its use to an attempt to commit arson. Mr. Spaulding commented that a fire once started was arson and nothing could be done to prevent it at that point but it would do the subsection no harm to include language such as Judge Burns had suggested so it would apply to both the commission and the attempted commission of arson. Mr. Paillette expressed agreement.

Mr. Chandler pointed out that "prevent" in the first line of subsection (b) would be inappropriate if Judge Burns' suggestion were adopted inasmuch as it would be impossible to prevent the crime after it had been committed.

Chairman Burns expressed approval of the language suggested by Judge Burns since it would eliminate the use of "reasonably" twice in the same sentence. Mr. Paillette indicated that "reasonably" was not used twice in section 6 (2), the subsection to which Judge Burns referred, because the opening paragraph contained the phrase "unless he reasonably believes that . . . " whereas subsection (2) of section 8 did not contain that phrase.

Judge Burns moved that subsection (2) of section 8 be redrafted in language consistent with subsection (2) of section 6 so it would read:

> "When he reasonably believes it necessary to prevent an attempt by the trespasser to commit arson."

The motion carried. The subsection was subsequently further amended. See page 18 of these minutes.

Mr. Spaulding noted that subsection (2) of section 8 implied that the person had to be both a trespasser and an arsonist and asked if the draft would cover persons who were not trespassers yet committed arson. Mr. Knight noted that the section also applied only to those who were in lawful possession or control of the premises. Mr. Johnson asked why section 8 was confined to trespassers and why arson could not be treated the same as burglary and included in section 6. Mr. Paillette replied that arson was an exception to the rule that only physical force could be used in defense of premises and was therefore placed in a separate section because deadly physical force was permissible where arson was concerned. Judge Burns further explained that section 6 was related to defense of persons whereas section 8 related to defense of property.

Judge Foster pointed out that if he looked out the window of his own home and saw someone setting fire to his neighbor's house, he would have no justification for preventing that fire because he was not in possession of his neighbor's property. Mr. Chandler replied that force was permitted under another section to prevent the commission of a felony. The question of extending the defense of justification to a nontrespasser was later discussed by the Commission. See page 19 of these minutes.

Judge Burns then moved that subsection (2) (b) of section 8 be reworded to provide specifically that the section would be invoked either by the prevention of an attempt to commit arson or by the prevention of the commission of arson. Mr. Paillette suggested the following language and Judge Burns moved its adoption:

> "When he reasonably believes it necessary to prevent the trespasser from committing or attempting to commit arson."

Mr. Johnson moved to amend Judge Burns' motion to amend subsection (2) (b) of section 8 to read:

"When he reasonably believes it is necessary to prevent the commission of arson."

Mr. Spaulding expressed approval of the amended motion and observed that it was unnecessary to include both the commission and the attempted commission because if the attempt were prevented, the commission was thereby prevented and vice versa.

Judge Burns agreed and restated his motion to have subsection (2) (b) of section 8 read:

"When he reasonably believes it is necessary to prevent the commission of arson by the trespasser."

The motion carried unanimously.

Mr. Carson asked if it was redundant to include "trespasser" in subsection (2) (b) in view of its inclusion in subsection (1). Mr. Spaulding expressed the view that it clarified subsection (2) and was not redundant.

Representative Carson indicated that he did not understand why arson was being singled out. If a person were stealing his car, he said, he would not have justification for killing the robber but if he saw a person setting fire to one of his trees or shrubs, he would be justified in killing him. Judge Burns said that the theory was that where arson was a serious enough danger, deadly physical force would be permitted. Mr. Paillette added that the subcommittee felt that arson was one of the serious felonies where the argument might be raised that it was not a felony involving force and violence as was the case with burglary, for example. They wanted to make sure that the felonious crime of arson was covered even though the argument might be raised that it was not a forcible felony.

Subsection (3). Mr. Johnson objected to the application of real property to the arson situation. Mr. Paillette advised that the subcommittee's decision was that section 8 should not be limited to first degree arson. He contended that the Justification Article should allow for the use of reasonable force against a trespasser on real property which did not necessarily involve a dwelling.

Representative Carson noted that the section could be applicable to children who burned an outhouse on Halloween.

Mr. Johnson then moved to amend subsection (3) of section 8 to read:

"As used in subsection (1), 'premises' includes any building as defined in Article ____."

Chairman Burns explained that Mr. Johnson's motion would permit the use of deadly physical force only in a building and would take care of Representative Carson's objection.

Mr. Paillette pointed out that the subcommittee had rejected the deletion of real property from section 8. He asked if Mr. Johnson's objection could be met by limiting subsection (2) (b) to arson in the first degree which would cover arson involving protected property. Protected property, he said, was defined in the Arson Article as meaning "Any structure, place or thing customarily occupied by people, including public buildings and forest land." If his suggestion were adopted, the only land that would then be covered in section 8 would be forest land.

Mr. Johnson then amended his motion to revise subsection (3) of section 8 to read:

> "As used in subsections (1) and (2) (a) of this section, 'premises' includes any building as defined in Article ____ and any real property. As used in subsection (2) (b) of this section, 'premises' includes any building as defined in Article ____."

Mr. Johnson explained that his motion would limit the use of deadly physical force so far as arson was concerned only to the prevention of arson in a dwelling.

Vote was then taken on Mr. Johnson's motion and it carried.

Judge Burns repeated the problem which Mr. Spaulding had raised earlier with respect to the amount of force which could be used to prevent the commission of arson by someone who was not a trespasser and asked if there were instances where deadly physical force should be permitted against a nontrespasser.

This question was discussed at some length and, at Judge Burns' suggestion, it was finally decided that the staff would draft an appropriate commentary reflecting the Commission's belief that a person who committed arson was a trespasser by virtue of that action and was deemed to be a trespasser within the meaning of section 8.

Mr. Johnson moved that section 8 be approved as amended and the motion carried unanimously. Voting: Judge Burns, Carson, Chandler, Haas, Jernstedt, Johnson, Knight, Spaulding, Chairman Burns.

Section 9. Justification; use of physical force in defense of property. Mr. Paillette explained that section 9 was not concerned with defense of a dwelling or fear of physical injury but was designed to prevent criminal mischief or theft of property.

Judge Burns moved that the phrase "what he reasonably believes to be" on lines 4 and 5 of section 9 be deleted.

Mr. Paillette explained that the two "reasonably believes" phrases were included for the same purpose that analagous language was used in section 8 before the Commission amended it; namely, one referred to the amount of force used and the other to the individual's state of mind.

Mr. Chandler expressed opposition to the motion. He was of the opinion that the deletion of the phrase would require the defendant to prove there was a commission or an attempted commission of a crime rather than to prove his belief. Mr. Johnson contended that if he reasonably believed his action was necessary to prevent a crime, it made no difference whether the crime actually occurred.

Vote was then taken on Judge Burns' motion to amend section 9. Motion carried.

Judge Burns asked if it was necessary to include the phrase "other than deadly physical force" in section 9. Mr. Paillette replied that in his opinion there were certain places in the draft where clarity demanded that this phrase be included and this was one spot where it should be specifically stated that deadly physical force would not be permitted.

Mr. Chandler moved that section 9 as amended be approved and the motion carried unanimously with the same ten members voting as voted to approve section 8.

Section 10. Justification; use of physical force in making an arrest or in preventing an escape. Representative Frost referred to the phrase in section 10 "unless he knows that the arrest is unauthorized" and asked if unauthorized was the proper word to indicate an improper arrest. Representative Carson asked if there was such a thing as an "authorized arrest" and suggested that "unlawful" might be more appropriate than "unauthorized." Mr. Paillette advised that section 10 was derived from Michigan Revised Criminal Code section 630 and the commentary to that section spoke in terms of the lawfulness of an arrest so this was apparently what they meant by "unauthorized."

Representative Carson moved that "unlawful" be substituted for "unauthorized" in subsection (1) of section 10. The motion carried unanimously. The subsection was subsequently further amended. See page 21 of these minutes.

Judge Burns asked if the same criteria concerning a lawful arrest should be included in subsection (2). Representative Carson said he would have no objection to including the same phrase in subsection (2) if it were framed in the same language as subsection (1). Mr. Paillette indicated that the difference between the two subsections was that subsection (2) was concerned with self-defense of the person or defense of another person whereas subsection (1) had nothing to do with self-defense.

Representative Carson pointed out that in the circumstances related to section 10 the law officer was the aggressor and even though he knew the arrest he was making was unlawful, he could get around the question of provocation by saying he was making a valid arrest. The question of lawfulness of the arrest should be raised in each subsection, he said, or not raised at all. He added that arrests by peace officers which they knew to be invalid probably occurred very infrequently.

Mr. Johnson commented that section 10 basically took away from the peace officer the standard rights of self-defense which were extended to everyone other than a peace officer. He contended that the same standard for self-defense should apply to a peace officer as to anyone else unless the officer was aware that the arrest he was making was unlawful in which case the person being arrested should have a right to defend himself. Representative Carson remarked that this raised a question with respect to section 15 wherein it was provided that physical force could not be used to resist an arrest.

Mr. Johnson moved to add the following phrase to subsection (2) of section 10: "unless he knows that the arrest is unlawful." His motion also included an amendment to the opening paragraph of section 10 to insert "in the performance of his duties" after "peace officer".

Mr. Spaulding stated it could place an officer in a difficult position if, when he was being attacked, he had to stop to think whether the arrest was lawful before he defended himself. Mr. Johnson maintained that if the officer were making an arrest he knew to be unlawful, he should not be able to rely on the protections of section 10. Mr. Spaulding asked Mr. Johnson if he believed the officer should lose the right of self-defense under those circumstances and was told that he should lose the special protection of section 10 but not the right of self-defense which extended to everyone else.

After further discussion, Mr. Johnson restated his previous motion so that section 10 would be redrafted by the staff as necessary to accomplish the following: Delete from subsection (1) the phrase "unless he knows that the arrest is unlawful" and add a new subsection (3) to state substantially that "This section is inapplicable if the officer knows the arrest is unlawful." The motion carried unanimously. Subsection (3) was subsequently deleted. See page 24 of these minutes.

