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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

February 11, 1969

A G E N D A

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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Thirteenth Meeting, February 11, 1969

Minutes

Members Present: Senator John D. Burns, Chairman
Mr. Robert Chandler
Representative Douglas W. Graham
Mr. Bruce Spaulding

Also Present: Mr. Donald L. Paillette, Project Director

The meeting was called to order by Chairman John D. Burns at 2:30 p.m. in Room 321 Capitol Building, Salem. Chairman Burns welcomed Representative Graham as a new member of Subcommittee No. 1.

Minutes of Meeting of December 18, 1968

Chairman Burns directed the attention of Mr. Spaulding to page 8, paragraph one, sentence two and asked him to look at the statement in context and advise the subcommittee if the minutes correctly stated what Mr. Spaulding had said and meant. After some discussion, Mr. Spaulding stated that he thought the minutes correctly reflected his statements. Chairman Burns then said that if there were no corrections or additions to the minutes and if there were no objections, the minutes would be approved without reading them. There being no objection, the minutes were approved as submitted.

Chairman Burns recalled that at the last subcommittee meeting the committee had gone over the General Principles of Liability - Culpability and amended section 1, adopted subs (1) and (2) of section 2 without amendments, and then decided to send the draft back for redrafting.

Mr. Paillette advised that he and Professor Arthur, the reporter for General Principles of Liability - Culpability; P.D. No. 1, had discussed the redrafting and that Professor Arthur planned to distribute a poll to some of the prosecutors of New York State and Illinois requesting their comments as to whether or not they have had any problems under their culpability statutes.

Chairman Burns was of the opinion that the subcommittee had performed marvelously but thought that its effectiveness depended upon its ability to meet regularly at short intervals. He hoped that at the next meeting the subcommittee could consider the second draft of General Principles of Liability.

Chairman Burns advised that Mr. Paillette had appeared before the subcommittee of Ways and Means and the subcommittee had completely

approved the Commission's request for the coming biennium. He did not anticipate any trouble with the budget before the full Ways and Means Committee. Chairman Burns also related that Senator Yturri and he had met with the administrator of the Crime Control Coordinating Council and two people from the office of Law Enforcement Assistance in Washington to determine if there would be an availability of federal funds to help the Commission during the next biennium. Apparently funds that would be available are those for planning stages and the Commission's work is beyond the planning stage. Chairman Burns noted that the Commission has a couple of contingency requests in and it was possible the Commission might receive some assistance from them, but he felt it might come too late to do any good. He felt the Commission would probably have to rely on the money received from the Legislature and move as fast as possible to achieve as much as possible.

General Definitions; Preliminary Draft No. 1, January 1969

Chairman Burns asked Mr. Paillette to discuss the proposals contained in the draft.

Mr. Paillette began the examination of the draft by pointing out that there are at least two ways the subcommittee could go on the question of definitions: All of the definitions could be lumped together, including the definitions that relate to culpability as well as the definitions that relate to classes of crimes, putting them into one big section; or the subcommittee could proceed as it had done up until now--whereby culpability terms would be defined in the section on Culpability and terms such as "offense," "crime," "misdemeanor," "felony," etc., would be defined in a separate section on classes of crimes. Mr. Paillette felt the latter method made more sense and was more understandable when one approached the code cold. He noted that New York and Michigan placed most definitions in one large section.

Mr. Paillette explained that his approach to the relatively short list of definitions contained in the draft was that the section should contain terms that had general application throughout the code and should not contain terms that appeared in one or two places only; also, that the culpability definitions and the crime definitions not be brought into the section on general definitions.

Mr. Paillette noted that all of the proposed definitions except one were new. He noted, also, that the draft began with section 3 and explained that under the Preliminary Article there were two other sections already drafted and that General Definitions was designed to be section 3 of the major Preliminary Article. The first two sections are the Title to the Code and General Purposes of the Code. These sections were approved by subcommittee No. 3.

Mr. Chandler noted that the statutes were in the hands of many people other than lawyers and noted that under the old OCLA it had

been impossible to find anything. Under the ORS it was possible, he said, to find some things. He wondered if it would be easier for various people to look up Arson to find its definition or whether it would be easier for them to have a General Definition section in which to look.

Mr. Spaulding felt that in respect to definitions of crimes, the definitions usually are an integral part of the statement of anything about the crime. He agreed with Mr. Paillette that the definitions of kinds of crimes should appear in the section on classes of crimes.

Mr. Chandler asked if it would be a great burden to place the general definitions at the head of each chapter.

Chairman Burns did not know that it would be too great a burden but did feel that this was a policy decision to be made. He felt it would be unnecessary to do this. He felt that if the code were set up logically, coherently, and indexed, it would not necessarily take a lawyer to look up the definitions.

Mr. Paillette commented that rather than clarifying the law, he felt the repetition of definitions in each Article of the code might be confusing to many people. He thought a General Definition section properly explained so that it was known that the definitions applied throughout the code, along with specific and necessary definitions with respect to individual crimes, would be less confusing.

Chairman Burns stated that he felt the definitions should be in a general definitional chapter in the beginning of the Criminal Code itself and not be repeated throughout each chapter as a preface to each chapter.

Chairman Burns observed that the section would be called "General Definitions" but noted there are some words that need defining generally such as "felony," "misdemeanor," "violation," and "crime." He felt to take these words out of a general definitional section and place them in classes of crimes seemed confusing. He asked Mr. Paillette why he felt the way set up in the proposed draft was preferable and why the list of terms defined was so much more abbreviated in scope than even the present ORS 161.010.

