Tape #72

Both sides

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

April 18, 1969

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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Fifteenth Meeting, April 18, 1969

Members Present: Chairman John Burns
Mr. Bruce Spaulding
Representative Douglas Graham (delayed)

Absent: Mr. Robert Chandler

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

Others Present: Justice Gordon Sloan

The meeting was called to order by Chairman Burns at 1:00 p.m., Room 401, Capitol Building, Salem, Oregon.

Mr. Paillette brought the subcommittee up to date on the other subcommittee meetings. Subcommittee No. 3 (Judge Burns' subcommittee) has met twice since this subcommittee met last. Their meeting about three weeks ago was on Responsibility and the insanity defense and that draft is almost ready to go back to the Commission. Then at their last meeting, they considered the draft on Inchoate Crimes -- attempts, conspiracies, solicitation and the incomplete type of crimes. They anticipate having another meeting in about three weeks.

Subcommittee No. 2 has a meeting scheduled for April 24 and will reconsider the Kidnapping draft which was sent back to that subcommittee by the Commission at its last meeting. They will also take up for the first time the draft on Sex Offenses.

Chairman Burns asked if the chairman of the Commission had scheduled a meeting and Mr. Paillette replied that he had not but that they would like to be able to take up Kidnapping again at their next meeting.

Chairman Burns reminded the subcommittee that they are now on the third draft of Culpability and that it was considered at the last meeting on

March 4, but was sent back for some more work.

Section 1. Culpability; definitions. Mr. Paillette briefly explained that although they did not get through all of the sections at the last meeting, this redraft takes care of the suggestions and amendments that were made at that meeting. He referred them to page 7 of the minutes and the definition of subsection (2) of section 1, and read,"'Voluntary act' was amended at the motion of Mr. Spaulding so that it now reads,"'Voluntary act' means a bodily movement performed conaciously and includes the conacious possession or control of property."

The second amendment was made in subsection (3) with the definition of "omission" which now reads,"'Omission' means a failure to perform an act the performance of which is imposed by law."

Subsection (8) "knowingly or with knowledge" was amended to now read, "'knowingly' or 'with knowledge', when used with respect to conduct or to a circumstance dexcribed by a statute defining a crime, means that a person acts with an awareness that his conduct is of a nature so described or that a circumstance so described exists." Mr. Paillette explained that it was really just a change in the structure of the sentence.

Chairman Burns asked if they had not approved the other definitions with these exceptions and Mr. Paillette replied that there had also been an amendment to subsection (7) with respect to the definition of "intent" so that it now reads,"'Intentionally' or 'with intent', when used with respect to a result or to conduct described by a statute defining a crime, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described." And, he added, he had amended subsections (8), (9) and (10) to be consistent in the format.

As it shows on page 7 of the minutes, a motion was made that subsections (7) through (10) be accepted as amended, so this draft reflects those changes.

Chairman Burns asked Mr. Paillette how he was coming on the biennial report to the legislature. He reported that the final proofing had been done and corrections made on the last proof and it was now at the printers. He has ordered 500 copies and it should be in not later than May 1. (The rough draft of the report was about 168 pages; the printed report will be about 88 pages, he said.) Copies will be presented to all members of the legislature, to the Bench and to a good portion of the Bar.

Chairman Burns indicated that if there were no objections, he would not ask for a motion on every subsection but just on each section. He asked if there were any questions to subsection (1) "Act" or to subsection (2) 'Voluntary Act" which is the new language that Mr. Spaulding had requested.

At this point, Mr. Spaulding wanted to recall the reason for the earlier definition of "Voluntary Act". Chairman Burns recalled that the former definition was very long and read,"'Voluntary act' means a bodily movement performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it." He observed that Mr. Spaulding's amendment made a lot more sense to him and that it was not as unwieldy and as limiting. He compared the two definitions and in his opinion, he said, it was fine.

Chairman Burns next asked about "omission" and observed that the suggestion Mr. Spaulding had made there was more grammatical or technical than a substantive change. It formerly read,"'Omission' means a failure to perform an act as to which a duty of performance is imposed by law", and now reads, "'Omission' means a failure to perform an act the performance of which is imposed by law". He felt that this was just saying the same thing but saying it more artfully. He asked if he were correct in that observation and Mr. Paillette agreed that we were indeed saying the same thing and that we had not altered the meaning of the term.

Chairman Burns asked if "conduct" was the same definition we had in the other draft and Mr. Paillette said it was. (He mentioned that this definition of conduct came up on the discussion by subcommittee No. 3 of the definition of Attempt and that the subcommittee, with the understanding that we had approved this definition, made some changes to shorten the statement of Attempt to incorporate the word"conduct"without further amplification in the draft.) As a matter of fact, he said, the first draft of Attempt used the words "an act or omission". In reply to a question from Chairman Burns, he said he saw no problem between the two drafts.

It was brought out that "To act" is the same as we have had before and was approved, and that "Culpable mental state" is identical to what it has been in the previous drafts.