Representative Haas recalled the comment made by Mr. Paillette with respect to section 9 concerning the necessity of specifically stating that the section would not permit deadly physical force and asked if an analagous phrase should be included in section 10 to make certain that it did not authorize deadly physical force. Mr. Paillette advised that section 11 referred back to section 10 and the necessary limitations were thereby imposed on section 10.

Mr. Chandler moved that section 10 be approved as amended with the understanding that the staff was given sufficient flexibility to redraft the section as necessary to accomplish the Commission's stated purpose. The motion carried unanimously. Voting: Judge Burns, Carson, Chandler, Frost, Haas, Jernstedt, Johnson, Knight, Spaulding, Chairman Burns.

Section 11. Justification; use of deadly physical force in making an arrest or in preventing an escape. Mr. Paillette explained that section 11 limited the use of deadly physical force by a peace officer who was acting under section 10.

Representative Frost posed an escape situation where a person was attempting to elude a police officer and asked if the officer would be prevented from firing at the escaping car because he would then be employing deadly physical force. Mr. Spaulding replied that firing at the car would not be using deadly physical force upon another person. Representative Frost asked if the officer's action would be justifiable if he hit the escapee when he fired at the car. Mr. Paillette replied that the officer would not always know the answer to that question and section 12 was included to set out the basis for his belief. He called attention to the first paragraph of the commentary on page 35 of the draft and said it would be his interpretation that if the officer considered a violation of the basic rule to be a felony involving force and violence and used deadly physical force to arrest the violator, he would not be justified in that action.

Representative Frost cited a case where an arresting officer had stopped a violator after a chase at high speeds. When the violator stepped from the car, the officer thought he reached for a pistol at his belt although this was not actually the case. He asked if this action on the part of the violator could be construed to be a crime involving force or violence. Mr. Paillette replied that there was no force or violence present but it did raise the question of self-defense and if the officer believed there was deadly physical force about to be used against him, he would have a right to protect himself. He did not believe, however, that the Justification Article would prevent the pursuit by the officer of the traffic offender. Representative Frost asked if the officer would be justified in taking a shot at the car to stop the lawbreaker. Mr. Paillette replied that the argument that could be made was that taking a shot at the car amounted to the use of deadly physical force against the occupant and if that premise were accepted, the officer would not be justified in his action because the offender was not committing a felony involving force and violence.

Mr. Knight asked if a bomb threat to blow up a store would be considered to be a felony involving force and violence and if an officer would be justified in using deadly physical force in an effort to arrest the one who made the threat. Judge Burns replied that the

discretion of the district attorney could be relied upon in such an instance. If he considered that a bomb threat involved force and violence, the officer would be justified in using deadly physical force.

Mr. Knight said he was concerned about the defendant suing the police officer in some of the situations which could arise. Mr. Spaulding commented that conduct which violated criminal statutes became negligence per se. Judge Burns said he recalled a line of cases that said the statutes gave a civil cause of action even though those statutes were framed in terms of a criminal statute. He did not, however, recall cases which said to look at the criminal statutes and if the crime was not defined there, then the person would have a civil cause of action. He said he understood Mr. Spaulding to say that if the conduct was not justified, it was criminal and would therefore be negligence per se and would form the basis for a civil action.

Mr. Knight said this would be true unless the arrest statute said that an officer could use whatever force was necessary, including deadly physical force, to arrest for a felony. If this course were not followed, he was of the opinion that the Justification Article was setting up the standards an officer was required to use in making an arrest. When he went beyond the authority provided in the Article, he had not only violated the criminal statute but had opened himself up to the possibility of being sued and the insurance rates for officers throughout the state would shoot, he said, sky high.

Mr. Knight observed that section 11 was changing the existing law insofar as the right to use deadly physical force was concerned from the right to use such force against one committing a felony to the right to use deadly physical force against one committing a felony involving force and violence.

After further discussion, Mr. Knight made a motion to insert a period after "felony" in subsection (1) (b) of section 11 and delete "involving force or violence." He explained that adoption of his motion would leave existing law undisturbed.

Judge Burns pointed out that adoption of the motion would permit deadly physical force against a person writing a bad check or against a shoplifter.

Vote was taken on Mr. Knight's motion and it failed.

Judge Burns suggested that one method of circumventing the problem which the Commission was discussing was to return to section 11 after the crimes had been classified. At that time it would be possible to insert a phrase such as "Class A felony" or "Class B felony" rather than "a felony involving force or violence" which would pinpoint the type of felony to which the section would apply.

Chairman Burns expressed approval of Judge Burns' suggestion to postpone a final decision on section 11 until the type of felony which should be covered under this section could be stated in more definitive terms.

Mr. Chandler moved that section 11 be approved with the understanding that the Commission would consider it further after felonies had been classified. The motion carried. Voting for the motion: Judge Burns, Carson, Chandler, Frost, Haas, Jernstedt, Johnson, Spaulding, Chairman Burns. Voting no: Knight.

Section 12. Justification; use of physical force in making an arrest or preventing an escape; basis for reasonable belief. Mr. Paillette explained that subsection (1) of section 12 imposed a high standard on a peace officer to know the rules and laws affecting his actions while subsection (2) related to arrests made under a warrant and stated he was justified in using the physical force described in sections 10 and 11. If the warrant were good on its face, he would be permitted to act without peril.

Judge Burns commented that section 12 was duplicatory in part of the amendatory language inserted in section 10 and Mr. Paillette pointed out that section 12 related only to arrests under a warrant. Judge Burns observed that section 12 required the officer to know the legal rules and his belief that violation of the basic rule was a felony would not constitute an acceptable excuse for the officer's use of excessive force against the of fender under section 12 (1). However, section 10 would apply to both an arrest with a warrant and one without. He suggested that subsection (2) of section 12 be deleted since this provision was already covered in section 10.

After further discussion, Mr. Johnson moved to delete subsection (3) of section 10 which the Commission had earlier inserted and to amend subsection (2) of section 12 to read:

> "A peace officer who is making an arrest is justified in using the physical force prescribed in sections 10 and 11 of this Article unless the arrest is unlawful and is known by the officer to be unlawful."

The motion carried. Voting no: Frost.

Mr. Johnson next moved to delete subsection (1) of section 12.

Mr. Paillette explained that subsection (1) was placed in section 12 for two purposes: (1) To indicate that the police officer was expected to know his job; and (2) If he used force to arrest for an offense that did not exist in law, he would not be protected by the Justification Article. He agreed with Mr. Knight that it imposed a

higher standard on a peace of ficer than on other persons but he felt this was justifiable because situations calling for force were more common to a peace officer than to an ordinary citizen and it was not unreasonable to expect him to know the law.

In response to Mr. Knight's concern that officers would be more liable for false arrest suits and more apt to be sued for assault and battery if subsection (1) were enacted, Judge Burns explained that if the officer had a reasonable belief that a crime had been committed and the elements of that crime were present, if the facts were true in law,he would be protected. On the other hand, if he reasonably believed the facts of the crime were true but together they did not add up and could not add up to a crime, he would not be protected and he was not so protected under existing law.

Vote was then taken on Mr. Johnson's motion to delete subsection (1) of section 12. Motion failed. Voting for the motion: Chandler, Jernstedt, Johnson, Knight. Voting no: Judge Burns, Carson, Frost, Haas, Spaulding and Chairman Burns.

Mr. Chandler moved to approve section 12 as amended. The motion carried. Voting for the motion: Judge Burns, Carson, Chandler, Frost, Haas, Jernstedt, Spaulding, Chairman Burns. Voting no: Johnson, Knight.

Section 13. Justification; use of physical force by private person assisting an arrest. Section 14. Justification; use of physical force by private person acting on his own account to make an arrest. Mr. Paillette explained that sections 13 and 14 dealt with use of force by a private person. Under section 13 a private person assisting an arrest was entitled to use physical force when he reasonably believed that force to be necessary to carry out the peace officer's direction and permitted deadly physical force under limited circumstances. Section 14 covered the citizen's right to use physical force under circumstances commonly known as a "citizen's arrest."

Mr. Spaulding objected to the phrase "if that happens to be the case" in subsection (2) (b) of section 13. Mr. Paillette explained that if the peace officer was authorized to use deadly physical force and directed the citizen to use such force, the citizen would be protected. Also, if the peace officer was not authorized to use deadly physical force but directed the citizen to use such force, the citizen would still be protected. Representative Carson remarked that the citizen would be liable only in the one case where he knew that the police officer did not have the authority to direct him to use deadly physical force.

Tape 3 begins here:

After further discussion, Judge Burns moved to amend subsection (2) (b) of section 13 to read:

"He is directed or authorized by the peace officer to use deadly physical force unless he knows that the peace officer himself is not authorized to use deadly physical force under the circumstances."

The motion carried.

In response to a question by Judge Burns, Mr. Paillette indicated that sections 13 and 14 were essentially reflections of existing law except for changes necessary to make them consistent with sections 10, 11 and 12 of the Justification Article.

Judge Burns moved adoption of section 13 as amended and section 14 without amendment. The motion carried unanimously with the same ten members voting as had voted on the previous motion.

Section 15. Justification; use of physical force in resisting arrest prohibited. Mr. Spaulding asked what the result would be under section 15 if a person reasonably appeared to be a police officer but the other person knew he was not. Mr. Chandler answered that if an individual knew the officer was actually not an officer, he would not meet the test of reasonably appearing to be one.

Representative Carson pointed out that in the situation where a person was wearing a police badge and appeared to be a police officer when he actually was not, the arrestee would be protected by the "no sock" principle because the proposed statute in the opening clause required that the individual must in fact be a peace officer.

In reply to a question by Judge Burns, Mr. Paillette indicated that section 15 would change existing case law regarding the right to use force to resist an unlawful arrest.

Senator Jernstedt moved that section 15 be approved and the motion carried unanimously. Voting: Judge Burns, Carson, Chandler, Frost, Haas, Jernstedt, Johnson, Knight, Spaulding, Chairman Burns.

Section 16. Justification: use of physical force by guard in detention facility to prevent an escape. Following a brief explanation by Mr. Paillette, Chairman Burns asked if a guard on a tower at the penitentiary would be justified in shooting an escaping inmate and received an affirmative reply from Mr. Paillette who pointed out that ORS 163.100 permitted justifiable homicide in such an instance.