Mr. Paillette noted that ORS 161.010 deals with definitions that primarily relate to culpability, most of which will be replaced by something in the nature of the draft on Culpability considered by the subcommittee at the last meeting. It seemed to him that the terms logically belonged in the section on Culpability and, secondly, the section had already been drafted with that in mind by Professor Arthur. He felt the same thing could almost be said as to Classes of Crimes. Mr. Paillette admitted that this was somewhat arbitrary

and felt the subcommittee could go either way on it. He did not feel that in the long run, as long as the definitions appeared somewhere in the code, that it would probably make that much difference.

Mr. Chandler felt the subcommittee would choose to go the definition route because he felt it would simplify things to put a definition section in. He felt that if there was to be a definition of a "person" or a "weapon" it would not do harm to also include in the same general section, or in an immediately following section, the definition of "misdemeanor," "felony," "crime" etc. It would seem to him that these definitions would be as useful to the person using the books as the definition of "person" would be.

Chairman Burns referred to page 22 of the Model Penal Code and pointed out that it had sixteen definitions beginning with "statute" and defined "act," "voluntary," "omission," "conduct," "actor," "acted," "person," "element of an offense," "material element of an offense," "purposely," "intentionally," "knowingly," "recklessly," "negligently" and "reasonably believes." He noted that on page 25, after having these definitions listed, they went to General Requirement of Culpability and defined: "A person acts purposely with respect to a material element of an offense when:" and "A person acts knowingly with respect to a material element of an offense when:" and did the same for "recklessly" and the same for "negligently." The terms were defined by the MPC in the Culpability Section as well as the Definitional Section.

Mr. Paillette observed that the MPC did not put in there the terms that relate to classes of crimes.

Chairman Burns agreed and also noted they did not include anything about deadly weapons.

Mr. Spaulding thought that all definitions except what constitutes a particular crime ought to go into General Definitions.

Mr. Chandler asked if Mr. Speulding meant that "weapon," "deadly weapon," "dangerous weapon" along with "knowingly," "recklessly," and "person," "injury," "physical injury," etc., should all go in one place and then keep in another place with the individual crimes themselves the definition of "arson," "robbery," "burglary," etc.

Mr. Spaulding agreed.

Chairman Burns asked Mr. Paillette if it would do any violence to the projected format as it relates to classes of crimes to put "misdemeanor," "felony," "crime" and "violation" in the General Definitions section.

Mr. Paillette replied that the draft approved by subcommittee 3, P.D. No. 2, August 1968, sets out what an "offense" is, classifies

"crimes" and states what a "felony," "misdemeanor," "petty misdemeanor" and "violation" is and goes into other provisions with respect to the nature of the punishment for the respective crimes. The draft not only defines the terms employed but also provides for a certain amount of disposition of the offenders--action that would be taken subsequent to conviction by the court. Mr. Paillette felt that at this stage of the drafting, the definitions relating to classes of crimes could be moved over and put into this section without doing any particular violence to what is accomplished but he was not so sure the same thing could be said about the culpability definitions because they are in a state of flux at this stage.

Mr. Paillette suggested another method of handling the problem would be to go ahead as is now provided and then lump the definitions all together after each of the individual sections were approved by the Commission.

Mr. Chandler felt this could be done but also felt there should be a decision as to the subcommittee's intent.

Chairman Burns suggested, for example, having Chapter 1, General Provisions, following the MPC format; Section 101, General Definitions define however many things it was decided to define; Section 102, Classes of Crimes; Section 103, General Principles of Construction; Section 104, General Principles of Culpability; and the whole thing would be within the chapter. He wondered if this was what Mr. Paillette projected.

Mr. Paillette replied that all definitions would be under one major chapter but in separate sections as the Model Penal Code sets out--Article 1, which is Preliminary, then broken down into sections which deal with General Definitions, Classes of Crimes, Jurisdiction, etc. With several drafters involved, he said, the approach taken so far facilitates the drafting job for the individual reporter because he can concern himself with the one specific section.

Chairman Burns stated his personal preference was to lump all the definitions as close together as possible.

Mr. Chandler felt that if the policy was to lump some of the definitions, everything should be lumped--with the exception of the definition of arson.

Chairman Burns noted that with that as a general policy declaration of the subcommittee to give Mr. Paillette something as a guideline, he would like to go through the seven definitions on page 1 of the proposed draft and discuss them from a substantive standpoint and see whether the members felt they were adequately defined. He would then like to discuss, he continued, the other definitions appearing in the MPC and also in ORS 161.010 and make a judgment as to which of these should also be included. They pervade the entire criminal code, he said, and he felt they belonged in the General Definitions section.

This procefure was agreeable with the other members.

Section 3. General Definitions (1) "Person"

Mr. Paillette read the definition of "person" contained in the draft and noted that it compares with the existing law in ORS 161.010 (11) which now defines "person" as:

> "'Person' includes corporations as well as natural persons. Where 'person' is used to designate the party whose property may be the subject of a crime it includes this state, any other state, government or country which may lawfully own any property in this state, and all municipal, public or private corporations, as well as individuals."

Mr. Paillette noted that the language in the proposed draft was derived from New York Revised Penal Law s. 10.00 and would leave it up the the court as to the instances where it was deemed appropriate to apply.

Mr. Spaulding asked if it would apply to the commission of a crime, like a partnership committing a crime.

Mr. Paillette did not think it would be held to be appropriate there.

Mr. Chandler asked if a trust was a public or private corporation.

Mr. Spaulding replied that a trust in itself was not an entity.

Mr. Chandler asked if the definition applied to those against whom the crime was committed as well as to the person committing the crime.

Chairman Burns aswered that it was directed at the actor.

Chairman Burns singled out the conditional phrase "and where appropriate," and wondered whether or not it constituted a constitutional problem because of not setting out a standard in the statute.