"Intentionally" has been changed from the last draft, Chairman Burns mentioned. It formerly read, "'Intentionally' or 'with intent' means that with respect to a result or to conduct described by a statute defining a crime a person acts with a conscious objective to cause that result or to engage in that conduct". He asked if that were not the same as the new definition and Mr. Paillette replied that it was not.

Before, Mr. Paillette explained, it read,"means that with respect to a result" and now it reads,"when used with respect to a result or to conduct" and then, he added, the last words in the sentence are different also, "cause the result or to engage in the conduct so described" where before it had read,"to cause that result or to engage in that conduct". Chairman Burns questioned Mr. Paillette whether he felt that "the" was better than "that".

Mr. Paillette replied that he did, and that this was the motion of the subcommittee.

For clarification, Chairman Burns asked if we hadn't changed the format on "knowingly", "recklessly" and "criminal negligence" so that they start out now with "recklessly" when used with respect . . . rather than saying "reckless" means? Mr. Paillette agreed that this was what the change meant.

Since there was no further discussion, Chairman Burns entertained a motion to approve section 1, but said they would wait until Representative Graham arrived.

Section 2. General Requirements of Culpability. Chairman Burns recalled that there had been a discussion about a culpable mental state as it related to each material element and the discussion was -- and he thought Mr. Spaulding brought this question up -- [illegible] that what we are really talking about is that each material element that necessarily requires a culpable mental state and that we didn't want to leave any doubt that it was not our intent to require culpability for an element such as venue or statute of limitations or such as that. So this new language is to take care of that or at least attempt to, so that it reads "he acts with a culpable mental state with respect to each material element of the crime that necessarily requires a culpable mental state".

Chairman Burns suggested that the subcommittee refer to page 7 of the minutes with respect to subsection (1) where he and Mr. Spaulding brought attention to the word "physically" as used in the context of "Physically capable of performing" and it was subsequently agreed to strike the word "physically", which he thought was a good motion.

In subsection (3) where Mr. Spaulding questioned the part which stated that a culpable mental state is not required for an offense that is a violation, the subcommittee had asked Mr. Paillette to draft a new subsection, which he did. Chairman Burns asked if we might have any problem in determining which material elements necessitate a culpable mental state. Mr. Paillette replied that he thought the draft took care of that because as we get into section 3, construction of the statute with respect to culpability requirements, sets out the element that culpability applies to.

Chairman Burns wanted to know where subsection (3) came from and Mr. Paillette replied that this was in our earlier draft and P.D. No. 2 actually didn't change that from the first draft that Professor Arthur had prepared. It is moved to a different section, however, but the substance is the same.

The purpose, Mr. Paillette continued, is that with respect to a violation, it is not classified as a crime and therefore would not require culpability in strict liability offenses unless the definition indicates that it is

required. This really would require an express statement in the statute; it would have to be expressly included in the definition of the offense in the statute defining a crime, he said. He noted that under subsection (b) we have used the word "crime" rather than "offense" because there we are talking about a crime. He did not think it very likely that there were going to be offenses that would not be felonies or misdemeanors and require a culpability element. At the same time, this does leave the door open for the legislature if something should occur subsequently so that because of the nature of the offense they would dispense with the culpability requirement; but he indicated that in those cases there would have to be a clear indication in the statute that the legislature intended to dispense with culpability requirement.

Chairman Burns commented that he could not foresee such an eventuality. He asked Mr. Spaulding whether he saw any problem with respect to subsections (2) or (3) and received a negative reply. He was concerned, however, with respect to form and wondered why it was broken down into subsections under subsection (3). Mr. Paillette thought from the drafting standpoint, it sets out the alternatives under subsection (3). The readability is better, he said, if it can be broken down into separate thoughts.

Representative Graham came in at this point. He was informed by the chairman that they had just completely reviewed sections 1 and 2 which were amended into P.D. No. 3 in conformance with the amendments that Mr. Spaulding suggested at the last meeting and that Mr. Spaulding had moved that they approve Section 1 of P.D. No. 3. The motion was carried unanimously. Mr. Spaulding also moved that they approved Section 2 and that motion also carried unanimously.

Section 3. Construction of Statutes with Respect to Culpability Requirements. Mr. Paillette pointed out that there was some renumbering of the sections but basically they are the same as P.D. No. 1. Although at the last meeting, he noted, it really wasn't discussed to any great extent.

Chairman Burns read the paragraph beginning under section 3, subsection (1),"If a statute defining a crime prescribes a culpable mental state but does not specify the element to which it applies, the prescribed culpable mental state applies to each material element of the crime that necessarily requires a culpable mental state." He felt that part was at variance from P.D. No. 2 because it said,". . . a culpable mental state applied to each material element. . ." and now we say,". . . each material element that necessarily requires . . .". Mr. Paillette explained that the reason was to make it consistent with the change we made in section 2, and the subcommittee agreed that it was clear.