Mr. Knight asked if section 16 would apply only to felons who had committed a crime involving force and violence and was told by Mr. Paillette that all the guard would be required to know under section 16 was that the escapee was a prisoner.

Judge Burns asked how section 16 would apply to a situation where an inmate of a correctional institution was out of the detention facility on work release. He said he posed the work release situation because in Multnomah County persons on work release were placed in the Oregon Correctional Institution where inmates were also lodged who had been convicted of crimes. Under section 16, he said, OCI would then be considered a detention facility in those circumstances. Others agreed this would be true.

Mr. Chandler said he would interpret section 16 to mean that an inmate on work release could walk away from the job without fear of deadly physical force being applied against him but he could not walk away from the detention facility when he had returned to it without the risk of getting shot justifiably. Judge Burns said he was not certain that would be the result of this section because the escape statutes had been construed to mean that if a person was in custody and committed the crime of escape, even though he was out on work release, he was nevertheless an escapee. Judge Burns asked Mr. Chandler if his interpretation meant that deadly physical force could not be applied so long as the inmate was not physically in the detention facility and received an affirmative reply. Mr. Chandler added that it was not the intent of the statute to say that a guard could go to the inmate's place of employment while he was out on work release and shoot him if he walked away. However, if he tried to break out of the correction facility in the middle of the night with several other inmates, deadly physical force could then be used to prevent his escape. Others agreed this was the interpretation they would place on section 16.

Mr. Spaulding moved that section 16 be adopted and the motion carried unanimously with the same members voting as had voted on the previous motion.

Section 17. Duress. Mr. Paillette called attention to the commentary on page 42 of the draft which stated that about half the states now had legislation regarding the defense of duress in a criminal case but Oregon was not one of them. Section 17 joined three other states in refusing to recognize the defense of duress in a murder case. Subsections (1) and (2), he said, amounted to a codification of the doctrines set forth in the three Oregon criminal cases he had been able to discover which dealt with the defense of duress. With respect to subsection (3) Mr. Paillette said he had been unable to find any reported Oregon cases where the defense of duress by a woman acting on command of her husband had been raised. The subsection, therefore, changed Oregon law in that the common law defense of coercion would probably be available at the present time to a woman acting on command of her husband. This defense would be removed by the passage of subsection (3).

Mr. Paillette noted that the phrase in subsection (1) "which force or threatened force was of such nature or degree to overcome earnest resistance" was similar to the language used in the section on forcible rape.

Mr. Knight asked if duress would be a defense to a manslaughter charge if the charge were reduced from murder and received an affirmative reply from Mr. Paillette. Judge Burns noted that Mr. Knight's question raised a problem as to how murder was to be defined in the Homicide Article and suggested that section 17 be earmarked for consideration following approval of the definition of homicide to make sure that the phraseology therein was consistent with the Homicide Article. Mr. Paillette observed that the homicide draft in its present form contained no degrees of murder but manslaughter was not murder.

Mr. Spaulding called attention to the phrase in subsection (2), "or recklessly places himself in [that] situation" and asked if the Commission agreed that it was right to apply this subsection to a person who recklessly placed himself in such a position without an intent to go along with the crime. Mr. Paillette replied that State v. Ellis, 232 Or 70, 374 P2d 461 (1962), and State v. Patterson, 117 Or 153, 241 P 977 (1926), specifically commented on that point and said that such compulsion must have arisen without the negligence or fault of the person who insisted upon it as a defense. Subsection (2), therefore, was not changing Oregon case law. Mr. Spaulding commented that he liked subsection (2) better than the case law because it used "recklessness" which was something more than "negligence" referred to in the cases. He contended that unless a person had intentionally or recklessly placed himself in a position where he would have to commit a crime, the defense of duress should be available to him.

Several examples were given of instances where recklessness would be a factor: (1) Where a person in a drunken stupor entered a house of thieves and became involved in their plans to steal; (2) Where a person set out to steal hub caps and ended up in an armed robbery; and (3) Where a person went along on a planned armed robbery, the victim resisted and one accomplice said, "Shoot him or I will shoot you." In these situations the person had placed himself in the position of being involved and section 17 provided that he was not entitled to the defense of duress.

Representative Haas commented that he was not convinced that just because someone was threatened with deadly physical force, he should be permitted to use deadly physical force upon a third person with impunity. He asked how the Commission would feel about exempting from section 17 not only the crime of murder but also any crime involving deadly physical force upon another. He expressed the view that every citizen had the responsibility not only to save himself but to apply the same amount of protection to his fellow man. He said that under

section 17 an inmate in the penitentiary could beat up a guard and claim that another inmate had threatened him with deadly physical force if he did not beat the guard. Mr. Carson commented that his chances with a Marion County jury probably would not be too great under those circumstances.

Judge Foster remarked that "not available" as used in subsection (2) was unclear. Judge Burns explained that the term "defense" as used in this section required the defendant to inject the defense into the case but the state had the burden to disprove his contention beyond a reasonable doubt.

Judge Burns moved that the Commission adjourn and that discussion of section 17 be resumed the following morning. The motion carried unanimously and the Commission adjourned at 4:30 p.m.

Tape 3 - Side 1 at 325:

December 13, 1969

Members Present: Judge James M. Burns
Representative P. Carson, Jr.
Mr. Robert W. Chandler
Representative David G. Frost
Senator Kenneth A. Jernstedt
Attorney General Lee Johnson
Mr. Frank D. Knight
Mr. Bruce Spaulding

Delayed: Senator John D. Burns, Vice Chairman
Representative Harl H. Haas

Absent: Mr. Donald E. Clark
Representative Thomas F. Young
Senator Anthony Yturri, Chairman

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

Also Present: Mr. Robert Y. Thornton, Member, Bar Committee on Criminal Law and Procedure

Agenda: JUSTIFICATION, Sections 17 and 18
Preliminary Draft No. 2; November 1969

SEXUAL OFFENSES
Preliminary Draft No. 3; December 1969

Judge James M. Burns called the meeting to order at 9:30 a.m. As Poet Laureate of the Criminal Law Revision Commission, he delivered the following limericks which he had written that morning while gazing into the mirror with a razor in his hand:

Lines Written Two Miles Above the Benton County Courthouse

There once was a Knight whose horse
Kicked with deadly physical force,
So I reasonably believe
His widow must grieve
Because he failed to consider the source.

Ode to a Criminal Law Revision Draftsman

Oh, reason is always in season
So laws aren't hard to frame.
Physical force may be spent
When and to the extent
That reason permits the same.

# # #

Senator John D. Burns arrived at this point and presided over the meeting in the absence of Chairman Yturri.

Justification; Preliminary Draft No. 2; November 1969

Section 17. Duress. (Cont'd). Mr. Paillette said that following the meeting on the previous day he had discussed with Judge Foster his concern that "not available" as used in subsection (2) was unclear and had suggested the following language:

> "Duress is not a defense if a person intentionally or recklessly places himself in a situation in which it is probable that he will be subjected to duress."

Judge Burns commented that this improved the wording and moved to amend subsection (2) as suggested by Mr. Paillette. Motion carried.

Mr. Paillette pointed out that Representative Haas had been concerned on the previous day that only the crime of murder was excepted from the scope of the defense of duress and asked if the Commission wished to consider Representative Haas' suggestion that other serious crimes involving deadly physical force upon another be excepted from section 17. There was general agreement that section 17 should not be changed in this respect.

Judge Burns moved that section 17 be approved as amended and the motion carried unanimously. Voting: Judge Burns, Carson, Chandler, Frost, Jernstedt, Johnson, Knight, Spaulding, Chairman Burns.

Section 18. Entrapment. Mr. Paillette explained that section 18 codified the defense of entrapment and made no departure from existing law.

Judge Burns pointed out that the Oregon cases said that the actor did not initially contemplate the proscribed conduct and asked if subsection (2) carried this meaning forward. Mr. Knight commented that subsection (2) could be a codification of present law but was subject to being interpreted otherwise. For example, if an undercover

agent asked a seller of marihuana to sell to him, this act was clearly not entrapment under existing law but he thought it could be entrapment under section 18. Judge Burns said the typical case was one where the undercover agent said the seller offered to sell and the seller said he was asked by the agent to sell; the evidence was usually mixed and it became a jury question. He expressed disagreement with Mr. Knight's statement that such an act would constitute entrapment under section 18 and further stated that the same act could be entrapment under existing law if the jury found that the seller would not have sold the goods if the officer had not induced him to do so.

Mr. Johnson observed that the question seemed to rely on Judge Hand's statement as quoted in State v. LeBrun, 245 Or 265, 419 P2d 948, cert. denied 386 US 1011 (1966), at page 269:

> "'(1) did the agent induce the accused to commit the offence charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence.'"

Mr. Knight commented that the proposed statute should not deviate from existing case law and read a further quotation from Judge Hand cited in State v. LeBrun at page 270:

> "' . . . if the prosecution can satisfy the jury that the accused was ready and willing to commit the offence charged, whenever the opportunity offered. In that event the inducement which brought about the actual offence was no more than one instance of the kind of conduct in which the accused was prepared to engage; and the prosecution has not seduced an innocent person, but has only provided the means for the accused to realize his preexisting purpose. The proof of this may be by evidence of his past offences, of his preparation, even of his 'ready complaisance.' Obviously, it is not necessary that the past offences proved shall be precisely the same as that charged, provided they are near enough in kind to support an inference that his purpose included offences of the sort charged.' 200 F2d at 882."

Judge Burns expressed approval of the language in the draft section so long as it was clear that it was intended to codify existing law. He called attention to the language in subsection (1) of section 18 " . . . by a law enforcement official, or by a person acting in cooperation with a law enforcement official . . . " He asked if under current law the question of entrapment would arise where the buyer was someone acting in cooperation with a law enforcement official. Mr. Paillette said that if someone were sent out for the purpose of inducing an individual to commit a crime with the intent of gathering evidence against that person, the law was not limited just to actual police or law enforcement officials but would extend to the person who was cooperating with them and acting at their direction.

Mr. Knight read subsection (1) of section 2.13 of the Model Penal Code and said it seemed clearer than section 18. Mr. Paillette said he had the opposite reaction to the Model Penal Code language and thought it obscured the defense more than it clarified it.

Judge Burns moved that section 18 be approved. He commented that the LeBrun case and the federal cases it relied upon, together with section 18, would make the law perfectly understandable.