Mr. Paillette pointed out that it was talking about one word, "person" and he did not feel that there would be a constitutional problem because it was not saying a crime was committed "where appropriate" leaving it up to some unstated standard to be a factor in determining whether a crime was committed.

Chairman Burns thought it gave the court discretion, though. The MPC used the wording "where relevant" and he thought the same argument would apply. He asked Mr. Spaulding's opinion.

Mr. Spaulding noted that New York used the wording "where appropriate." He wondered about the meaning of the phrase; if it meant "where meaningful?"

Mr. Paillette explained that what New York was trying to do with the definition was to put into one definition not only a definition that would apply to the actor with respect to the type of person who could commit a crime, or the type of entity that could commit a crime, but providing as well some guidance with respect to ownership of property. It was a two-fold definition and the language "where appropriate" would allow the court to avoid weird results but at the same time eliminate the necessity each time a specific crime was set out of saying that the crime does not apply to corporations or that this crime applies to natural persons only. Also, he noted, some crimes might apply; under certain circumstances there might be a crime where it might be appropriate to charge a non-human person.

Mr. Spaulding noted that present language in ORS 161.010 (11) read "Where 'person' is used to designate the party whose property may be the subject of a crime...." and observed this did not relate to the actor. He wondered, however, if there were not sections in present code where a corporation could be guilty of crimes.

Chairman Burns reminded the members that basically they were concerned about the Criminal Code, chapters 160 through 169 and wondered if there were crimes defined in these chapters where a corporation would be held subject or accountable.

Mr. Paillette observed that he looked upon sub (1) as a combination of sub (11) under ORS 161.010 with respect to ownership of property in the event that "person" would be used in the sense where it might come up under one of the sections, so there would not be any question that these entities could be the owner of property. That was more the intent, he thought, than saying they could be charged with a crime. At the same time, it was his feeling there might be instances where it might be appropriate to charge a non-human person with a crime. He felt New York was trying to cover both situations, as he was in adopting the New York approach.

Chairman Burns read from the statute referring to firearms, "Any person who manufactures or causes to be manufactured in this state or imports or transfers.....firearms shall be in violation... shall be punished upon conviction...." and noted this could apply to a corporation or a partnership or a governmental instrumentality.

Mr. Spaulding added that bribery and treason could also apply to a non-human person.

Chairman Burns thought so--through the actor being an agent. He thought the subcommittee had a policy decision to make--whether they wanted to include corporations and partnerships as subject to criminal proscription.

Mr. Spaulding noted that the agent could be held guilty but he felt there was some merit in getting at the corporation itself.

Chairman Burns commented that the sanction would be much greater if you could get at the prime mover. He asked if it would be the sense of the committee that the commentary reflect that it was the intent of the committee that corporations, unincorporated associations, partnerships and governmental instrumentalities be subject to the criminal proscriptions in the Criminal Code.

Mr. Spaulding agreed but noted that it would be impossible to put a corporation in jail and wondered if a phrase should be inserted to denote "where the penalties are appropriate."

Chairman Burns thought that perhaps this was sufficient justification for the retention of the language "and where appropriate," found in section 3 (1) of the proposed draft. Chairman Burns noted that most of the Federal criminal penalties include fines as well as periods of imprisonment. He felt this was something that would have to be wrestled with when penalties were inserted in the code.

Mr. Paillette noted that the language in the proposed draft came from New York. Michigan, he continued, has adopted this but also has, under a separate Article, Parties to Offenses, a section on Criminal Liability of Corporations, which specifically sets out under what circumstances a corporation is guilty of an offense.

Mr. Chandler cited instances where county assessors were found guilty of accepting money from large corporations. The corporations were aware of what was being done but the assessors were the only ones who went to jail.

Chairman Burns asked for a vote regarding the inclusion of corporations and partnerships as subject to criminal proscription. The members unanimously favored the proposal.

Mr. Spaulding added that he was also in favor of trying to do something to make the penalties against the corporation commensurate with the penalties against the individuals where the statute is heavy on imprisonment of the individual. If the penalty were solely imprisonment, there would be nothing that could be done to a corporation.

Chairman Burns thought perhaps the Federal system would have to be followed; but it would have to be solved when the Commission came to penalties.

Chairman Burns asked Mr. Spaulding if he thought sub (1) sufficiently defined the intent of the committee to make the corporations, partnerships, etc., the victim as well as the actor.

Mr. Spaulding thought it did; he thought the definitions of crimes would take care of it because they would be drawn so they could apply to these artificial entities.

Representative Graham thought the discussion on the wording "where appropriate" was good in that he felt broad latitude was given to whoever made decisions regarding prosecution on this. He noted that artificial entities could not be imprisoned, but he did not feel this meant they should not be prosecuted. Perhaps, he continued, some other method of punishment should be provided. Representative Graham did not feel the definition should be created to meet just the penalty means presently available but should look to the future as to what might be available.

Chairman Burns gave some background information on the Commission stating that subcommittee No. 1 had the responsibility, initially, of going through all the crimes against property, such as larceny, burglary, obtaining money under false pretenses, etc., and of redefining them substantively. Another subcommittee, he said, had the responsibility of working on insanity, etc. He explained that one of the subcommittees would have the job of attaching penalties to various types of offenses and these would have to be commensurate with the punishment applicable to corporations.

Mr. Paillette felt the proposed draft codified what the law is now with respect to holding corporations liable for the commission of a crime because most of the statutory crimes now are phrased in terms of "any person who" does such and such and "person" is defined in the code now as including corporations. Corporations, then, now are charged where it is appropriate.