Chairman Burns continued by reading subsection (2) "Except as provided in subsection (3) of section 2 of this Article, if a statute defining a crime does not prescribe a culpable mental state, culpability is nonetheless required and is established only if a person acts intentionally, knowingly or recklessly."

In other words, Chairman Burns asked, would you have to act intentionally, knowingly or recklessly to be able to act culpably? Mr. Paillette said that that was right and explained further that if the statute defining a crime has nothing in it requiring culpability, this section then would nonetheless require the court to find culpability, unless it were under a statute as provided for in a previous section.

Chairman Burns asked why we even needed a section like this, what is the rationale? Mr. Paillette rationalized that it is really to preclude any implication that because a statute defining a crime might be silent on the question of culpability, that there is going to be any such thing as a strict liability crime. It was determined then, he said, that it would be made absolutely clear that we are going to require culpability as a material element of a crime whether it says so in the statute or not. Mr. Spaulding added, "unless the statute says not." Chairman Burns agreed that this makes sense and asked if this were out of the MPC to which Mr. Paillette replied that it was similar to the MPC. All the codes have sections similar to this, he added, and explained the derivations from the other codes. He said it was the same as section 1 in P.D. No. 1 and quoted that part of the section.

Chairman Burns asked for an example that would demonstrate the need for this particular wording. Mr. Paillette stated that if the statute prescribed recklessness and the evidence showed that the defendant acted intentionally, or knowingly, he would be guilty because he had a greater culpability.

Mr. Spaulding wondered if it wasn't necessary to define what was meant by greater. Actually, he said, recklessly is in a different category than knowingly. It didn't seem to him that it would go in steps. Intentionally is quite different from recklessly, he thought.

Mr. Paillette admitted that it could be, but what he was trying to do was to shorten without repeating each time, and that that was a change from P.D. No. 1 and suggested that the subcommittee may want to make that change.

Mr. Spaulding said he could envision some person making an argument that those words mean different things even though it is quite obvious to us what they mean. In other words, a person could be damned careful and do it knowingly, and with a complete lack of recklessness.

It was the impression of Chairman Burns that it was anomalous to say that recklessly is a lesser included element than intentionally. But, he

asked, is that what you are trying to say it is now? Mr. Paillette agreed that that was the idea, but that it was more explicit in the previous draft because it spelled out in P.D. No. 1, p. 2, Section 3, subsection (2), "If the definition of a crime prescribes criminal negligence culpable mental state is also established if a person acts intentionally, knowingly or recklessly. When recklessness suffices to establish a culpable mental state it is also established if a person acts intentionally or knowingly. When acting knowingly suffices to establish a culpable mental state, it is also established that a person acts intentionally." So, he commented, that is what he was trying to say in a simplified version, but admitted that perhaps "greater" is not the right word to use.

Chairman Burns asked if this was a good idea as a matter of policy, if for example, you have a traffic offense, namely homicide, how would you fit it in.

There would be no defense to a homicide case, said Mr. Spaulding, if a person said he did it on purpose. It wouldn't under existing law, Chairman Burns noted. In fact, it might be murder or assault with a dangerous weapon. Would enactment of this kind of a statute prevent a district attorney from filing a murder charge in an appropriate case, he wondered.

Justice Sloan commented that it sounds like what this is trying to do, is the reverse of a lesser included offense. In other words, if a person proves a greater included offense, he has established the necessary element. Mr. Paillette asked if he thought that was good or bad. He replied that he was not sure, but wondered if it was necessary. And, he added, as Mr. Spaulding said, if you have a man charged with something that requires a reckless conduct, you can't conceive of anyone defending on the ground that it wasn't reckless, that it was intentional. He assumed it would avoid some pleas of variance where you have a person charged with a crime he didn't commit.

Mr. Paillette informed the subcommittee that the language that Professor Arthur has in P.D. No. 1 is identical to the MPC.

Justice Sloan said that it seemed to him that there are cases where in order to get a new trial on appeal, it is argued that if the person were guilty at all, he was guilty of a greater offense.

Chairman Burns admitted that it was difficult for him to see what the intention is in subsection (3). However, he would agree that the observation that Mr. Spaulding made is valid and if we are going to say this perhaps we ought to say just exactly what we mean to say, and use the language that we had in P.D. No. 1 and take it verbatim out of the MPC which was shown on page 11 of the blue sheet in P.D. No. 1, subsection (5). He asked the committee's opinion on this.

He observed that the subcommittee might not think it necessary since the legislative history on this case certainly shows what our intent is. Mr. Spaulding doubted the necessity of substituting it.

Mr. Paillette was asked if he could defend its inclusion. He said that he didn't think it was essential to the draft, but at the same time, when Professor Arthur first drafted it he felt that it should be included and, of course, he was relying on the MPC approach to this at the time.

Justice Sloan wondered if in the lesser included offenses, if you might have a person charged with manslaughter and he set about proving that if he was guilty of anything, he was guilty of first or second degree. He questioned whether or not the word "greater" connotes what it is the subcommittee is intending to say. It would seem to him that it would, he added. Mr. Spaulding said it was suggestive of what we are saying, that we know what we are saying, but that it doesn't really say it, because, he contended, knowingly isn't greater than anything, isn't greater recklessness. It is a more serious thing and a more culpable thing but it isn't more recklessly. Justice Sloan and Chairman Burns agreed that this is precisely the point.

Representative Graham asked for clarification. He said that as he understood it, we set up culpability as being these three elements -- intentionally, knowingly and recklessly -- and any one, or all of them, constitutes culpability, is that not correct? "But not for every crime", Mr. Spaulding replied. Then, Representative Graham asked, as the different crimes are set out they include one of those elements and what we are trying to say is that proving one of them also proves the other two, for any lesser offense.

Chairman Burns indicated that that was correct, that what we are saying here is that assuming that you have a given fact situation and the culpability required is of the least degree, that is recklessness, let the proof that is introduced at that trial show not that the defendant is guilty of recklessly acting but that he is guilty of the highest degree of culpability, that is intentionally acting. Now, he said, there would be a variance between the pleading and the proof. We didn't prove that he was reckless, we proved that he was intentional. He explained further by saying that what we are trying to do is to say notwithstanding that even if we prove that he acted intentionally, that would suffice to find him guilty of recklessness, the least degree.

Representative Graham offered that it seemed to him that the substitution of subsection (2) of Section 3 in the Preliminary Draft No. 1 is probably much better than this and that it seems to have been set up much better. Chairman Burns agreed that it seemed to him to be more concise.

Justice Sloan voiced his opinion that certainly subsection (3) expressed precisely what we are talking about. The only question then, Chairman Burns

observed, is do we need it at all? Mr. Paillette noted that New York doesn't have a comparable section, nor do they say in their commentary why they don't. And, Chairman Burns added, our existing law has no comparable section.

Representative Graham's feeling was that it should be included, but Mr. Spaulding didn't know whether he would agree or not, since he had another question about it. When recklessly suffices to establish an element, such element also is established if a person acts purposely and knowingly. Well then he contended, you might act knowingly and purposely on a completely innocent thing. Mr. Paillette disagreed with this. Under the definition of those terms, the way they define purposely and knowingly, he didn't think it could be on an innocent basis.

Representative Graham moved to substitute subsection (2) of Section 3 of P.D. No. 1 for subsection (3) of section 3 of P.D. No. 3. The motion carried unanimously.

Chairman Burns read subsection (4) "Knowledge that conduct constitutes an offense, or knowledge of the existence, meaning, or application of the statute defining an offense, is not an element of an offense unless the statute clearly so provides." (It means ignorance of the law is not excuse, it was explained.) Representative Graham asked if it really says that. That is the concept, Mr. Spaulding replied, and Representative Graham said he knew that was the concept, but did it really say that?

Both Mr. Spaulding and Chairman Burns said they didn't particularly like the word "clearly" where it says the "statute clearly so provides." Mr. Paillette defended the wording on the basis that you run into a statutory construction problem sometimes, he thought, where the court tries to find by implication what the legislature intended. Mr. Spaulding's opinion was that theoretically, the statute says a definite thing. The court might have trouble arriving at what that is. Chairman Burns stated though, that it was up to the court to make the determination and when the court construes it, then it is clear. Mr. Spaulding agreed, but added, the court is still going to have to construe whether or not it <u>is</u> clear. Chairman Burns agreed that then, there was a problem.

Representative Graham asked if there was any reason why we should have the word "clearly" in the draft. Mr. Spaulding replied that he didn't think so. Representative Graham then moved to strike "clearly" from the draft. First, however, Mr. Spaulding asked to hear what Mr. Paillette had to say further about it.

Mr. Paillette said that if you go on the old axiom that ignorance of the law is no excuse -- that if you're going to require in any given instance, knowledge on the part of the defendant that he is actually violating a statute or that it is an offense -- then he does not think it is being unduly

harsh to the defendant to say,'We are not going to give you an 'out' on something like this," unless the legislature expressly intended it that way.

Chairman Burns asked Mr. Paillette if what he was saying was that knowing that it is an offense isn't an element of the offense unless the statute clearly provides, such as "knowingly receiving stolen property". That wouldn't require knowledge of the statute; it would just require knowledge that the property was stolen, Mr. Paillette stated. Your statute could and should require that he knew the property was stolen, and he said, he is certainly not suggesting that the person should be guilty of receiving stolen property unless he had knowledge. What he is saying, he explained, is that he doesn't have to know that there is a statute which prohibits that kind of activity.

Chairman Burns then asked whether Mr. Paillette wasn't arguing strongly for retention of the word "clearly" and received the reply that he did have some thoughts on it and he did think we should make it abundantly clear that it is really going to be an exception that knowledge of the existence of the statute is ever going to be required.

Justice Sloan suggested consideration of the word "specifically." Chairman Burns suggested then, why not say, "is not an element of an offense unless it is specifically provided by statute" rather than "unless the statute clearly so provides." Mr. Spaulding felt he would be more satisfied with it and Mr. Paillette agreed.

Chairman Burns and Representative Graham commented on the difference between "clearly" and "specifically" and Justice Sloan explained that in our nomenclature, he thought there could be a definite difference. Mr. Spaulding contended that with respect to a "clear and concise" statement of the facts, you can get an accurate statement of the facts that is a hell of a long way from clear and concise.

Chairman Burns then moved that subsect'on (4) of section 3 be amended in the last line after "the" by inserting "same is specifically provided by statute" and the rest of the line deleted. It would now read "...is not an element of an offense unless the same is specifically provided by statute...". There was no opposition and the motion carried.

Mr. Spaulding then moved to adopt all of section 3 as amended and this motion also carried without opposi*ion.

Justice Sloan referred to an earlier question about the word, "offense". He assumed, he said, that when it came to a final editing, and if it appeared that for instance "crime" and "offense" were consistent with the context, that changes would be made then.

Mr. Paillette stated that he had not used these words interchangeably

and that he didn't intend to mean that they were interchangeable. Offense and crime do not mean the same thing, he said.

Chairman Burns then inquired of Mr. Paillette if he were using offense here as applicable to violations but when using crime, however, he is talking about a culpable mental state that isn't a necessary material element of the violation.

Mr. Paillette said that he felt that we would be on safer ground not to limit a statement such as we have there just to crimes. . . There might be more flexibility in the statute, . . if we made it broad enough to include crime and if there should be instances in which you might have some question as to whether an offense was a crime or a violation or something else, then it would still be broad enough to cover it. Our draft on classes of crimes, he continued, says "an offense defined by any statute of this state for which a sentence of imprisonment is authorized is a crime.". So it is only a crime if you can be imprisoned. And then we go on to say,"Crimes are classified as felonies, misdemeanors and petty misdemeanors".

In direct response to Justice Sloan's question, Chairman Burns explained that we are just putting the finishing touches on the probate code and have been going over it for two weeks in Senate Judiciary. This question arose in that Committee and it was determined that Legislative Counsel has an indexing system of some manner and have conformed some generic code and will check this very type of thing. When we have established what our intent is and when this is put into a title, in the final phases Legislative Counsel will be in a position to do that kind of indexing and checking for us under Mr. Paillette's direction, and asked if Mr. Paillette didn't agree.

Mr. Paillette disagreed. He didn't think that they would change a word like that where we have used the word in explicit fashion someplace in the code, certainly not where we have defined the word "crime" and used the term "offense". We've said that there are crimes and there are violations and these make up offenses, so anyplace we use "offense" it is broad enough to include (or go beyond) "crimes." He would say, however, that if we want to say "crimes", he certainly wouldn't object to it, because really we are talking about crimes basically and that is the whole purpose of this culpability draft -- to direct our attention toward crimes and not offenses. He added that perhaps he was just being over cautious. Mr. Spaulding's opinion was that "offenses" is properly used in this draft.

Chairman Burns had a technical question, he said. So far, he stated, we've made only very minor amendments to P.D. No. 3 and he was wondering if in the interest of economy, it would be possible, rather than to go over a nd make a complete new preliminary draft of this, if we just amended the the committee books in the manner in which bills are amended and write them in. He thought this would save some work and the subcommittee agreed that this would be all right.

Section 4. Intoxication. Mr. Paillette advised the subcommittee that we haven't discussed this section at all and directed them to his commentary and the reason why he wanted to present it to the subcommittee. This was discussed in the subcommittee that handled the insanity defense and some of the codes treat this for the purpose of construction of the code as part of their Responsibility sections.

Professor Platt did not, however, include this in his draft. In subcommittee 3, which discussed Insanity, it was decided not to include it in that draft with the understanding that it would be discussed by this subcommittee. There is an existing Oregon statute that covers this with respect to intoxication as no defense except that it may go to the question of the ability to perform a specific intent. He read the provision of ORS 136.400 with respect to voluntary intoxication being no defense. Mr. Paillette remarked that this draft does not change that but goes considerably beyond. He added that it is taken both from the MPC and the Michigan Code but that the real genesis of this section is the MPC. He referred them to P.D. No. 2, p. 8, which sets out the MPC and the Michigan draft on the subject of intoxication.

Chairman Burns observed that Michigan was more liberal than our present law. Our present Oregon law, for all intents and purposes, says voluntary intoxication isn't a defense but evidence may be offered by the defendant to negative an element of the crime charged, so, in fact, the defendant could show that he was drunk and thereby negative specific intent. Mr. Paillette repeated that this draft does not change that. We have framed it in terms of intoxication which we define and we define self-induced intoxication as voluntary intoxication.