Vote was taken on Judge Burns' motion to approve section 18 and it carried unanimously with the same members voting as had voted on the motion to approve section 17.

Mr. Knight asked if the language quoted on pages 269 and 270 of the LeBrun case should be incorporated into the commentary. He was particularly concerned with the interpretation of the last sentence in subsection (2) of section 18. Judge Burns and other members of the Commission agreed that the statement in the commentary which said that section 18 restated the doctrines of entrapment recognized in Oregon case law was sufficient to show that the Commission's intent was that section 18 would be interpreted in line with the holdings in the LeBrun case. Judge Burns further added that even if both the officer and the defendant agreed at the trial that the officer was the one who first said, "Sell me some pot," assuming there were other relevant circumstances such as location, previous habits, etc., entrapment would still be a jury question. There would not be entrapment as a matter of law merely because the officer and the defendant agreed that the officer initiated the sale.

Inchoate Crimes; Preliminary Draft No. 2; December 1969

Professor Platt explained that the primary purpose of the law of attempt was to neutralize dangerous individuals; not necessarily to deter the dangerous act, but to allow the police to intervene at a sufficiently early stage to prevent the actor from committing the offense he had in mind.

Section 1. Attempt; definition. Section 1, Professor Platt said, dealt with two problems which continuously caused problems in the law of inchoate crimes: (1) The mens rea of attempt -- the culpability element; and (2) The drawing of the line between mere preparation and the point at which the act became an attempt punishable under the Article on Inchoate Crimes. Section 1 was phrased to avoid the problem of proving a specific intent to commit the crime because it spoke in terms of intentionally engaging in conduct which constituted the offense and this would encompass all the attendant circumstances with respect to the crime.

The drawing of the line between preparation and attempt, he continued, was covered in the phrase "constitutes a substantial step toward commission of the crime." This was Model Penal Code language

and turned away from the classical doctrines generally known as the "proximity tests." The Model Penal Code and the substantial step doctrine focused on the personality of the individual who performed the act and turned the attention to what had been done rather than what remained to be done.

The idea of the substantial step, he said, was that the step was one which strongly corroborated the intent to engage in criminal conduct. The statements and admissions of a defendant either before or after the act were admissible within, of course, the constitutional restrictions to assist in establishing the purpose of the individual when he first set out on his course of criminal conduct. This, he said, contrasted with the res ipsa loquitur test applied in some jurisdictions which said that only the act itself could be considered and not a statement of the actor. The trouble with that, Professor Platt said, was that most acts were ambiguous and section 1 as drafted would not allow as unfair a result as might take place under the res ipsa loquitur test.

Judge Burns asked how section 1 would change Oregon law and was told by Professor Platt that it would tend to move back the line between preparation and attempt to allow the police authorities to intervene sooner than under present law. It was not, he said, a dramatic shift but generally would result in earlier interference by the police in dangerous conduct. It did not, however, change the mens rea element but would clarify the close cases with respect to the attendant circumstance kind of crime. Chairman Burns added that it would be a jury question as to whether the act constituted a substantial step.

Chairman Burns asked if it was contemplated that a person could be convicted of an attempt under this section even though the offense was consummated. Professor Platt replied affirmatively and added that this represented existing law. No one could be convicted of both the attempt and the substantive offense, however.

Mr. Chandler asked if ORS 161.090, attempted arson, was retained in the Article on Arson and was told by Mr. Paillette that this would be covered by the Inchoate Crimes Article.

Mr. Chandler noted that under ORS 161.090 if a person committed any act preliminary to an attempt to burn property, he was guilty of attempt whereas in the case of murder he would have to go farther than to commit a preliminary act. The proposed statute, therefore, would equate murder and arson so far as the attempt was concerned. Professor Platt said it was generally recognized that mere preparation to commit a crime should not be made criminal. In the very early stages it was impossible to tell whether there was a firm criminal purpose. Buying a box of matches would be an example of a completely innocent act which might also be an act preliminary to arson.

Mr. Chandler commented that the legislature had decided that arson was a more heinous crime than, for example, passing a bad check and for that reason had applied a different standard to attempted arson than to an attempt to pass a bad check. Professor Platt expressed the view that this was bad legislative policy and should be rectified. He did not, he said, see any reason for differentiating with respect to the line of attempt on any crime and advocated that a uniform standard be applied across the board.

Mr. Chandler said it was his understanding that it was particularly difficult to obtain a conviction for an attempt to commit arson. Professor Platt called attention to the listing on pages 2 and 3 of the commentary. This information was included in the legislative history, he said, to offer specific help with the arson problem and he called particular attention to paragraphs (e) and (f) thereof.

Chairman Burns agreed with Mr. Chandler that section 1 was making a change in the existing attempted arson statute and was actually making it more difficult to prove attempted arson. Mr. Spaulding commented that while this was true, section 1 was also making it easier to prove attempt in other crimes so that the two were being brought closer together and accomplishing the worthwhile objective of rendering attempt crimes uniform.

Judge Burns moved that section 1 be approved. Mr. Spaulding seconded and the motion carried unanimously. Voting on the motion: Judge Burns, Carson, Chandler, Frost, Haas, Jernstedt, Johnson, Knight, Spaulding, Chairman Burns.

Section 2. Attempt; impossibility not a defense. Professor Platt explained that section 2 dealt with a classic defense in the law of attempt and reflected the current law in Oregon as well as in the vast majority of other jurisdictions. The rationale could be demonstrated by the case where a man set out to kill his rival. Believing him to be in bed in a particular room in a rooming house, he shot into the bed which was empty because the intended victim was sleeping elsewhere. The charge of attempted murder would lie under section 2 as well as under present Oregon law although in a sense it was impossible for him to commit the crime under those circumstances. He again urged the Commission to keep in mind the basic concept of the law of attempt which was to reach the dangerousness of the person engaging in the criminal conduct. Professor Platt said there was extended discussion in the subcommittee on both sides of this issue. Some felt that if no one was hurt, the person who had attempted the crime ought not be prosecuted. This he believed to be the minority view and contended that section 2 set forth the best policy because it allowed the police to arrest the man at that point rather than to let him try again on the following night when he might know which bed his rival was in.

Representative Frost indicated that he had represented the minority view in the subcommittee. He noted that section 2 included both factual and legal impossibility and in the factual impossibility situations he believed the provision to be too broad. He called attention to the example set forth in the commentary on page 9 where black magic was chosen as the means for an attempt to kill an individual. If the person actually died, Representative Frost asked if the fact that an individual had been stabbing a doll with pins should make him guilty of murder. Mr. Spaulding commented that if he was attempting to commit a crime, he should be punished for it.

Professor Platt observed that Representative Frost posed an interesting question. The man puncturing the doll did present a danger because he might ultimately realize that this means was not going to kill his victim and he might find other more effective ways to dispose of him. Another possibility was that the prosecution had great discretion in matters of this kind and might decide that the man was insane and take him into court for civil commitment.

Mr. Chandler asked if the Inchoate Crimes Article presented a danger of using language which was too loose and vague in defining specific crimes. Mr. Spaulding replied that this Article was to be used in the light of other statutes which were definite. Professor Platt advised that there was a long line of decisions both in Oregon and elsewhere which dealt with the law of attempt in substantially the same form as this draft. He said he had no doubt in his own mind that there was no "void for vagueness" element in this Article. It was talking about mens rea elements and making clear the kind of culpability required and suggesting the kind of act it would take for the person to be convicted of whatever element of the crime he had in mind.

Mr. Chandler then asked if an attempt to commit murder would be punished the same as an accomplished murder. Professor Platt replied that it would not. The subcommittee, he said, had decided to remove the grading provisions of the inchoate offenses. The original draft had contained a section which provided that one who was found guilty of an attempted murder would be punished to the same extent as for an accomplished murder and the same penalty would apply for other inchoate crimes as for the completed crime. The subcommittee determined that this decision should be made on the sentencing aspects and referred the matter to the sentencing subcommittee for study in conjunction with the grading of all crimes.

Mr. Spaulding commented that there was a statute which said that unless otherwise provided by statute, an attempt to commit a crime was punishable by one-half of the sentence for the completed crime. Judge Burns confirmed this statement and said that if a person attempted to commit burglary not in a dwelling, the maximum sentence was five years because the maximum for the crime itself was ten years. This was true throughout the code, he said, except for certain offenses such as obtaining money by false pretenses where the sentence for attempt was included in the statute.

Mr. Paillette related that the subcommittee was concerned with the provision in the original draft which punished an attempt the same as the completed offense. They felt it would be better to deal with the sentencing on a more specific basis because there might be certain crimes where they would want to treat attempt the same as the completed crime but this might not be true in every case and some offenses would need to be downgraded insofar as the attempt was concerned.

Mr. Spaulding moved that section 2 be approved and the motion carried unanimously with the same members voting as had voted on the motion to approve section 1.

Section 3. Attempt; renunciation a defense. Professor Platt explained that section 3 created a defense for attempt and the same defense was included in the draft subsequently for solicitation and conspiracy. The defense would be demonstrated by a person who set out to rob a bank and even reached the point where he was walking through the door with a drawn revolver. If he then voluntarily, with no outside pressure, renounced his course of criminal conduct and forestalled the commission of the crime, including a situation where he prevented any accomplices he might have with him from committing the crime, this would be a complete defense to the crime of attempt.

Professor Platt noted that page 16 of the commentary incorrectly stated the present status of the law. It said, " . . . a renunciation defense is such a new concept virtually unsupported in existing case law . . . " He had conducted further research on this subject and the renunciation defense, he said, was supported in existing law except with respect to assault cases. The crimes of assault and attempted battery were really the same in Oregon. Traditionally and historically, however, the crime of assault had been identified as a separate substantive crime. Because of the nature of assault and because it did put one in the immediate presence of serious bodily harm, the cases for renunciation had held that at that point it was too late to renounce because too much terror had been instilled in the victim and too much of a social problem had been cuased. Putting those cases aside, the case law showed that renunciation had always been a complete defense to an inchoate crime. He expressed approval of this policy because it enabled the actor to step out of his course of criminal conduct and encouraged and rewarded him for not going through with what might be a serious crime.