Chairman Burns wondered if when the point was reached where a subcommittee was defining penalties if it would be appropriate then for it to make policy declarations re cases where it would be appropriate for a corporation to be held liable. He wondered if it would be safe to say that this is a decision the subcommittee would not have to make at this point.

Mr. Spaulding thought so but also commented that if subcommittee No. 3 were to offer any advice it would seem to him that it should be to make a corporation guilty of any crime that it could or does commit.

Mr. Chandler was reluctant to be bound by defining too finely. He thought that most corporate crimes would probably come in the area of bribery, fraud and things of this nature rather than crimes of violence.

Mr. Paillette observed that Michigan held a corporation guilty if the conduct constituting the offense was engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation and the offense was a misdemeanor or a violation or the offense was one defined by a statute that clearly indicated the legislative intent to impose such criminal liability on a corporation.

Chairman Burns related that in the beginning he had had some question about the language "where appropriate" in section 3 (1) of the proposed draft but he had now resolved that in favor of keeping the language there because he now felt there was sufficient need for it.

Mr. Chandler commented that the words applied to two things--to the actor committing a crime and, apparently, also would attach to the property subject to the crime in some cases and was needed to be meaningful.

Mr. Spaulding thought there probably was a need for the language but said there was still a bit of a question in his mind as to whether the language was sufficiently definite to be constitutional.

Chairman Burns asked if there was a standard that would take it past the constitutional objection for vagueness.

Mr. Chandler observed that the American Law Institute, New York and Michigan all used the same type of language and apparently felt it passed the constitutionality test.

Representative Graham asked who decided the "where appropriate" issue?

Mr. Paillette replied that presumably the courts would decide, in the final analysis.

Mr. Chandler noted that initially it would be the district attorney.

Chairman Burns regretted that Mr. Paillette did not have enough help so that he could go through the annotations in the states that have this and see if there are any reported cases.

Mr. Paillette answered that he had checked New York and that there were no reported cases there.

Mr. Spaulding stated that he did not have enough question in his mind about the constitutional matter to object to the use of the words "where appropriate" and he felt they did help the meaning.

Chairman Burns asked if there were questions as to the rest of the definition of "person."

Mr. Spaulding moved the adoption of subsection (1) of section 3 as drafted and Mr. Chandler seconded the motion. The motion carried unanimously.

Section 3. (2) "Possess"

Mr. Paillette observed that this definition would come up particularly in respect to some of the property crimes. All the

definition really does, he said, is to define "possession" in such a way as to include constructive possession and noted that this also was from the New York Revised Penal Law.

Mr. Spaulding asked if the word "tangible" was needed; if it strengthened the definition any. He thought it might raise a number of questions in the prosecution as to whether something was tangible or intangible and perhaps the defendant would be just as guilty no matter which it was.

Chairman Burns thought that with the more and more sophisticated types of transactions that are possibly subject to the OMFP laws that a person could be in possession of intangibles without being physically in possession.

Mr. Paillette conceded that it was conceivable that there would be a situation where it should not be limited. He said that his feeling was that based on the Theft Draft, the proposed definition would cover instances where it would most likely apply. He did not feel that deleting the word "tangible" would do any violence in the definition.

Chairman Burns referred to the section on Receiving and Concealing Stolen Property and asked if "possess" was defined in the section.

Mr. Paillette directed the members' attention to page 14, Theft, T.D. No. 1, and read that "'Receiving' means acquiring possession, control or title, or lending on the security of the property."

Chairman Burns asked where in the code so far the word "possess" had been used and where it was contemplated that it would be used.

Mr. Paillette replied that "possession" had been used in most cases; for example, the "possession of burglar's tools" had been used in the drafts. "Burglar tool" had been defined, he said, but not "possession." This appeared on page 13 of T.D. No. 1, Burglary and Criminal Trespass.

Chairman Burns asked why it would be appropriate to have "possess" in the General Definitions when so far it had only been used in the section on burglar's tools and "receiving" is not in the proposed draft and is defined in the specific section as it relates to receiving stolen property.

Mr. Paillette answered that trying to draft the definitions was a little bit of a "chicken or the egg" type of problem and that without having all of the specific sections drafted on crimes, he could not be positive that any one of the definitions might be required. He gave "possession" of narcotics or "possession" of an instrument of a crime as examples as to where he thought the definition might be required.

Chairman Burns asked if there was a sufficiently over-riding necessity to include "possession" within the General Definitions and not some other things that may be used as such.

Mr. Paillette thought there was to this extent: he felt it should be made clear what "possession" means, that it is not limited to actual possession, that this encompasses constructive possession of property as well.

Mr. Spaulding moved to strike the word "tangible" in section 3 subsection (2). The motion carried. (With Chairman Burns, Mr. Chandler and Mr. Spaulding voting "aye". Representative Graham was not present at the time of the vote.)

Section 3. (3) "Physical injury"

Mr. Paillette advised that this definition, also, was taken from the New York statute and had particular importance in the assault and robbery area. The proposed definitions furnish guidelines, he said, for distinguishing between minor and major injuries which are based on the same type of rationale found in the majority of cases on the subject.

Chairman Burns asked what was meant by the words "substantial pain."

Mr. Paillette admitted that "substantial" was a nebulous word but felt the meaning had to be left obscure because he did not know of another way of expressing it.

Mr. Spaulding asked if the term did not have a general meaning.

Mr. Paillette felt the terms used did have meanings in the law, mostly through the cases. He said that "physical injury" was synonymous with "bodily injury."

Chairman Burns was of the opinion that because such phrases as "serious bodily injury," "deadly weapon," "dangerous weapon" and "deadly physical force" were used in the substantive crimes already covered, that it was appropriate that they be defined; however, he was not sure that it was necessary to define plain "physical injury." If plain "physical injury" were defined in the definition section he thought it opened it up for a motion to dismiss prior to trial because the defense attorney would have something to shoot at whereas it might be a question of fact.