Chairman Burns wanted to know why we say self-induced intoxication rather than voluntary intoxication. Mr. Paillette expressed his belief that it seemed clearer. He also explained what was meant by pathological intoxication, which is saying that a person gets drunker than he should on the same amount of the intoxicant but doesn't realize he is susceptible to this condition.

Under subsection (2), we really say what is said in our present Oregon statute, 136.400. This language was discussed in the subcommittee studying the insanity defense by the psychiatrist who appeared at that meeting in January. They expressed the desirability of having something like this in the law to take care of situations in which there is pathological intoxication.

Chairman Burns agreed that it was very important but that his initial reaction to the language and the size of this section renders the subject of intoxication more complicated than it is right now. He thinks that it is going to give the court fits and that we are going to have a multiplicity of opinions on intoxication as a defense and it will not be until then that the law, which now is fairly well settled, becomes clear. It occurs to him that we are getting into a movement taking us more into a black and white area perhaps with respect to insanity and with respect to intoxication, pointing

us in the direction of factual determination of whether or not the person did something. For example, in California in the case of Sirhan Sirhan, is he guilty of murder and then, next, the issue of insanity? He felt that Mr. Paillette would certainly be able to defend his position, but didn't he agree that this opens up the door to a more liberal approach to intoxication defense?

Mr. Paillette agreed that it does, but only in those cases where it is either (1) pathological intoxication, or (2) it is not self-induced, and those are going to be, it seemed to him, extremely rare instances. Representative Graham agreed that he could think of instances where this could be the case, but certainly not generally.

Justice Sloan said in many cases it could be used as a defense and even though juries might not buy it, that jury might be hung up on how drunk the fellow was and what caused him to get drunk. He might, for instance, claim that he took an aspirin before he went to the party and he didn't know that aspirin mixed with alcohol would cause him to black out after one or two drinks. Representative Graham added that a couple of cold tablets might do it too.

Chairman Burns wondered if by the use of the words "pathological intoxication" the defense attorney argues that is a good defense and because it sounds great, the jury is confused. Representative Graham asked if it wouldn't be simpler to say as stated earlier that intoxication is no defense and then state that except when it is not self-induced.

Chairman Burns felt that "voluntary" is better than "self-induced". He referred to p. 9 of the blue sheets in P.D. No. 2, New York Revised Penal Law, Section 15.25, and said he thought that "voluntary" could just be substituted as the first word in that line. "Voluntary intoxication is not as such a defense to criminal charge but in any prosecution for a defense, intoxication of the defendant may be offered by the defendant wherever it is relative to negative an element of the crime charged." It would permit a defendant -- even though voluntarily intoxicated -- to assert intoxication as a defense if he could show that it would negative the specific intent to a crime and retains existing law, he stated.

Justice Sloan suggested it would seem to him that there would be nothing wrong in the court permitting a defense of this so-called pathological intoxication, where it was an appropriate defense without a specific statute. Representative Graham said he did not see how the court could allow it, if it was drafted as Chairman Burns recommends.

Justice Sloan cited a hypothetical situation where a doctor prescribes some medication and there is evidence that he does not inform his patient

that if he takes one of these pills and has a drink he could have a dangerous reaction, and in the process he commits some offense. This is not voluntary intoxication so it would seem to him that this would be a permissable defense on this type of claim. Representative Graham agreed with Justice Sloan. Actually, he said, it would be self-induced, but there is a vast difference between voluntary and self-induced and Mr. Spaulding agreed with this. They both agreed that voluntary could be used.

Chairman Burns requested Mr. Paillette's opinion with respect to language similar to New York, Section 15.25 with the exception of inserting "voluntary" in front of "intoxication". It bothered Mr. Paillette to put "voluntary" in the section. Does that mean, he asked, that if it is involuntary that it can't be used to negative an element? If it is involuntary it could be used, Chairman Burns replied. What we are saying here is that voluntary intoxication is not a defense and there have been morals cases where there was involuntary intoxication involved and it was certainly used legitimately as a defense.

Chairman Burns was a little disturbed by the definition of intoxication in subsection (a). He read,"'Intoxication' means a disturbance of mental or physical capacities resulting from the introduction of substances into the body." He suggested that if you took one drink, there could be a disturbance of mental or physical capacities, but the law presently has a different concept of intoxication. He thought the case was clearly defined. We talk about being in a state of intoxication on a public street as opposed to the crime of being under the influence of intoxication. This new definition is going to create problems because, for example, I am going to claim and I am going to be able to show that I have had a couple of drinks, and my expert witnesses are going to be able to testify that those drinks have caused a disturbance of my mental capacities, and I can see where I could assert intoxication as a defense and take it up on the technicality of it all.

He asked Mr. Spaulding if he didn't think we might be into trouble by trying to get a definition of intoxication. Mr. Spaulding replied that he did, that we are likely to get into trouble by trying to get a statutory definition of intoxication. He thought we might do like we have in the "driving while intoxicated" or "while under the influence" but presumptively, intoxicated for the purpose of a particular situation is no doubt an accurate medical definition but does it fit the legal concept, he asked. He said he didn't think so.

It was also brought out that when we are talking now about introduction of substances into the body, it goes beyond alcohol; of drugs, for example, but the emphasis is on the result that is produced by the substance and not the substance itself.

Chairman Burns' feeling was that he would not define intoxication. He thought it was clearly defined in the case law and he felt that if we were to adopt the New York definition it would make the Supreme Court's task much easier in construing any possible objections that might be raised under our new code. He also thought it was sufficiently close to present Oregon code and that there won't be any great effort made to hand up some case on an intoxication defense. He did think, however, that it would legitimately permit a person to use involuntary intoxication for a defense or to be able to use voluntary intoxication as a defense if the evidence would show that he was so drunk that he couldn't form a specific intent. He thought probably the District Attorney's Association will have something to say on that, but a person who is so drunk that he can't form a specific opinion should not be charged for having such intent.

Mr. Paillette didn't feel the district attorneys would object to that because it really isn't much different from what we have now and didn't think they now have much trouble under ORS 136.400.

Chairman Burns said he was not personally in favor of putting everything into the statutes because the statutes are going to last a lot longer, hopefully, than the cases, and he felt that they should have a sufficient amount of flexibility to endure. And, he added, he was not sure that the verbiage in section 4 of P.D. No. 3 would endure very long before somebody would start trying to change it.

It was agreed that the subcommittee was in favor of striking the definition of intoxication and Representative Graham then moved that Section 4 be stricken and we adopt Section 15.25 of the New York Revised Penal Law as amended and the motion carried.

Section 5. Ignorance or Mistake. Mr. Paillette admitted to the subcommittee that he had mixed feelings about this section. The last draft didn't even include this section but all of the new codes speak to this question and here again, he said, we are talking about ignorance of the law is no excuse and the old saw that everyone is presumed to know the law which is really a joke when you come right down to it, because nobody knows all of the law. This question of ignorance or mistake has been written about and discussed for a good number of years now; all of the case books in the law schools talk about this.

Professor Hall is very critical of this in his treatises on the criminal law and on culpability. He is very critical of not having this kind of provision and feels that there are instances, justifiably, where ignorance of the law is and should be an excuse.

Attention was called to the California discussion on this which had been passed out to the subcommittee, California T.D. No. 2, on Ignorance or Mistake.

Mr. Paillette further explained his position that he was not necessarily promoting this section, but did feel that the subcommittee should be aware of the discussion that has taken place on it and what the California drafters thought about it. He added that California, New York, Michigan, Illinois and the MPC all have sections on this question. He said he could find no Oregon cases on record where ignorance of the law was used as a defense.

Chairman Burns agreed with the last two sentences of the commentary on p. 7 of Section 5 of P.D. No. 3 which say,"An attempt to establish statutory guidelines for this kind of case might well create more problems than it solves by opening the door to spurious defenses based on technicalities. Such a situation seems best left to the sound judgment of the prosecutors and courts of this state." He was pleased that it had been brought up and discussed, but he said he would be amenable to a motion to delete it and, as Mr. Paillette indicated, the ignorance or mistake that supports a defense of justification will be taken care of in that Article.

It was moved by Representative Graham to delete Section 5 and the motion carried. Mr. Spaulding moved to adopt P.D. No. 3 as amended and that motion also carried.

Amendments to Forgery and Related Offenses. The subcommittee moved on to consider the amendments proposed by the Commission at its meeting on February 22. Mr. Paillette told the members that the main thing we need to discuss is the section on bad checks. He explained that they have prepared amendments similar to amending a bill to point out the changes in this without redoing the whole draft. There is some restructuring of the draft because some of the sections were deleted by the Commission. He suggested that the subcommittee use their copies of P.D. No. 2 as they discuss the amendments.

Chairman Burns reminded the members that they had gone through Forgery in detail in the Commission meeting on February 22. Therefore, he thought it would help in connection with the recommended amendments if they would refer to the appropriate pages in the minutes where these proposals were discussed. Mr. Paillette noted that p. 13 of the Commission minutes had the discussion on this subject.

Section 3. Forgery in the first degree reflects the first change. In the first draft of P.D. No. 2, Section 3 had a subsection (5) with respect to a written instrument officially issued; the Commission voted to delete that. He read from the minutes on p. 13, "Judge Burns moved to delete subsection (5) of Section 3 and to have the commentary appropriately show that it is not the intent of the Commission to say that it does not constitute a crime but rather that those acts would come under Section 2 of Forgery in the second degree. The motion carried unanimously."

Chairman Burns moved that the amendment e. deleting subsection (5) of Section 3 be approved and the motion carried.

The second amendment -- on p. 10, delete Section 4 -- was recalled as the point where forged prescriptions were discussed. Mr. Paillette referred the subcommittee to p. 18 of the minutes which he said covered most of these amendments, and the subcommittee reviewed those sections of the minutes that referred to the suggestions for amendments. Sections 4, 5 and 6 are all possession type crimes and the Commission voted to delete those with the assumption that they felt it would be an incomplete criminal conduct that would amount to an attempt under the Inchoate Crimes and that is what Proffesor Platt felt too.

Chairman Burns asked for clarification as to the intent of the Commission with respect to procedure. Did the full Commission vote to take this action, and then ask that it come back to this subcommittee for review or did they take the action with finality? Mr. Paillette said that it was his understanding that with respect to these deletions, it was the action of the Commission and that they were not sent back for further consideration by the subcommittee. Chairman Burns then remarked that it was superfluous for us to act on them now.

But, Mr. Paillette pointed out, he had to set it out this way so the subcommittee could see what the draft is going to look like when we discuss these other sections, although no action is required now. He wanted the members to know why these sections have been renumbered. Actually, he added, the two areas that were really sent back for redrafting were Sections 11, which appears now as Section 8 - Negotiating a bad check, and the question of forged prescriptions. He had written, he said, to the Oregon State Medical Association and to the Pharmaceutical Association to inquire whether they have any point of view on the question of forged prescriptions and he has not heard from either of them, although it has been about a month since he wrote them.

Chairman Burns thought that perhaps we should go ahead with a decision and that there would be plenty of time for them to come in later when we publish the first draft if they were interested.

Mr. Paillette reminded the subcommittee that there need be no action on this however; that only the section on forged prescriptions had to be discussed.

Chairman Burns asked what about negotiating a bad check. Mr. Paillette replied that these are recommendations of the Commission but that in this particular instance they sent it back for reconsideration also.

Chairman Burns asked then if section 11 on p. 30 of P.D. No. 2 has to be considered by the subcommittee and Mr. Paillette agreed that it did.

On p. 36 of the minutes, he said, it says that the proposed draft of the amendments would go back to the subcommittee for redrafting incorporating the Commission's policy decision to limit the language more than it was in the first draft to make it clear that we are talking primarily about the checks and sight drafts. Also, there was a discussion about the waiting time.

On p. 35 of the minutes, the new language proposed for section 11, subsection (1) now reads,"A person commits the crime ...knowing that it will not be honored by the drawee.". That is what we now have under Section 8, subsection (1) of the amendments. This language has been modified somewhat in accordance with Chairman Burns' suggestion from the last meeting that the language be adapted to the MPC.

Chairman Burns asked where the part of subsection (2) "unless the check or order is postdated" came from and Mr. Paillette replied that it was from the MPC. Chairman Burns then asked if it is appropriate to say in this subsection that not only for purposes of this section, but in any prosecution for theft committed by means of a bad check, and extend it beyond the scope of this section?

The directive that he was given, Mr. Paillette replied, was to use the language of the MPC and change it only for purposes of structuring it to our drafting techniques.

The question here, then is to determine whether Mr. Paillette said what he should have said under the policy decision from the Commission and Chairman Burns felt that it had been drafted properly. He felt it was appropriate to entertain a motion to adopt the amendments in the forgery section and Representative Graham made a motion to that effect. The motion carried.

Mr. Paillette questioned the subcommittee about whether or not there should be some more discussion of forged prescriptions.

Chairman Burns said he had raised some questions both in subcommittee meetings and full Commission meetings about the desirability of having a specific statutory provision for the crime of presenting a forged prescription.

Mr. Paillette explained that under the narcotics and the dangerous drug acts, forging prescriptions for either of those classes of drugs is a crime. There isn't anything in those codes that cover just routine prescriptions for other drugs and that was the basis for the discussion in the Commission meeting -- whether or not there was a policy reason for including that as a separate crime. He thought that an argument could be made

that, even without specifically setting out forgery of prescriptions (as New York does, making a higher degree of the crime), under our definition of a written instrument, presenting a forged prescription could amount to forgery in the second degree if you could prove intent to injure or defraud. The question, of course, would be whether getting a forged prescription filled would be either injuring or defrauding somebody. You are deceiving someone but, perhaps, not injuring or defrauding them, he concluded.

Chairman Burns thought perhaps we should let it be handled in the medical practice inasmuch as Mr. Paillette had advised the medical and pharmaceutical associations that we are considering a forgery revision in the Commission and that the question had come up with respect to making a separate provision to cover forged prescriptions. He had also sent them copies of the New York Penal Law so they could examine it and make any recommendations or suggestions they might have to the Commission. He asked the members for their opinion of the problem.

Justice Sloan assumed, he said, that with the use of more tranquilizers, and the "Pill", there are medicines available that kids might want to get but that the medical profession or the pharmacists might want to restrict, but it seemed to him that it would be up to them to determine if this is a problem.

Chairman Burns suggested that we not recommend a specific crime for forged prescriptions.

With no further business, the meeting was adjourned.

Respectfully submitted,

Connie Wood,
Criminal Law Revision Commission