Mr. Johnson contended that a defendant would have this defense with or without section 3. Judge Burns agreed but pointed out that section 3 provided some reasonably specific and rational criteria for evaluating this kind of defense. Professor Platt added that it was included to tell the court system of Oregon that the legislature preferred the majority rule rather than to allow the courts the choice of taking the other course and saying the attempt was a complete crime despite the fact that the actor did not complete his conduct.

Mr. Chandler asked if the renunciation defense would apply to the driver of a "get-away car" who changed his mind and drove away, leaving his accomplices in the bank. Professor Platt answered that it would not since he did not forestall the commission of the crime.

Mr. Spaulding questioned the use of the word "necessary" in the last line of subsection (1) of section 3 and asked if "possible" might be a better choice. Professor Platt said the intent was that anyone who decided not to commit the crime also had to forestall the commission of the crime and if he did not, the defense was not available to him. The section purposely made it difficult for the defendant in that he had to prove the defense by a preponderance of the evidence. Mr. Johnson commented that in some cases this would be an assistance to law enforcement officials because the defendant would assume the affirmative obligation to stop his cohorts from committing a crime.

Mr. Spaulding was not convinced that it was right to provide that the person who did everything he could possibly do to stop the commission of the crime would be deprived of the defense by the action of his accomplices who continued their course of criminal conduct. Mr. Paillette remarked that the draft on Parties to Crime had attempted to get to the problem Mr. Spaulding raised. The first draft contained a renunciation defense for the accomplice where the crime had been completed and imposed a stricter standard to invoke the renunciation defense, but the provision was deleted by the subcommittee.

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

Section 4. Solicitation; definition. Professor Platt explained that solicitation was a new crime in Oregon. At common law solicitation did exist; however, Oregon was not a common law crime state and therefore solicitation was not a crime. Oregon presently reached the criminality of solicitation in an artificial manner through the law of attempt. As an example, he called attention to the case of State v. Taylor, 47 Or 455 (1906), cited on pages 24 and 25 of the commentary. The way the court in State v. Taylor found the instigator of the crime guilty was to hold that he had done all he could by supplying the tools for the crime of arson and that action constituted an attempt as distinguished from a preparation. This holding was criticized by authorities and by the Model Penal Code as being a strained interpretation of what was really a solicitation situation. In most jurisdictions the instigator would not be guilty of the crime of attempt, one of the reasons being that he did not himself have the intent of setting the fire but clearly had the culpability requirements for the crime of solicitation. Section 4 would for the first time recognize the crime of solicitation and punish it as a separate crime.

Mr. Johnson was of the opinion that section 4 went too far. If a person were driving up the highway, he said, and his passenger said he was in a hurry and urged the driver to exceed the speed limit, this could be a crime of solicitation which would carry a misdemeanor penalty. Professor Platt explained that "felony" was included in the draft in brackets because the subcommittee left the policy choice for the Commission as to whether to apply section 4 to all crimes or just to felonies. His choice, he said, was to apply it to any crime, whether misdemeanor or felony. Mr. Johnson's example was really solicitation for reckless conduct and he was of the opinion that this kind of conduct should be reached by the statute but punished on a lower level than the commission of the crime itself.

Mr. Spaulding commented that section 4 would not apply where the crime was accomplished because the actor would then be a principal. It had always been considered right and proper, he said, to make the actor a principal if the crime was completed, and by the same logic it would be right and proper to make him responsible for soliciting.

Mr. Frost indicated that the subcommittee had decided to place two policy questions before the Commission with respect to section 4: (1) Whether there should be a crime of solicitation; and (2) Whether the crime, if adopted, should be applicable to all crimes or just to felonies. He personally felt strongly, he said, that there should not be a crime of solicitation. The example used in the subcommittee was that of a boy wearing a button saying "Smoke Pot" which could constitute a solicitation. He contended there was no great social harm done when the solicitation did not ripen into an attempt. If the actor went far enough to make some move toward accomplishment of the crime, then there was an attempt and a better reason to file a charge against him.

Chairman Burns said that in the example Mr. Johnson had cited if the driver said he would not go fast enough to exceed the speed limit, the driver could stop at the next town and ask the district attorney to prosecute his passenger for solicitation. Professor Platt agreed this would be possible under the draft.

Judge Burns said that the Commission was discussing a significant area of the law which included the First Amendment areas that were so sensitive today. When someone said, "Let's burn all the flags," or, "Let's stop all the inductions today," section 4 would come into play. He wanted the Commission to be aware of the import of the provision.

Mr. Johnson remarked that the section was attempting to reach the dangerous type of conduct where a person went to someone and said, "I will give you $1,000 to kill John." The question to be answered was whether that person should be allowed to continue this line of conduct until he finally found someone who would accept his offer or whether he should be stopped before the crime was committed.

Representative Frost contended that the Commission would be taking a big step to make a crime out of something that did not ultimately result in attempt and he did not feel that solicitation was so socially reprehensible as to require criminal sanction.

Mr. Chandler maintained that the rationale of the section was to stop the conduct before it reached the point where it created a real danger. Mr. Johnson added that in the Mafia type situation a provision such as section 4 might be the only way the individuals could ever be convicted.

Representative Frost moved to delete section 4.

Judge Burns recommended that the first decision should be to retain or omit the felony language and stated his vote on the motion would be different depending on this decision.

Representative Frost withdrew his motion to delete section 4 and moved to limit solicitation to felonies.

Professor Platt, speaking on the motion, said the Commission in voting on this policy determination should bear in mind that if they voted to restrict solicitation to felonies, they might want to restrict conspiracies and perhaps even attempts to felonies in order to maintain uniformity in the penalties for all inchoate crimes.

Mr. Spaulding commented that in many instances it would not be known whether the crime was a felony or a misdemeanor until the judge had passed sentence. Mr. Knight replied that those crimes would be treated as felonies. Judge Burns added that in any felony-misdemeanor option situation, the person could still be guilty of solicitation if the ultimate crime solicited was capable of being a felony.

After further discussion, vote was taken on Representative Frost's motion to limit section 4 to felonies. Motion carried. Voting for the motion: Judge Burns, Carson, Frost, Haas, Spaulding, Chairman Burns. Voting no: Chandler, Jernstedt, Johnson, Knight. The section was further amended. See page 41 of these minutes.

Representative Haas said he was concerned with the situation posed by Mr. Johnson where a person offered money to another to kill someone. He asked if that situation would fall within the attempt statute and received a negative reply from Professor Platt. Representative Haas called attention to paragraph (g) on page 3 of the commentary which said "soliciting an innocent agent to engage in conduct constituting an element of the crime." Professor Platt explained that the innocent agent in that instance referred to one who had no idea that the person soliciting him wanted him to commit a crime; in the situation posed by Mr. Johnson he would obviously know that he was being solicited to commit a crime if he were asked to kill someone.

Representative Haas asked if offering someone $1,000 to kill another would be considered a substantial step toward the commission of a crime. Professor Platt replied that it would not unless there were other evidence and the courts had consistently so held.

Mr. Paillette said he would like to propose a middle ground for the Commission's consideration. If section 4 were limited to felonies, some misdemeanors might well be excluded that would be fairly serious offenses which the Commission might want to treat as solicitation. He was of the opinion that a way should be left open to reach the indictable misdemeanor type of offense and at the same time make it clear that the section was not being limited to straight felonies. To accomplish this purpose, he suggested the following language:

> "A person commits the crime of solicitation if with the intent of causing another to engage in specific conduct constituting a crime punishable as a felony or as a ___ misdemeanor . . . "

He explained that the blank would give the sentencing committee an opportunity to insert a specific grade such as a "Class A" misdemeanor to get at the crime that might not quite reach the felony stage.

Judge Burns moved that the language proposed by Mr. Paillette to amend section 4 be adopted. Motion carried unanimously.

Representative Frost then moved to delete section 4. Motion failed. Voting for the motion: Frost, Haas. Voting no: Judge Burns, Carson, Chandler, Jernstedt, Johnson, Knight, Spaulding, Chairman Burns.

Mr. Johnson moved that section 4 be adopted as amended. Motion carried. Voting no: Frost and Haas.

Section 5. Solicitation; renunciation a defense. Professor Platt stated that the same argument could be made for renunciation as a defense to solicitation as had been made for the defense to the crime of attempt.

Representative Frost asked if the word "crime" should be changed in light of the amendment adopted to section 4. Mr. Spaulding replied that the section was satisfactory as drafted since it would take care of the misdemeanors covered in section 4. The Commission agreed.

Judge Burns moved adoption of section 5 and the motion carried unanimously with the same ten members voting as had voted on the previous motion.

Section 6. Conspiracy; definition. Professor Platt explained that the definition of conspiracy in section 6 was significantly different from existing Oregon law in two respects. The present Oregon law pursued the bilateral nature of conspiracy; when two persons agreed to commit a crime, thus constituting a conspiracy in conjunction with certain other elements, and when the first person agreed with the other and the "other" was an undercover police agent, the person could not be held guilty of conspiracy under the present law. There were no cases to that point in Oregon but cases construing that situation elsewhere had uniformly held that it took two to make a conspiracy under the kind of language in ORS 161.320. Section 6 would reject this bilateral emphasis and adopt a unilateral emphasis so that the person who agreed to commit the crime and who in fact could commit the crime could be reached under the conspiracy statute, even though the person with whom he conspired was a police agent, was insane and obviously incapable of consent, was an infant or for some other reason could not consent to the course of conduct.

The second major change from Oregon law was that existing law limited conspiracies to felonies only. This point, Professor Platt said, had been resolved by the amendment to section 4, assuming the Commission would insert the same provision in section 6 as had been adopted with respect to solicitation.

Mr. Johnson moved adoption of section 6 with directions to the staff to make the appropriate technical amendments to make it conform to the amendments adopted in section 4. The motion carried unanimously with the same ten members voting as had voted on approval of section 5.

Section 7. Scope of conspiratorial relationship. Section 8. Conspiracy with multiple criminal objectives. Professor Platt explained sections 7 and 8 reflected the present law on conspiracy. Oregon, he said, had practically no existing case law on conspiracy except that dealing with evidentiary matters on the hearsay rule where more than one person was engaged in criminal conduct. Those cases usually arose not out of an indictment for conspiracy but out of an indictment for the completed offense.