Mr. Chandler thought that because of the way subsections (4), (5), (6) and (7) were written that subsection (3) became necessary. He was, however, concerned about the word "substantial" in the phrase "substantial pain," about the difficulty of measuring "substantial." He presumed this would be a question for the jury to decide.

Chairman Burns supposed the line of demarcation would be drawn between "protracted impairment" as used in subsection (4) and simply "impairment" as used in subsection (3), but he wondered what the word "impairment" meant.

Mr. Spaulding commented that he thought it possible to have subsections (4) and (5) without having (3) because he thought everyone knew what "physical injury" meant.

Chairman Burns asked Representative Graham what a "physical injury" was.

Representative Graham answered that medically it was a "disruption of the tissue."

Chairman Burns noted that Mr. Chandler felt subsection (3) was needed with subsections (4), (5), (6) and (7), whereas he and Mr. Spaulding questioned this and he asked Mr. Chandler to explain why he felt it necessary.

Mr. Chandler replied that it seemed to him that the normal concept, on the part of the average person, of a physical injury is limited to impairment of physical condition. He thought that if "substantial pain" was to be one of the elements that the definition of it must be in subsection (3).

Chairman Burns asked if it would not be possible to have an injury without an impairment of the physical condition.

Mr. Chandler did not think so. The mere fact that someone was pained by something without being cut or having swelling or having something broken, would not, in his connotation, mean a physical injury, but in the proposed definition it would. He again expressed his concern about the definition of "substantial," wondering how "substantial" could be proved, how to convince a jury as to what "substantial" was.

Mr. Paillette noted that as applied to evidence, substantial evidence means more than a scintilla.

Chairman Burns expressed the opinion that the necessity to define "physical injury" comes when you describe "serious physical injury" because there you would have a line of demarcation.

Chairman Burns pointed out a technical difference in that the Arson Draft talked about a "bodily injury" but the proposed Definition draft used the term "physical injury" and he noted, assuming that the subcommittee adopted "physical injury," it would be necessary to go back through and change the terminology "bodily injury" to"physical injury"

Mr. Paillette again expressed the opinion that the place where this definition would be most important, although it could be

applied to some other drafts as well, would be Assault. He advised that the preliminary drafting of the Assault Draft had been completed. The draft, he continued, had been predicated on certain assumptions since the terms used had not been defined and one of the assumptions was that "physical injury" and "serious physical injury" would be defined. He would be hesitant, he said, to have the subcommittee throw out a definition until it could relate it to some of the other Articles. He felt some guidelines must be given for drafting in some of the other areas. He added that he felt the wording "substantial" should be included in the definition and that he did not feel it needed to be defined. He thought there would be some language that would appear in the code that should not be defined--certain adjectives that would be used. He felt it was possible to over-define. Mr. Paillette was of the opinion that an instruction could be framed under the proposed draft and even without instruction as to what "substantial" meant he thought a jury would be able to understand it.

Mr. Chandler thought the courts would be instructing on "substantial" because he thought in some cases it would be the dividing line between the prosecution and the defense.

Chairman Burns asked if "physical" or "bodily" injury was presently defined by case law.

Mr. Paillette replied that "bodily injury" was defined in case law. Generally, he said, the annotation of cases in A.L.R. says that "bodily injury" means a harmful effect upon the body caused by some form of external violence.

Mr. Spaulding thought there was a policy question involved--as to whether the committee wanted to legislate on "substantial pain" without "physical injury."

Mr. Chandler observed that he thought of "substantial pain" as being caused by the physical act of another upon the body of the person feeling the pain, not involving a third party relationship where pain is caused by witnessing injury to another.

Mr. Paillette related that the draft on Assault generally followed the approach that the Model Penal Code and the recent revisions of New York and Michigan have taken--that is, to define an assault in terms of the completed act and not what is sometimes thought of now as an incomplete battery. An assault, and the definition of Assault, is tied in with the idea of inflicting injury on the victim. The MPC definition of Assault, he said, is in terms of "bodily injury" or "serious bodily injury" and the seriousness of the injury would affect the degree of the crime. New York went along with that rationale but felt that since assault was being tied in directly with an injury to the victim, that the terms should be defined. Mr. Paillette admitted that he was guessing somewhat since the New York or Michigan revisionists did not articulate their

reasons in their commentary, but he thought the reason was that they were tying the definitions in to some of the other crimes; that they were trying to distinguish between the kind of act that reflects a minor or inconsequential pain upon the victim, saying that it has to be more than that, that it has to be substantial, but at the same time they did not want to limit the definition of physical injury to just some actual physical impairment. He thought they felt that pain should enter into it so far as the victim was concerned.

Mr. Spaulding suggested using the wording "trauma to the body."

Representative Graham agreed that the word "trauma" would be inclusive, all right. He thought that the wording "substantial pain" must be included; he felt it important because injuries such as dislocations, etc., could be very painful and yet leave no visible injury.

Mr. Chandler objected to the word "trauma" because he felt it, too, would have to be defined for juries.

Chairman Burns thought there were instances relating to assaults where there should be a criminal proscription even though maybe there was not substantial pain inflicted. He thought this was a departure from the present law and would make it harder on the prosecution to prove simple assault.

Mr. Chandler did not agree that it would make it harder on the prosecution. He felt they would have either of two grounds to prove physical injury, impairment or pain.

Representative Graham asked if assault required physical pain.

Mr. Paillette answered that it does not now but the new definition of assault would. This would be a decision of the Commission.

Representative Graham certainly did not feel that he would want to see assault restricted to physical injury or pain.

Chairman Burns observed that the new definition was certainly a departure from the traditional concept of assault and he could not foresee his instincts allowing him to vote for such a departure.

Mr. Paillette explained that the only difference would be that what is thought of now as assault would actually be an "attempted assault" under the new definition. "Assault" would be what is now thought of as assault and battery.

Mr. Chandler moved the approval of subsection (3) of section 3 as drafted. Representative Graham and Mr. Chandler voted "aye"; Chairman Burns, "no"; Mr. Spaulding abstained. Representative Graham then retracted his "aye" vote and requested further discussion.

Representative Graham stated that his reservations about the subsection seemed to revolve about the word "substantial."

Chairman Burns observed that there are definitions in the case law of "substantially" just like there are presently definitions in the case law of "physical injury." If there is no need to define "substantial" in the statute and you go to the case law to get a definition, why, he asked, is it necessary to define "physical injury."

Mr. Paillette felt it was necessary because the definition went beyond the case law definition of "physical injury."

Mr. Spaulding commented that the one thing he did not like about it was that there could be pain caused by an occurrence, without physical contact. He felt the meaning of "pain" was vague.

Mr. Chandler agreed that he did not like the "third-party" aspect in causing pain, with or without a physical action on the part of the actor.

Representative Graham asked Mr. Spaulding if he favored striking the word "pain."

Mr. Spaulding thought he would favor this; of not having a criminal sanction for causing pain where there is no physical injury.

Mr. Chandler was of the opinion that if the word "pain" were deleted, subsection (3) would not be needed.

Chairman Burns noted that this was his original objection. He felt that by creating sections that would compound the problems that the courts and lawyers have with respect to the criminal law, the members would not be fulfilling their function as a Criminal Law Revision Commission; the revision must be kept as concise and as clear as possible.

Mr. Paillette commented that it was difficult for the subcommittee to discuss and to decide on definitions when they could not really read them in context with the specific crime. He repeated that the draft on Assault generally follows the other codes and that the general idea that assault requires a physical injury is encompassed in the draft. Mr. Paillette first explained Assault in the third degree as: "with intent to cause physical injury to another person, he causes such injury to such person or to a third person, or he recklessly causes physical injury to another person or with criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument" and then read from the Commentary under the Assault Section of the New York Code, which uses the proposed definition of "physical injury":

"In visualizing the operation of the new 'assault' scheme, the following observations are pertinent.

"(1) Since actual 'physical injury' is a requisite of assault, and the crime is not established by an unsuccessful attempt to cause such, the crime of attempted assault becomes a meaningful one, at least with respect to the intentional forms of assault. For example, one who with intent to cause serious physical injury swipes at another with a knife is guilty of first degree assault if he succeeds (§120.10 [1]), but only of an attempt to commit that crime if he fails.

"(2) In view of the 'physical injury' requirement, mere physical contact which, though amounting to a common law battery, does not produce 'physical injury,' is not covered by the revised assault Article. Elimination of such from the criminal ambit seems generally salutary. There are, however, two areas where physically uninjurious 'assaultive' conduct does merit at least some criminal sanctions. One of these relates to the trivial slap, shove or kick delivered out of hostility, meanness or other petty motives. The other involves physically uninjurious by offensive sexual acts."

Chairman Burns observed that presently a lot of homosexual offenses are prosecuted under the guise of assault and he assumed that following the proposed revision through to its logical conclusion, through its adoption, this practice would be eliminated because of the definition of "physical injury." He was concerned, and a little confused, and suggested that perhaps it would be best to go on through the rest of the definitions and then come back to subsection (3).

This plan met the approval of the subcommittee members.

(4) "Serious physical injury"

Mr. Paillette read the definition of "serious physical injury" as it appeared in the draft and noted it contained the word "substantial" which was not defined and which he did not think should be defined. The definition, he said, could be related to the Restatement, Torts definition of "serious bodily harm." "Bodily harm" is defined as "the consequence of which is so grave that it is regarded as differing in kind, and not merely in degree, from other bodily harm. A harm which creates a substantial risk of fatal consequences is a 'serious bodily harm' as is a harm, the infliction of which constitutes the crime of mayhem." The proposed definition, he continued, is intended to indicate a grievous physical injury to the person.

Mr. Chandler thought it was a limiting definition. It would keep a district attorney from charging someone with a more serious crime than the facts might support.

Mr. Paillette observed that such an injury would be Assault in the first degree.

Mr. Chandler observed that it was hard to draw the definitions without looking at the end the Commission was driving at but at the same time he said he would have to write the other statutes without having at least in mind what would be defined as a crime under them.

Mr. Paillette conceded that that was what had been done during the past year; the drafting had been done by making certain assumptions as to the definitions which would be adopted.

Chairman Burns stated that the draft defined "serious physical injury" as a physical injury which (1) creates a substantial risk of death or (2) which causes serious and protracted disfigurement (he noted this was conjunctive, both elements must be present), (3) protracted impairment of health or (4) protracted loss or impairment (disjunctive) of the function of any bodily organ.

Mr. Spaulding asked why the word "organ" was used instead of any part of the human body tissue. He asked the definition of "organ."

Representative Graham replied that any tissues of the body could be classified as an organ. Organs, he said, have functions and every tissue has a function.

Mr. Chandler doubted that the average individual serving on a jury would interpret "organ" in this manner.

Chairman Burns thought it was a pretty esoteric definition. It was, he noted, the same definition that New York and Michigan have.

Mr. Chandler moved the adoption of subsection (4) of section 3, as drafted. The motion carried unanimously.

(5) Deadly physical force"

Chairman Burns read the proposed definition and stated that he felt the key word in the definition was "readily" capable of causing death or serious physical injury. He asked Mr. Paillette the genesis of the definition.

Mr. Paillette replied that the definition came from New York and he felt that, again, Assault was where it would apply.

Chairman Burns asked where so far in the subcommittee's work the wording "deadly physical force" had been used and Mr. Paillette said that it had not been used so far in any of the subcommittee's work.

Chairman Burns asked where the use of "deadly physical force" was contemplated and Mr. Paillette replied in Assault and under Justification.

Mr. Spaulding had no objection to the use of "readily" but questioned the use of the word "deadly" to describe physical force causing "serious physical injury" when it is not readily capable of causing death. He did not feel a force was "deadly" unless it was readily capable of causing death.

Chairman Burns thought you could have a force that was capable of causing either death or serious physical injury and it might just be happenstance that one or the other resulted.

Mr. Spaulding observed that the definition said that it is a "deadly physical force" if it is "readily capable of causing death" even though it does not cause death.

Mr. Paillette thought if anything were to be deleted, he would rather see the "death" part deleted and the "serious physical injury" retained.

Chairman Burns compared subsection (5) with sub (6) and felt there should be some analogy between them. He noted that subsection (6) left out one of the elements put into sub (5) and wondered if there was consistency there. He referred to subsection (7), the "dangerous weapon" definition and felt it was the same thing, basically, as subsection (6), the "deadly weapon." He thought that perhaps the way to amend the subsections would be to have "death" in sub (5), put "death" in sub (6) and leave sub (7) as drafted.

Mr. Paillette disagreed. He thought subsections (6) and (7) were important as they related to each other because one was a "deadly weapon," which would be something specifically designed as a weapon, whereas the other could be an iron bar or a fist, etc. "Deadly physical force," he said, might or might not include the use of a weapon.

Mr. Chandler thought the problem of consistency might be solved by the deletion of the words "death or" from subsection (5). He would also change the word "deadly" to "dangerous" or "severe" or something else so that it would read: ".....physical force means physical force that under the circumstances in which it is used is readily capable of causing serious physical injury."

There followed a short discussion of the difference between a "deadly" and a "dangerous" weapon.

Chairman Burns advised that the "deadly weapon" is the gun that has the bullet in it and is presently capable of causing serious physical injury. The gun which is proven unloaded is a "dangerous weapon" when under the circumstances in which it is used (pistol whipping) it is capable of causing serious physical injury.

Chairman Burns indicated that he did not have any objection to subsections (6) or (7) and thought perhaps his overview, as it related to sub (5), was inappropriate.

Mr. Chandler asked if the words "death or" were removed from subsection (5) what word would replace "deadly."

Mr. Spaudling felt the word "deadly" should be retained but thought it should be limited to a force "readily capable of causing death" and in order to be completely consistent there would have to be another definition and that would be of a "dangerous force" which would be readily capable of causing "serious physical injury."

Mr. Chandler suggested changing "deadly" to "dangerous" and striking "death or"; then he felt there would be consistency all the way down the definitions.

Mr. Spaulding objected to this on the basis that there had always been the concept of assault with a deadly weapon and assault with a dangerous weapon.

Mr. Paillette pointed out that in the cases and even in the statutes in this state the terms "deadly" and "dangerous" are used interchangeably now. What the courts have looked at and what the definition continues to do is to look at the kind of use the instrument is put to. For the sake of consistency, he said, he would much rather see the subcommittee insert "death or" in subsections (6) and (7). He felt this would do no violence to the definitions although he admitted it would not meet Mr. Spaulding's objection to subsection (5).

Chairman Burns did not think anything would be solved by substituting "dangerous" for "deadly" in subsection (5) because the Commentary on page 4 showed how the two terms were interchangeably used by the Oregon cases.

Mr. Spaulding supported the changing of the word "deadly" to "dangerous" on the basis that he did not like to use a word to mean something that it did not mean.

Chairman Burns asked if he would be willing to use the following phrase in the Justification section: "A person is justified if he uses dangerous physical force to thwart attack or in defense of himself." He thought this would be a departure.

Mr. Spaulding did not think it would be a departure--a person would be justified in protecting against certain things by using a dangerous physical force, as so defined.

Chairman Burns surmised that Mr. Spaulding's objection was that since the definition had a serious injury component in it,

he did not want it called "deadly" and Mr. Spaulding agreed that this was his whole objection.

Mr. Paillette noted that the same thing was said in sub (6) with respect to weapon but there he thought it was necessary to distinguish between kinds of weapons.

Mr. Spaulding thought a little different kind of concept was involved in subsection (6) as against that in (5).

Representative Graham referred to sub (5) and suggested substituting "dangerous physical force" for "deadly physical force" and having the definition read: "'Dangerous physical force' means physical force that under the circumstances in which it is used is readily capable of causing serious physical injury."

Mr. Chandler thought the subcommittee could follow this suggestion or could insert "death or" after the word "causing" in subsections (6) and (7).

Chairman Burns suggested a third alternative: deleting "readily" and "or serious physical injury" and inserting a period after "death" so that subsection (5) would read: "'Deadly physical force' means physical force that under the circumstances in which it is used is capable of causing death."

Mr. Chandler was of the opinion that the wording "or serious physical injury" must be retained.

Chairman Burns said he would then prefer inserting the words "death or" in subsections (6) and (7).

Mr. Chandler moved that subsection (5) of Section 3 be adopted as drafted and that subsections (6) and (7) be amended by the insertion of "death or" before the word "serious." The motion carried unanimously.

(3) "Physical injury"

Mr. Paillette suggested because of the work that would be coming up for another subcommittee that would shortly be undertaking the consideration of the Arson and Assault Drafts, that subsection (3) be provisionally approved with the understanding that subcommittee No. 1 reserved the right to review the definition in connection with the Assault Article. If it later appeared that this definition would be satisfactory with respect to the other Articles, it would stand approved; if not, then it could be amended at the discretion of the subcommittee.

Representative Graham moved the adoption of subsection (3) of section 3 as drafted. Mr. Chandler seconded the motion. The motion carried with 3 "aye" votes (Representative Graham, Mr. Chandler, Mr. Spaulding) and one "nay" vote (Chairman Burns).

Chairman Burns felt the subcommittee should make a decision as to how far it wanted to go with the General Definition section. He thought the section should go further than was proposed and should embody some of the definitions that are in the Model Penal Code, such as "statute," "act," "voluntary," "conduct," "actor," "acted," "writing," "property," "wrongfully," etc.

Mr. Spaulding referred to ORS 161.010 and thought some terms referred to there should be considered such as "wilfully," "negligent".

Mr. Paillette noted these were culpability terms relating back to the draft considered by the subcommittee on December 18, 1968. He had not included the terms in the General Definitions Draft because they were in the other draft.

Chairman Burns noted that in the MPC the definitions appeared in the Definition Section and also in the Culpability Section. He pointed out that the term "gross deviation" had been covered in the culpability section and felt it should be defined in the definition section because it was used someplace other than in the culpability section.

Mr. Paillette agreed that the term had been used earlier--in respect to theft when referring to "gross deviation" from the terms of the agreement under Unauthorized Use of a Vehicle. He noted that the subcommittee had decided then not to define the term.

Chairman Burns observed that the term "reasonable person" was employed several times and that it was defined in case law. He wondered if it should be defined in General Definitions.

Mr. Spaulding did not feel that the subcommittee should try to define that term.

Mr. Chandler suggested that the subcommittee consider adding "material element of offense," "burden of injecting the issue", "element of an offense" and "juror" to the list of terms defined.

Chairman Burns pointed out that "material element of an offense" is defined in the MPC.

Mr. Paillette said that in looking ahead to the rest of the code, the only place that he could see the term "juror" coming up was relating to interference with juries and bribing a juror, that type of thing. He did not think it would have any application outside of that section. He thought the term "public servant" would also have limited application. He noted that the definition of "property" appeared in the section dealing with Crimes Against Property and was defined as "Any article, substance or thing of value, including but not limited to money, tangible and intangible personal property, real property, choses-in-action, evidence of debt or contract."

Mr. Paillette admitted that he could have included the terms "act," "actor " and "omission" and felt they could be included in General Definitions if the subcommittee desired.

Chairman Burns asked if it were the sense of the subcommittee that the General Definitions reviewed sufficiently encompassed the scope of the Criminal Code; that this was all the further the subcommittee should go.

Mr. Chandler felt it was necessary to define "wilfully" and "negligently."

Mr. Paillette agreed that these must be defined and his reason for not including the terms in the General Definitions section was that they would be defined in the Culpability section.

Mr. Chandler asked about defining the terms "conduct" or "omission" in the General Definitions section.

Mr. Spaulding did not feel that the terms "conduct" or "omission" needed to be defined.

Mr. Chandler then asked about the term "statute."

Mr. Spaulding did not think it needed to be defined, either.

Chairman Burns asked if "material element of an offense" should be defined.

Mr. Paillette advised that it appeared in the Culpability section.

Chairman Burns observed that five definitions had been injected which do not appear in either the MPC General Definition Section or in the Oregon General Definition Statute and notwithstanding that, there are eleven definitions in the Oregon statute and sixteen in the MPC. He was not sure that the proposed General Definitions section was sufficient. He wondered if perhaps the subcommittee should survey the matter and come up with a list of terms for discussion purposes to see if they should be included in the General Definitions section or in the applicable section.

Mr. Paillette referred the members to his statement in the Commentary on page 2: "The definitions of some terms that are employed generally in our present criminal statutes are located in ORS 161.010, most of which deal with language that will be replaced by new definitions set out in the Draft section on culpability." Most of the MPC definitions are culpability definitions which he felt were covered in the Culpability Draft. He thought that the only terms left over were those such as "act," "actor," and "omission."

Chairman Burns asked where he had planned to put these terms and Mr. Paillette answered that he had not planned to put them anywhere because he did not feel they needed defining.

Chairman Burns asked if it were contemplated that "act" as used included, where relevant, "omitted act?" This is a peculiar definition that is in the MPC that he thought would have to be defined as it would have broad application.

Mr. Paillette did not think that failure would be punished under any of the specific crimes unless it were set out in the definition of the crime.

Chairman Burns observed that Mr. Paillette had pretty well surveyed the situation and that perhaps as the subcommittee continued its work terms could be added later to those now listed in the General Definitions section.

Chairman Burns asked Mr. Paillette to discuss the next work of the subcommittee.

Mr. Paillette replied that they were still in the same Article, Preliminary Provisions. He advised that he had the research completed on Time Limitations and also on Jeopardy but did not have them drafted as yet.

Chairman Burns asked if the subcommittee would feel it advisable to go back and firm up Culpability or Liability. He asked if it would be agreeable to get Mr. Paillette started redrafting General Principles of Liability--Culpability and that this be on the agenda for the next meeting so that final decisions could be made on it.

After some discussion the next meeting for the subcommittee was scheduled for March 4, 1969, at 2:30 P.M., subject: Principles of Liability - Culpability.

The meeting was adjourned at 6:30 P.M.

Respectfully submitted,

Maxine Bartruff, Clerk
Criminal Law Revision Commission