Section 7 would define the scope of a conspiratorial relationship. It was a problem, however, to know how far a conspiracy extended beyond the immediate conspirators. If A agreed with B to rob a bank; B arranged for C to drive the car; C arranged with D to supply the guns, this would all be part of the conspiracy to rob a bank. Section 7 defined conspiracy so that there was a limit ultimately on how many conspirators in the chain could be brought in and tried, presumably at the same time, and how many of their admissions made out of court could be used under the hearsay evidence rule against A. Section 7 said that if A knew that B was going to conspire with C, even though he did not know the identity of C, A would be a conspirator with C. Under the hypothetical example he had just cited, Professor Platt said A would be guilty of conspiring with B, C and D because it obviously took both a

car and guns to rob a bank so he could reasonably anticipate that B would go out and conspire as necessary to supply these necessities.

If on the way to rob the bank, one of the conspirators down the line said, "Let's stop and rob this supermarket before we go on to the bank," the question became closer as to whether A meant to conspire with B to rob that supermarket and it would be a jury question under the language in section 7. Professor Platt pointed out the desirability and the fairness of not imposing on one defendant the chain reaction that might be far beyond anything he could reasonably expect.

Mr. Spaulding noted that section 7 made the statements of co-conspirators admissible against the chief conspirator.

Professor Platt explained that the draft covered two situations which were best illustrated by a chain reaction and by a wheel. In the chain example everybody in the chain would be guilty of conspiracy in the bank robbery situation he had just cited. In the wheel example the hub of the wheel would represent a person dealing individually with persons who were represented by the spokes of the wheel. The spokes of the wheel were not aware of the existence of the other spokes but dealt only with the person who was the hub. The United States Supreme Court had held in a recent case that the spokes could not be treated as part of a conspiracy with the other spokes but could only be treated as conspiring with the hub of the wheel. This draft reflected that policy.

Section 8, which reflected current law, said that a person engaged in a conspiracy to commit a number of crimes or to commit the same crime a number of different ways or with different people -- for example, passing ten bad checks -- could only be indicted for one conspiracy and not for a conspiracy each time he passed a check.

Mr. Johnson cited a New York case where Luciano had formed an organization of houses of prostitution. He asked if the prostitute could be indicted for conspiracy because she probably was aware of the existence of the organization. Professor Platt replied that she could not because her intent was not to engage in placing other girls in houses of prostitution but only that she agreed to submit herself to this lucrative endeavor.

Mr. Knight called attention to the language in section 7 " . . . and knows that a person with whom he conspires to commit a crime has conspired with another person . . . " He asked if this clearly stated that it made no difference whether the first person knew who the other person was. Mr. Knight contended that the section would be more clear if it said "has conspired or will conspire with another person . . . " Professor Platt agreed.

Mr. Knight moved to amend section 7 in that fashion. Motion carried without opposition.

Mr. Johnson then moved to adopt section 7 as amended and this motion also carried unanimously. Voting on both motions: Judge Burns, Carson, Chandler, Frost, Haas, Jernstedt, Johnson, Knight, Spaulding, Chairman Burns.

Section 8. Mr. Spaulding asked if it would be one crime if a group agreed to rob every bank in Oregon and to commit one robbery per month. Mr. Knight replied that it would be one crime and called attention to the provision in section 13 which said that if the actor had been convicted or acquitted once of one conspiracy, he could not be tried again. His objection to this provision, he said, was that if there was an organized criminal conspiracy wherein one of the members of the organization was convicted and sentenced to two years, he could be out of the penitentiary in 12 months, be back in business running the syndicate and could not be charged again so long as his operation was part of the one continuous criminal conspiratorial relationship.

Mr. Spaulding asked if he could be convicted of conspiracy and also of committing the crime. Mr. Knight said he could be if he went so far as to become a principal but he could be careful not to get into the situation where he was a principal.

Professor Platt said his initial reaction to the problem posed by Mr. Knight was that a jury could never be convinced that, for example, someone had agreed to rob every bank in Oregon at the outset of the conspiracy. However, he had found an article in 57 Columbia Law Review 387 which said:

> "When determining whether one or more conspiracies exist, the focus of the court's attention is the agreement and not the multiplicity of the acts done in pursuance of it. However, when it is to the defendant's advantage to claim that he has participated in only one conspiracy despite the existence of a number of conspiratorial objectives, the courts have frequently shifted the focus of examination away from the agreement and toward the activities performed by the group."

Judge Burns suggested that the commentary be expanded to reflect the quotation which Professor Platt had just read.

Mr. Knight said the defendant would be able to raise the defense of double jeopardy. Professor Platt maintained that involved in the double jeopardy situation was the "same evidence rule" and read a statement which he said was supportable by case law:

"The general rule with respect to the same evidence is that indictments relate to the same offense when the evidence necessary to support the latter would have sustained the conviction under the former indictment. In conspiracy courts have found no former jeopardies where a mere change in the co-conspirator is alleged."

That statement, he said, was an exception to the "same evidence rule" and yet was found to be the law that was generally applied. Therefore, if a conspirator was sent to jail once for a conspiracy, was released and then on another indictment claimed double jeopardy, the courts had held elsewhere that by changing the indictment to include another conspirator, the same evidence could be used again and a conviction could be had for conspiracy.

Mr. Knight contended that if this were true, section 8 was not needed. He moved that section 8 be deleted.

Mr. Spaulding was of the opinion that the courts could handle these cases better on an individual basis than they could if this section were enacted.

Vote was then taken on the motion to delete section 8 which carried. Voting for the motion: Judge Burns, Carson, Chandler, Haas, Jernstedt, Johnson, Knight, Spaulding, Mr. Chairman. Voting no: Frost.

Section 9. Joinder, severance and venue in conspiracy prosecutions. Professor Platt suggested that section 9 be considered at the end of the Inchoate Crimes Article since it was not part of the logical flow of the draft. [See page 50 for further discussion.]

Section 10. Conspiracy; renunciation of criminal purpose. Mr. Spaulding questioned the meaning of "manifesting" as used in section 10. Mr. Chandler read the definition from Webster's New World Dictionary, College Edition (1968): "to make clear or evident; show plainly; reveal; evince." The Commission agreed that the word was suitable as used in the draft.

Mr. Chandler moved that section 10 be approved and the motion carried unanimously with the same ten members voting as had voted on the previous motion.

Section 11. Duration of the conspiracy. Professor Platt explained that when a crime had been committed, the splitting of the loot could be included as part of the crime under Oregon case law, and the crime would not be terminated under the definition in section 11 until the loot had been separated. The general language would incorporate whatever the court might decide were acts flowing from the actual commission. The crime would not be limited to sticking the gun

in the face of the victim but would include taking his safe out of the store, removing the safe to an apartment, opening that safe and splitting the proceeds. For purposes of admitting statements made during the time of sticking the gun in the victim's face and the actual opening of the safe and passing out the loot, those statements had been held to be admissible because the crime was not completed until the proceeds had been divided.

Mr. Johnson posed a hypothetical situation where a group of men committed a number of bank robberies. After they had completed their fifth robbery and divided the loot, they continued to meet periodically and discuss bank robberies generally. He called attention to the language in subsection (1) which said " . . . a continuing course of conduct which terminates when the . . . crimes . . . are committed . . . " He was not certain, he said, that this language covered the point of termination in every case. Mr. Knight suggested "completed" be substituted for "committed" in that phrase so that the disposal of the loot would be included.

Mr. Spaulding commented that in Mr. Johnson's example, if the men planned a new robbery following division of the proceeds of the fifth robbery, it would then be a new conspiracy.

Mr. Knight moved that subsection (1) be amended to read:

" . . . conduct which terminates when the crime or crimes which are its object are completed or the agreement . . . "

Mr. Spaulding commented that in his opinion adoption of the motion would add to the period of time which would be included in the crime and Chairman Burns agreed that the amendment would clarify the intent of the subsection.

Vote was then taken on the motion and it carried unanimously.

Judge Burns pointed out that the subcommittee had discussed the question of whether section 11 properly belonged in the Article on Inchoate Crimes or in the procedural portion of the criminal code and had agreed to leave this decision to the Commission. Mr. Spaulding commented that section 11 in part defined the crime. Professor Platt expressed the view that conspiracy made the problems of the statute of limitations so different from other crimes that it should be treated separately in the Inchoate Crimes Article because of the continuing nature of the crime.

With respect to subsection (3) Judge Burns cited a situation where an individual sought to take advantage of section 11 and said, "The statute has run on me because more than three years before the indictment for conspiracy to rob banks was returned, I told those

cohorts that I wanted no more of this caper. I was in on the first two robberies but from then on I told them that I wanted no further part in the conspiracy." He asked if this man would be completely free of blame if there were no further evidence to support his statement. Professor Platt replied that he would be "off the hook" for the conspiracy charge but not for the completed subsequent crimes because he had not frustrated the conspiracy with respect to the future crimes with which he now tried to disassociate himself. The only way he could have a complete renunciation defense would be to frustrate the completion of any future crimes; he would, however, start the statute of limitations running by his statement regarding his complete abandonment of association with the conspirators.

Mr. Paillette asked how subsection (3) would be injected by the defendant so far as the statute of limitation was concerned. Mr. Knight replied that the state would have to prove that the crime was committed within the statute of limitations. Proving that the crime was committed within the last three years, he said, would probably be sufficient to get the state by on the statute of limitations question, particularly if they could show any type of continued association. Judge Burns said if the state had some evidence to refute the defendant's testimony, his unilateral testimony of abandonment of association with the conspirators more than three years before would be a jury question and the court would instruct in the language of subsection (3).

Judge Burns moved that section 11 be adopted as amended and the motion carried unanimously. Voting: Judge Burns, Carson, Chandler, Frost, Haas, Jernstedt, Johnson, Knight, Spaulding, Chairman Burns.

Section 12. Solicitation and conspiracy; availability of certain defenses. Professor Platt explained that section 12 was designed to forestall some of the defenses that had been raised in the past which some courts had approved but which the majority ruling on them had disapproved. It therefore reflected the majority view.

When the defendant in a conspiracy or solicitation case raised the defense that the person he conspired to bribe was not a public official and therefore he could not be accused of conspiring to bribe a public official, this would not be a defense under subsection (a) because the defendant had believed that person to be a public official and conspired with or solicited him to accept a bribe. It would not be a defense because he unilaterally had the culpability of soliciting the crime or the culpability of conspiracy to commit the crime.

Secondly, under subsection (b) if the person solicited or conspired with one who was irresponsible or had an immunity to prosecution, as in the case of an undercover agent who obviously would not have the mens rea of conspiracy, it was no defense to the actor who had the culpability to commit the crime to say that he couldn't conspire or solicit because a conspiracy required two actors. He himself would be held responsible for the conspiracy or solicitation.

Subsection (c) reflected existing law wherein the fact that a co-conspirator had not yet been prosecuted would not permit the defendant to say, "You have not yet prosecuted or convicted him; you can't therefore prosecute me." Also, if one conspirator had already been acquitted, this would not be basis for convicting or acquitting the co-conspirator now on trial. Case law was split on this issue, Professor Platt said, so to that extent subsection (c) was making some change in the law.

Mr. Paillette commented that subsection (c) was consistent with the Commission's action on the Article on Parties to Crime with respect to liability regarding conduct of another.

Chairman Burns asked if subsection (2) implied that an accomplice could be guilty of conspiracy and was told by Professor Platt that accomplices could be guilty of conspiracy in the normal case with the exception of a Luciano type conspiracy where complicity and conspiracy would not necessarily follow. Some cases held that because there was conspiracy, there was automatically complicity. This was not true under section 12.

Professor Platt explained that subsection (2) was consistent with the complicity section and with existing law and would cover, for example, statutory rape. It was designed to protect the girl by saying that she could not be held for conspiring to commit statutory rape even though she solicited the intercourse.

Judge Burns called attention to subsection (1) (b) and asked if the word "immunity" was properly used with reference to a person who was immature. Professor Platt said the subsection was designed to cover the person to whom the immunity statute applied. If he then testified before the grand jury, he would be immune from later prosecution. Because he was immune, a co-conspirator would not be permitted to say that he could not be prosecuted because of the immunity of the other conspirator.

Mr. Johnson moved that section 12 be approved. Judge Burns seconded and the motion carried unanimously with the same ten members voting as voted on the previous motion.

Section 13. Multiple convictions barred in inchoate crimes. Professor Platt indicated that section 13 was included because there were no Oregon cases covering this subject and the section made specific the law in this area. As an example of the type of case which would be covered by section 13, Professor Platt said there could be a prosecution in the same case for solicitation to a bank robbery or attempt of the same bank robbery or conspiracy of the same bank robbery as well as for the bank robbery itself if it were completed. However, there could be conviction only for the completed crime or for one of the three inchoate crimes. It would be a rare instance, he

said, where the state would prosecute for an inchoate crime when the crime had been completed but if for some reason the inchoate crime was charged in the indictment, then the person could be convicted for that inchoate crime.

Mr. Spaulding inquired if the section was saying that attempt, for example, was not a lesser included offense and asked if a person acquitted of attempting to commit the crime could then be prosecuted or convicted for the commission of the completed crime. Professor Platt replied that he could assuming there was no break in the conduct involved.

Mr. Paillette said he interpreted subsection (1) to mean that the defendant could not raise a defense in a prosecution against him for an attempt or a conspiracy by saying he was charged with the wrong crime because the crime was completed and he should have been charged with the substantive crime.

Tape 4 begins here:

Judge Burns pointed out that subsection (3) when presented to the subcommittee included brackets around the last six words. The subcommittee had deleted the brackets thus injecting a change in existing law. Subsection (3) in its present form provided that a person could not be convicted of both the substantive offense and of conspiracy, although he could be indicted for both.

Mr. Knight posed a situation where a defendant was charged with both conspiracy and, for example, burglary. When the jury retired, he asked if the judge would then instruct that the defendant could only be convicted of one of the charges or if section 13 would require that the state had to elect whether to go to the jury on the principal offense or on the conspiracy. He said he would object to the state being required to take this latter course. Mr. Spaulding commented that conspiracy would be a lesser included offense. Mr. Knight said that attempt would be a lesser included offense but he was not certain that conspiracy would be a lesser included offense under the language of the section.

Representative Carson said that if attempt, conspiracy and commission of a crime were thought of as a chain, conspiracy did not fit into that chain but attempt did; attempt merged into the commission but this was not so with conspiracy.

Mr. Johnson remarked that conspiracy could often be a higher social evil than the crime itself and this more serious type of conspiracy should be dealt with by a separate statute.

After further discussion, Mr. Johnson moved to adopt the general policy of section 13 that conspiracy was a lesser included offense but when the Commission had completed its sentencing and grading provisions, the subject should be reviewed to see if there were certain conspiracies which should be treated as elevated offenses and separate crimes.

Professor Platt said he would agree with Mr. Johnson's motion. The proviso, however, should not necessarily be limited to conspiracy but rather the focus should be on the type of people involved in the conspiracy. If the conspirators consisted of a Mafia type group, this should be more serious than conspiracy by less dangerous individuals. This could be accomplished, he said, by the enhanced penalty provisions as set forth in the Model Penal Code.

Mr. Knight opposed Mr. Johnson's motion and contended that the statute should be clear with respect to the situation where the indictment charged two counts -- for example, conspiracy to commit bank robbery and bank robbery. The statute should specify when the state was required to make the election between the two counts -- either prior to sending the case to the jury or by letting it go to the jury and having the judge instruct the jury that a guilty verdict could only be returned on one charge. Professor Platt indicated the latter course was the better procedure, i.e., to let the case go to the jury with both charges and the instruction from the judge that the defendant could be convicted of only one of the two charges.

Mr. Spaulding then moved to amend Mr. Johnson's motion to approve section 13 with the caveat included by Mr. Johnson which was that following the Commission's approval of sentencing and grading provisions, the question would be reviewed of whether conspiracy should be treated as an elevated and separate offense in certain instances.

Judge Burns said he had reservations concerning adoption of Mr. Spaulding's motion because the procedural problem raised by Mr. Knight had not been solved. He also pointed out that subsection (2) of section 13 said "A person shall not be convicted" while subsection (3) stated "A person may not be convicted." Since the procedure by which subsection (3) would be implemented was not discussed by the subcommittee, he suggested that the section be returned to the subcommittee.

Mr. Johnson commented that subsection (3) in effect made the crime of conspiracy a rule of evidence which was what it should be in most cases and urged adoption of Mr. Spaulding's motion.

Vote was then taken on Mr. Spaulding's motion to adopt section 13 with the caveat enunciated by Mr. Johnson. Motion carried. Voting for the motion: Judge Burns, Carson, Chandler, Frost, Haas, Jernstedt, Johnson, Spaulding, Chairman Burns. Voting no: Knight.

Section 9. Joinder, severance and venue in conspiracy prosecutions. Judge Burns explained that the subcommittee had recommended that section 9 be submitted to the Commission for a policy determination as to whether to adopt Professor Platt's view to include section 9 in the Inchoate Crimes Article or to place section 9 in the procedural part of the criminal code.

Judge Burns informed the Commission that the Circuit Judges Association had voted to study the question of joinder, not limited to conspiracy cases, and to submit a recommendation to the next session of the legislature for permissive joinder, somewhat analagous to the federal rule. For that reason he suggested that section 9 be placed in the procedural code.

Professor Platt said he would have no objection to adopting that course. His principal reason for including the section in the Inchoate Crimes Article, he said, was to follow the general policy of the Model Penal Code of incorporating matters of procedure in the substantive code which were closely related to specific subjects.

Judge Burns moved that section 9 be transferred to the procedural code and that the Commission rule on the merits of the section when it reached that point in its deliberations. The motion carried unanimously with the same ten members voting as had voted on the previous motion.

A recess was taken at this point and Representative Haas left the meeting.

Sexual Offenses; Preliminary Draft No. 3; December 1969

[Note: See Commission Minutes, July 19, 1969, pp. 2 - 18.]

Mr. Paillette advised that the Commission had considered the Article on Sexual Offenses in July and at that time had made a number of amendments. Insofar as policy and substance were concerned, Preliminary Draft No. 3 made no changes contrary to those approved by the Commission at that time. In October, he said, the subject was considered by Subcommittee No. 2 and the most important subject discussed was the question of sexual misconduct with a minor which appeared in the draft as section 14 and contained new material which was not before the Commission in July.

Section 14. Sexual misconduct with a minor. Section 14, Mr. Paillette explained, attempted to cover the situations in which the victim might be either a female or a male but was over the age of 16 and under the age of 18. The previous draft did not include victims within this age span and this was one of the areas which received criticism by those who contended that adequate protection was not being extended to individuals over the age of 16. The draft in effect repealed the crime of fornication and while the present fornication statute was rarely used, there was nevertheless a statute on the books to cover the situation of intercourse with a girl over 16 but less than 18.

Secondly, section 14 picked up the area previously covered by the statute on contributing to the delinquency of a minor and was designed to fill the gap created as a result of the Supreme Court decision in State v. Hodges, 88 Or Adv Sh 721, 457 P2d 491 (1969), which held the contributing statute unconstitutional because of vagueness. With respect to intercourse, whether it was sexual intercourse or deviate sexual intercourse, if the individual were less than 18, the act would be covered by section 14. The sections in Preliminary Draft No. 2 on sexual abuse would cover the problem of fondling and manipulating.

Mr. Paillette read section 14 and Mr. Spaulding asked if the male under subsection (1) had to be over 18. Mr. Paillette replied that situation was covered by section 5 which said it was a defense to the charge when the male was less than three years older than the female. Chairman Burns asked if this would be true even if force were present and was told by Mr. Paillette that the charge in that event would fall under either the sodomy or rape sections.

Mr. Spaulding suggested it would be better to include the three year age differential provision in section 14 so that the section would be complete in itself. Representative Carson commented that the provision in section 5 applied to a number of situations and it would be unwieldy to include it in each place where that defense would be applicable. [Further discussion of section 14 will be found on page 55 of these minutes.]

Section 5. Defendant's age as a defense. Mr. Paillette advised that the language and the approach used in section 5 was not approved by the Commission in July. The theory was approved, however, because the Commission said in the statement of the crime that the defendant had to be more than three years older than the victim in order to be guilty of, for example, rape in the second degree. The question was brought up in July as to whether this would require the state to plead and prove the age of the defendant. Clearly, this would not be advisable, Mr. Paillette said, and under present law the state was not required to prove the defendant's age. He had, therefore, decided that if the section were framed in terms of a defense, it would be abundantly clear that this was not an element of the crime and the age of the defendant was to be raised by him because he was certainly in the best position to know his own age.

Mr. Johnson said he agreed that the state should not have a fornication statute and even if there were one, it would not be enforced. On the other hand, sometimes the law was used to express the morals sanctioned by the citizens of the state. With respect to minors, he said, there was more excuse for using the law in this manner than there was for codifying morals for older people. He maintained there would be a great deal of criticism of this statute by people who would say this was a license for minors to indulge in fornication.

Mr. Johnson then moved that reference to section 14 be stricken from section 5.

Representative Carson pointed out that if Mr. Johnson's motion were adopted, it would not be a crime if the defendant had cohabitation with someone under 16, but if the victim were 16 to 18, it would be a crime.

Representative Carson said the Commission should decide whether it was writing a moral code or a criminal code. Mr. Spaulding replied that they were writing a criminal code bearing in mind the moral effect on society. Mr. Chandler asked what a criminal standard was if it was not a moral standard. Representative Carson observed that he had many moral standards which he didn't ask the legislature to impose upon society. He did not favor a code which would put every sinner in jail, he said.

Mr. Johnson, speaking in support of his motion, said that he would favor making sexual misconduct a misdemeanor. This would give the police some authority to evict minors from the park who were engaging in promiscuous activity. Mr. Carson maintained that it would endow the police with the authority to put the minors in jail.

Mr. Johnson then restated his motion to direct the staff to amend the Sexual Offenses Article to make it a misdemeanor for anyone under the age of 18 years of age to engage in sexual intercourse or deviate sexual intercourse. He said that to adopt any other course would in his opinion jeopardize the entire work of the Commission.

Mr. Paillette indicated that if this course were adopted, the criticism would be leveled that the code was allowing a defense to a rape charge, which was a felony, if the victim were under 16 but would not allow the defense if the victim were under 18 and maybe as much as two years older than the victim of a rape. Mr. Johnson said that his purpose was to draft a separate crime which would in effect be a lesser or petty offense to deal with fornication between minors.

Professor Platt commented that no matter how this Article was written, it would undoubtedly draw criticism when it reached the legislature. He urged that the Commission focus its attention on the main purpose of the Article and do what they considered to be best. If compromise had to be made later, it should be made at the legislature when its critics were in a position to voice their complaints. The question, he said, was whether the Commission believed it was necessarily a crime for 16 year olds to have intercourse.

Mr. Johnson reiterated that his motion was based upon the politics of this subject because of the expressed view of many people who felt that inclusion of a statute such as he had suggested would be a deterrent to sexual intercourse between minors.

Mr. Paillette stated that the policy decision that sexual conduct between adolescents should not be looked upon as criminal was approved by this Commission in July. The criticism which had been leveled at that draft was not that it would exclude adolescent sexual experimentation from the coverage of the criminal law but rather the critics felt the code was saying that once an adolescent reached 16, she could consent to all sorts of sexual activities with older men. He asked if the Commission felt the criticism would be any more severe because the code did not make it criminal for minors to engage in sex with other minors.

Mr. Johnson replied that the public was more tolerant with respect to consenting adults than they were when talking about behavior of their children.

Mr. Johnson then restated his earlier motion to direct the staff to amend the Sexual Offenses Article to make it a petty offense for minors to engage in fornication.

Representative Carson pointed out that this motion, if adopted, would go far beyond the present fornication statute which now involved a female less than 18 and a male more than 18. He asked what the charge was under present law if two 16 year olds engaged in sexual intercourse. Mr. Paillette replied that it would not be fornication nor would it be contributing.

In reply to a statement by Mr. Knight Mr. Paillette said the Oregon cases held that a person under 18 could not be charged with contributing. He called attention to the commentary on page 58 of the draft wherein it was stated that the Oregon court had impliedly scoffed at the notion that a juvenile could contribute to the delinquency of another juvenile. Section 14, he said, would go beyond the contributing law if it were made to apply to other juveniles.

Mr. Johnson again restated his motion and moved that the staff draft appropriate language to make sexual intercourse and deviate sexual intercourse between consenting minors under the age of 18 who were not married a petty offense. The motion carried. Voting for the motion: Chandler, Jernstedt, Johnson, Knight, Spaulding, Chairman Burns. Voting no: Judge Burns, Carson and Frost.

Mr. Paillette commented that the difficulty with the statute which the staff had been asked to draft lay principally with the 17 year olds. Under existing law if the girl were over 16, the crime was not statutory rape so before she would be protected by another sex crime statute, she would have to be under 18 but the defendant would have to be over 18. A 17 year old defendant who had intercourse with a 17 year old girl with her consent could not be charged with fornication nor could a 17 year old defendant be charged with the

crime of contributing to the delinquency of another 17 year old. Adoption of the motion meant, therefore, that two 17 year olds had committed a crime if they had sexual intercourse, which was a harder line than that taken by the present law. If the intent of the Commission was to protect the immature, he expressed doubt that this was really being accomplished by going after older adolescents than did the existing law.

Representative Frost commented that the Commission was late in exercising its Puritanical morals. Representative Carson stated that the vote just taken had established that the criminal law was hypocritical and was subscribing to a line of conduct which the Commission members knew would not be enforced. Mr. Spaulding replied that on the other side of the coin, if the Commission did not adopt this policy, adolescents would read in the newspaper that what everyone had thought was not accepted by the criminal law was now accepted and therefore was all right.

Section 14. Chairman Burns asked if the criminal code was going to do away with the contributing to the dependency of a minor statute and received a negative reply from Mr. Paillette who added that it would be covered under the Article on Offenses Against the Family.

Judge Burns stated that section 14 could not be approved in light of the motion just passed. Chairman Burns noted that the motion did not eliminate the proscriptions in section 14 and indicated it would be appropriate for the Commission to vote on section 14.

Judge Burns asked if it was clear that section 14 applied only to a male over the age of 18 in subsection (1) and similarly only to a female over the age of 18 in subsection (2). Mr. Knight replied that because of the three year age differential defense contained in section 5, section 14 necessarily applied to a male over 18. The female had to be 16 or the charge would be rape so the male would have to be over 19 to have this statute come into play.

Mr. Spaulding said he did not see how the Commission could pass on section 14 until the staff had drafted a statute in line with the motion just passed by the Commission. Representative Carson explained that Mr. Johnson's motion which was adopted would pick out two 17 year olds and say they would be guilty of the crime if they had sexual intercourse or deviate sexual intercourse. He said he did not believe this was the policy which Mr. Johnson had intended; his intention was to say that sexual intercourse between all people under the age of 18 would constitute this minor crime and the three year defense would not be applicable. The three year age differential, he said, permeated the entire Article and the Commission should therefore make a determination as to whether that defense would be permitted for the petty crime just approved.

Mr. Paillette said that the thing the Commission should really be concerned with was the protection of the girl or the immature victim. Mr. Johnson said he was talking about a petty offense which would carry a minor penalty.

Mr. Chandler moved that section 14 be approved and the motion carried. Voting for the motion: Carson, Chandler, Jernstedt, Johnson, Knight, Spaulding, Chairman Burns. Voting no: Judge Burns, Frost.

Section 15. Lewd solicitation. Mr. Paillette explained that section 15 was not before the Commission in July because sections 15 and 16 were originally planned to be included in other Articles. The subcommittee, however, felt it might be well to place them with the Sexual Offenses Article. Inasmuch as the Article said in effect that deviate sexual intercourse between consenting adults in private was not criminal, the subcommittee felt the objection would perhaps be raised that this was going to allow all kinds of undesirable behavior to take place on the streets. Section 15, therefore, was included to make it a crime, presumably a misdemeanor, to solicit another in a public place for the purpose of engaging in deviate sexual intercourse. It was not directed at the act itself but rather at the affronting of public sensibilities.

Mr. Johnson contended that section 15 was a little hard on two men who knew each other. Sometimes there was police harassment in this area, he said, and law enforcement officers might haul someone in for soliciting when he was actually not committing a crime. He moved that a provision be included in this section which would make it a defense if the two parties knew each other prior to the solicitation. The purpose would be to make it clear that the section would not apply to purely private conversations.

Mr. Chandler commented that the commentary on page 65 made it very clear that the section was intended to discourage indiscriminate public seeking for deviate sexual intercourse but was not intended to reach private conversations.

Vote was taken on Mr. Johnson's motion which failed. Voting for the motion: Johnson. Voting no: Judge Burns, Carson, Chandler, Frost, Jernstedt, Knight, Spaulding, Chairman Burns.

Professor Platt pointed out that "solicits" was defined in the Inchoate Crimes Article and was a word of art. He thought it might be confusing to use the word in a different context in section 15. Mr. Carson suggested that the staff redraft the section to use "invitation" or "request" or some other appropriate word.

Judge Burns moved that section 15 be approved with the understanding that the staff would rephrase it in the light of Professor Platt's comment. The motion carried unanimously with the same nine members voting as had voted on the previous motion.

Section 16. Public indecency. Mr. Paillette explained that section 16 was designed to get to the problem of indecent exposure and to proscribe certain types of sexual activity in a public place.

Mr. Spaulding asked why the clause "with the intent of arousing . . . himself or another person" was included in subsection (3) and suggested a period be placed after "genitals." Representative Carson said that if a person were out in the woods, he would have to go to a service station to relieve himself if that latter phrase were deleted.

In response to an objection by Mr. Johnson that section 16 was too broad, Mr. Paillette replied that the actor could be charged under the disorderly conduct statute if he were merely exposing himself without the intent of arousing himself or another person.

Judge Burns moved that section 16 be adopted and the motion carried unanimously. Voting: Judge Burns, Carson, Chandler, Frost, Jernstedt, Johnson, Knight, Spaulding, Chairman Burns.

Date of Next Commission Meeting

Chairman Burns suggested that the Commission meet twice in January on the 9th and 10th and again on the 30th and 31st. It was agreed that the staff would contact the members by telephone to confirm their availability on those dates.

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

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission