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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Sixteenth Meeting, June 13, 1969

Members Present: Chairman John Burns
Mr. Robert Chandler
Representative Douglas Graham
Mr. Bruce Spaulding

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

The meeting was called to order by Chairman Burns at 1:00 p.m., Room 315, Capitol Building, Salem, Oregon.

The minutes of the meeting of April 18 were approved.

Mr. Paillette passed out copies of Sentencing Alternatives and Procedures, an approved draft prepared by the American Bar Association Project on Minimum Standards for Criminal Justice. He advised the subcommittee that he had purchased copies for each member of the Commission. He anticipates, he added, that by the end of August, the Commission will be getting into sentencing and he wanted to make these available now so that members might have an opportunity to look through them.

Chairman Burns asked about the other subcommittees and what they were working on now.

Mr. Paillette answered that each of the other two subcommittees have met this month. Subcommittee No. 2 met this week and had gone through the first draft on Bribery and Related Offenses. Subcommittee No. 3, at their last meeting, went over Responsibility again and that draft will be ready for the Commission as soon as George Platt is able to prepare some amendments.

Chairman Burns said that before conclusion today, he wants to discuss setting up a regular meeting day for this subcommittee.

Mr. Paillette mentioned that several weeks ago he sent out a tentative outline of the entire proposed code along with a series of recap sheets which lists a current history of each of the drafts. He added that we will maintain one of these recap sheets on each draft hereafter. The outline of the code was to give the Commission an idea of what it will look like when finished, he said.

Parties to Crime

Section 1. Criminal liability based upon conduct.

Chairman Burns questioned Mr. Paillette about the draft. He said that as he read it, the draft applied to both misdemeanors and felonies, which would be a departure from present law.

Mr. Paillette explained that this really wasn't the case where principals are concerned, since we are talking about accessories before the fact, which under our present statutes no longer exist. The present statute, he said, defines accessory, but is limited to accessory after the commission of a felony. In ORS 161.230, accessories are defined as "All persons are accessories who, after the commission of any felony, conceal or aid the offender, with knowledge that he has committed a felony, and with intent that he may avoid or escape from arrest, trial, conviction or punishment.". Also, Mr. Paillette continued, ORS 161.210 provides that there are no accessories to misdemeanors. We are talking about accessories after the fact, not principals, so he didn't think this was changing anything. He thought it would certainly be uncommon to see someone prosecuted under our present statute for a misdemeanor on the basis of being an accomplice although there is nothing in our law that prohibits this. He didn't feel that this would be changing the law with respect to misdemeanors.

Mr. Spaulding didn't think so either and Mr. Chandler and Chairman Burns all agreed that it was all right.

Mr. Paillette continued by pointing out that this draft has seven sections and that nowhere are the words "principal" or "accessory" used. It does not cover accessories after the fact. That will be covered under Interference with Administration of Justice since this will be conduct that would take place after the commission of a crime. Principals after the fact will still be covered by the revision. The commentary indicates that we are not intending to change the law. As you know, Mr. Paillette stated, under common law there were distinctions made between accessory before the fact, accessory after the fact and principals. Of course, our statute changed that years ago. In fact, most states have now by statute or by case law abrogated any distinction between principals and accessories. That has not been changed, although we don't use those terms. We talk in terms of criminal liability. The draft on Parties to Crimes complements the Culpability draft worked on by this subcommittee. In a sense, he added, we are talking about culpability here, but we are setting out the basis of your liability, not only for your own conduct but for that of another person. The first section says then, that a person is guilty of a crime if it is committed by his own conduct or by the conduct of another person for which he is criminally liable, or both.

Mr. Chandler thought that perhaps it could be said a little smoother to say, "A person is guilty of a crime if he commits it or if it is committed by another person for whose conduct he is criminally liable."

Mr. Spaulding said that after re-examination, he finally decided it was all right.

Chairman Burns suggested that it could say, "A person is guilty of a crime if committed by him or committed by another person."

Mr. Paillette thought that the term conduct should be left because, he reminded, conduct is a term we have defined in Culpability as meaning "an act or omission and its accompanying mental state." This is very close, he continued, to the Model Penal Code, except that it seemed to him, since we are talking about criminal liability, the term "criminally liable" was more appropriate than "legally accountable."

Mr. Chandler asked if there was any explanation in the MPC as to why they use "legally accountable."

Mr. Paillette answered that there was none but that their headline of this section is "Liability for Conduct of Another." He pointed out that Michigan uses "legally accountable" without explanation while New York uses "criminally liable."

Mr. Spaulding said that a person might be legally accountable for certain conduct, but not criminally liable.

Mr. Paillette agreed, and said that it seemed to be more precise to use the term "criminally liable."

Mr. Spaulding agreed that it did.

Chairman Burns asked if we have defined the term "criminally liable."

Mr. Paillette replied that it was defined in section 2, where the circumstances under which a person is criminally liable is stated.

Chairman Burns wondered if the rationale for the term "of the conduct of another person for which he is criminally liable" is suggested by the case cited of a person who owns a tavern and whose bartender sells liquor to a minor.

Mr. Paillette replied that this would be one example of an instance where he is made liable because of the wording of the statute.

Chairman Burns then asked for an example where no statute is involved.

Mr. Paillette replied that he would be liable under the provisions of subsection (2) of section 2 if he aids or abets or solicits another person to commit a crime, or if he has a legal duty to attempt to prevent the commission of a crime and fails to do so e.g., our present escape statute, ORS 162.324, which imposes a duty on a guard or police officer to prevent an escape.

Chairman Burns wanted to know if Parties to Crime would follow Culpability in the draft.

Mr. Paillette replied that it would. Chairman Burns then said that he had no objection to approval of section 1.

Representative Graham moved to approve section 1 and the motion carried unanimously.

Section 2. Criminal liability for conduct of another; complicity.

Mr. Paillette explained that this section goes on to say under what circumstances a person would be criminally liable for the conduct of another. It provides -- and this would be looking toward future statutes, he noted -- a strict liability approach. As with Culpability, which was discussed earlier, he noted, we want to make it clear that as a matter of policy we are not advocating strict liability for most crimes, but at the same time we recognize that there may be instances in which the legislature may want to impose strict liability. So this is really another way of saying that within the context of this draft, and if the statute so provides, there would be liability.

Mr. Spaulding wondered why it was necessary to say it twice, once in the statute which so provides, and again here.

Mr. Paillette answered that it was a question of maintaining continuity through the Articles by avoiding inconsistencies between this and the Culpability draft. He pointed out that we are talking here about criminal liability i.e., being susceptible to punishment or prosecution for commission of a crime rather than the culpable mental state required to commit the crime.

Chairman Burns then asked if the reason for its inclusion was more structural than substantive.

Mr. Paillette explained that although culpability and liability are interrelated, they are not the same. Liability might exist on the basis of a statute, in the absence of culpability.

Mr. Chandler asked about section 2 subsection (c). He wondered who has a legal duty to prevent the commission of a crime.

Mr. Spaulding replied that a guard at the penitentiary has a legal duty to prevent the commission of a crime.

Mr. Chandler then asked if a citizen observing a crime or having knowledge of a crime about to be committed has any duty to prevent it.

Mr. Spaulding noted that unless there is a statute making him liable, he would not ordinarily be expected to prevent it.

Mr. Paillette cited the possibility of a police officer commanding the assistance of another, and noted that we presently have a statute which provides that a peace officer can command a civilian to assist and that the civilian is criminally liable if he refuses.

Chairman Burns asked what would happen if there were a city ordinance which made it a violation to leave the keys in your car and a person did leave his keys in his car, which resulted in someone taking the car, driving to Idaho, and ending up being charged with grand larceny. Through a strict interpretation of this section, he asked, could the person leaving his key in the car be charged with complicity.

Mr. Paillette replied that he could not be charged.

Chairman Burns asked if the owner of the car had a legal duty to prevent the commission of the crime.

Mr. Chandler mentioned the Brudos case where Brudos is alleged to have been picking up girls and then killing them. In one case, Brudos is said to have picked up a girl in Portland and brought her to his home in Salem. As he drove into the driveway his wife told him that dinner was ready, so he left the girl tied in the car, went in and ate dinner, and then came back out and killed her. Mr. Chandler thought that his wife certainly had some knowledge of what he was about to do in view of his past actions. He wondered if, knowing what had happened in the past and what Brudos had in mind, Mrs. Brudos did not have a legal duty at this point to phone the police or make some effort to prevent the crime.

Mr. Spaulding said there had been a recent case in Portland where a mother was charged with manslaughter for not taking care of her child and letting him die. This was a little different, he said, but basically it raised the same question that Mr. Chandler presented.

Chairman Burns cited a more recent case where a mother was convicted of statutory rape. Her boyfriend had been intimate with her child where there was evidence that the mother knew it and did nothing to stop it.

Mr. Spaulding didn't think that in the Brudos case the wife would be criminally liable. However, he added, it is hard to draw the line between that case and the mother failing to give her child what he needs to stay alive.

Mr. Paillette had a case of manslaughter by neglect in Lane County about four years ago, he recalled, where they prosecuted both the father and the mother. The father's defense was that he didn't participate in the neglect, but they were able to show that he had knowledge that the mother was not taking care of the child and providing the necessary food and shelter for the child. The child contracted pneumonia, aggravated by malnutrition, and died. Although he was a passive participant, the father knew about the situation. Subsequently, both the mother and father were convicted.

Mr. Chandler said that it seemed to him that this was the kind of conduct which particularly outrages public decency i.e., where parents are involved in neglect of their children. He mentioned again the Brudos case, in which he said we may find that this man was one of the great murderers of all time. He felt that where a person has knowledge of a situation such as this, whether or not they are conspirators or co-conspirators, they have some criminal liability.

Mr. Spaulding said that Mrs. Brudos would come very close to falling into this category under the facts stated by Mr. Chandler, but he still didn't see how she could be charged.

Chairman Burns reminded the subcommittee that conspiracy had always required an overt act or an agreement of some sort.

Mr. Spaulding agreed. In the case of Mrs. Brudos, he said, there was no agreement, just knowledge.

Mr. Chandler said he understood there was no assistance on her part.

Chairman Burns questioned Mr. Paillette about his case in Lane County where he got it to the jury on the basis that the father knew about the situation. He wondered why that case required no overt act.

Mr. Paillette replied that it was because the father knew and made no attempt to do anything about it.

Representative Graham asked if this were not the "omission of the act" which we have already defined.

Chairman Burns assumed that under those conditions, Mrs. Brudos would be guilty. The draft might change her liability, he said, because if you had to determine her culpability within the framework of section 2, you could not show that she aided or abetted in any way.

Representative Graham thought subsection (2)(c) was applicable in that case, because he understood the Culpability draft to say that the omission of the act was sufficient.

Mr. Spaulding answered that the Culpability draft said that the omission of an act that one has a legal duty to perform is culpable conduct, which is a little different, he felt.

Mr. Paillette explained that under Culpability we were talking about the actor's own conduct or omission; here we are talking about liability for the conduct of another.

Mr. Chandler wondered under what circumstances a wife or husband would ever be liable for the other's conduct.

Mr. Paillette answered that there were definitely cases such as the rape case which Chairman Burns mentioned. Michigan cited an 1886 case, he said, where a husband wanted grounds for a divorce. In attempting to get his wife into a situation where she would commit adultery,he hired a man to commit adultery with her. She wouldn't cooperate, however, and the man raped her. The husband was aware of the situation, since he was in the next room, but made no effort to come to the aid of his wife. The court found that he had an affirmative duty to come to his wife's aid and that his failure to do so made him criminally liable for the conduct of the man who raped her. Mr. Paillette concluded by saying he was not certain whether we can answer these questions about exactly where the legal duty lies.

Mr. Spaulding asked whether we were not creating a situation where a person might be guilty of a crime because of this provision, where otherwise he would not be. If so, hadn't we ought to know what his legal duty is.

Mr. Chandler asked if there was an affirmative duty on anyone to report his knowledge that a crime is being committed or is about to be committed.

Neither Chairman Burns nor Mr. Spaulding knew of any such duty,they said.

Mr. Paillette said that there was no statutory law that he was aware of, but added that you have to look at each situation and each defendant in relation to the victim of the crime. In some instances, he said, certainly with a parent-child relationship, it is not too difficult to find a legal duty.

Mr. Spaulding reported that he had gone into that sort of thing very carefully and thoroughly in the old "goon" cases where officers of the Teamsters Union knew that a mill was going to be burned down and didn't tell anybody about it. As a matter of fact, he continued, they had a couple of guys in jail who knew all of the details about it but the judge released them. In that case, he said, they could not come up with a theory to prosecute, even though they definitely should have been prosecuted. In fact, he added, Dave Beck hasn't come into Oregon since then because he is not sure there isn't a secret indictment out for him. The reason there isn't, he said, is just the thing we were talking about. He knew all about the crime and we could prove that he knew it was going to occur, but that was all we could prove.

Representative Graham said that since Oregon did not have a statute requiring a person to prevent a crime, did any state have such a requirement i.e., to take reasonable measures to prevent a crime and report it.

Mr. Paillette replied that the Model Penal Code has this provision in section 2.06 (3) which says, "A person is an accomplice of another person in the commission of an offense if...having a legal duty to prevent the commission of the offense, fails to make proper effort so to do."

Chairman Burns suggested that the subcommittee consider section 2 and the subsections under it in order. He noted that section 2, by stating, "A person is criminally liable for the conduct of another person constituting a crime if: (1) he is made criminally liable by the statute defining the crime..." makes subsection (1) really moot. He thought Mr. Spaulding had raised a good point, although perhaps it had been answered. He asked if the subcommittee agreed that subsection (1) was acceptable notwithstanding Mr. Spaulding's point that it was redundant.

Mr. Spaulding remarked that he thought Mr. Paillette's rationale was reasonable, because we are covering the full meaning of criminal liability for another's conduct.

Chairman Burns asked Mr. Paillette where he got the language, "promote or facilitate" in subsection (2), which says, "With the intent to promote or facilitate the commission of the crime."

Mr. Paillette replied that it came from the Model Penal Code. He thought that it was important when we talk of solicitation to keep in mind the Inchoate Crimes provisions. He said his commentary related to George Platt's commentary on Inchoate Crimes which is now in subcommittee No. 3. "Solicitation", he said, as shown in his commentary, has the same meaning for the purposes of this section as that proposed in the Inchoate Crimes Article. He then read George Platt's definition of "solicitation": "A person commits the crime of solicitation if with the purpose of causing another to engage in specific conduct constituting a crime or an attempt to commit such crime he commands or solicits such other person to engage in that conduct."

Chairman Burns asked if anyone had a quarrel with "promote or facilitate", since by reason of its wording it seems to stop after the crime is committed, with no accessory after the fact.

Mr. Paillette explained that accessory after the fact will be covered under Interference with the Administration of Justice.

Chairman Burns said that that cleared the question he had. He then went on to subsection (2)(a), "Solicits or commands such other person to commit the crime", which the committee approved, and subsection (b), "Aids or abets or agrees to aid or abet such other person in planning or committing the crime." He wondered if Mrs. Brudos' situation would apply here by the use of the word "agrees." Suppose, he said, she sees the girl tied up in the car and she takes no overt action. She has knowledge and her agreement is implied by her refusal to make any effort to report it to the police.

Mr. Spaulding agreed, he said, because an agreement is implied by her previous conduct, as a result of which her husband knew that she would not call the police.

Chairman Burns observed that use of the language here was in accord with present law.

Mr. Paillette agreed. "Aids or abets", he said, is defined by case law. The courts have given it a fairly fixed meaning and it seemed to him that although it is old language, it is language that should be retained in the law of accomplices.

Chairman Burns asked why we didn't use the term "perpetration", rather than "planning or committing" in subsection (2)(b).

Mr. Spaulding replied that the draft language would make a person guilty if the crime was planned but never perpetrated.

Chairman Burns agreed that that was proper.

Mr. Spaulding wondered, however, if we really wanted to go that far.

Mr. Paillette explained that if a crime is planned and doesn't go any further, it would amount to an attempt, or at least to a solicitation, depending on the conduct of the parties. In that case you are talking about incomplete conduct as a criminal conspiracy, or a solicitation where "A" solicits "B" to commit a crime but "B" doesn't commit it. In this draft on Parties to Crime we are talking about completed criminal conduct.

Mr. Spaulding contended that we are saying here that he is liable for the conduct of another if, with intent to promote or facilitate the crime, he aids or abets somebody else in its planning.

Mr. Paillette directed the subcommittee to the first sentence which says, "A person is liable for the conduct of another person constituting a crime..." If the crime hasn't been committed, he added, he might be liable under Inchoate Crimes for an attempt.

Mr. Spaulding then agreed that the term "constituting a crime" disposes of that question.

Mr. Paillette then referred the subcommittee to page 5 of the draft where, in the second paragraph, he set out the Oregon cases defining "aids" and "abets." State v. Rosser was the case Mr. Spaulding mentioned earlier about the mill fire. In that case, he continued, they talk about one who advises, counsels, procures or encourages another to commit a crime. In State v. Start, "abet" is defined as meaning to countenance, assist, give aid, and includes knowledge of the wrongful purpose of the perpetrator, and the giving of counsel and encouragement in the crime.

Mr. Chandler asked then if countenancing becomes aiding and abetting.

Mr. Paillette replied affirmatively.

Chairman Burns wanted to know why, since we are going to have a separate section on attempts, do we here say, "attempts to aid or abet."

Mr. Paillette explained that in the attempt section, we are dealing with conduct that falls short of committing the crime. He said he did not know whether the subcommittee had had a chance to read the Inchoate Crimes draft or not but, depending on what the Commission decides, this may turn out to be rather academic. George Platt is proposing that an attempt will be graded the same as the completed crime. He pointed out that this idea isn't novel, being the direction of some of the codes. For the purposes of grading, for example, if you graded "attempted robbery" the same as "robbery" for the purposes of punishment, it wouldn't make much difference to a defendant whether you charged him with an attempt or with the crime itself. But, he continued, for the purposes of comparing the two, we are here talking about completed conduct; where "A" has completed a crime and you are after "B" and "C" for abetting.

Chairman Burns said that he now saw the distinction. He had no problem with subsection (2)(b) personally, and if no one else had, they would move on to subsection (c).

Mr. Spaulding said that he could see what Chairman Burns was talking about, but that he was now satisfied with the provision.

Chairman Burns said that somehow it sort of offends his sense of justice that if a person fails to commit the crime, he would be as guilty as if he had been successful.

Mr. Spaulding replied that if his agent is unsuccessful, a principal is just as guilty as though his agent were successful; he did the best he could in any event.

Chairman Burns said that he had two problems in distinguishing the difference between this section and attempt. For instance, a person is going to commit a crime, but falls short, and so is ultimately charged with attempted robbery. Someone else attempted to help the person commit the crime but was unable to assist for some reason and he, by reason of this language, is guilty as a principal in the first person's attempt. It seemed to him that we are reaching out to drag in the person as a principal who attempted to help.

Mr. Paillette disagreed. He did not think that such a person would be brought in as a principal to an attempt, although he might be prosecuted for a conspiracy.

Representative Graham felt that the man who attempted to help should also be prosecuted.

Mr. Paillette pointed out that he would be liable, it was just a question of what kind of label you would put on it.

Chairman Burns referred to subsection (2)(c) which says, "Having a legal duty to prevent the commission of the crime, fails to make an effort he is legally required to make." The question here, he asked, is are we creating a crime that doesn't exist?

Mr. Chandler said that it was his understanding that unless a person had a specific duty as stated in a statute, he had no legal duty to prevent a crime.

Chairman Burns didn't think the provision would go that far. If that is what is meant, he said, it should designate "statutory" duty because a legal duty can be created by case law. So, he asked, is "statutory" what we mean here?

Mr. Paillette replied that he did not mean to confine it only to "statutory" duty. He did, however, cite the case of the "escape" statute, which is an example of a statutory duty.

Mr. Chandler asked Mr. Paillette to cite an example of where a legal duty did not mean a statutory duty.

Mr. Paillette indicated that the cases of child neglect mentioned previously were cases where the courts have found a legal duty.

Representative Graham wondered if that was sufficient to create a case precedent as a basis for prosecution.

Chairman Burns said he thought so. He did not know whether either of these cases had gone to the Supreme Court. If they have not, he said, it is going to depend on whether it is sufficiently persuasive on the trial court to allow it to go to the jury.

Mr. Chandler cited a hypothetical situation where Mr. Spaulding might be driving from Portland to Salem and a car loaded with machine guns passes him and pulls up in front of the First National Bank in Salem. As an officer of the court, does Mr. Spaulding have a legal duty to report that, he asked.

Mr. Spaulding reported that he would have no duty whatsoever.

Chairman Burns cited another hypothetical situation where Mr. Chandler was driving home and someone obviously drunk passes him, driving 90 miles an hour and weaving all over the road. There is a telephone booth at the side of the road, but he does not stop and avail himself of that phone to call the police. Twenty miles on down the road the drunk driver runs into someone and kills him, making it negligent homicide. Did Mr. Chandler have a legal duty to attempt to prevent that crime, he asked.

The subcommittee agreed that he would have a moral duty but not a legal duty.

Mr. Spaulding commented that a legal duty can arise outside a statute; under a contract, for instance. He questioned whether the subcommittee intended to get into a field other than cases of a statutory duty.

Mr. Paillette reported that there is no common law, case law, or statutory law that imposes upon a private citizen a legal duty to prevent the commission of a crime, and he did not think we would be creating such a duty by this provision.

Mr. Spaulding suggested another case where a lease provides that the person who leases the property will not permit any illegal conduct to occur on the premises. This would create a legal duty for the lessee to prevent such occurrences, he concluded.

Mr. Chandler asked if this was not a civil duty. He said he did not think the District Attorney would prosecute in such a case.

Mr. Spaulding agreed, but warned that we don't want to tell him he can either.

Mr. Chandler returned to the Brudos case and remarked that it seemed to him that under those circumstances, a person who passively observed the conduct is almost as guilty as the person who committed the crime. He said it appeared obvious that at least one other person related to him knew about the criminal conduct almost from the beginning, and he felt that that person was also guilty.

Chairman Burns agreed that that person should be prosecuted. He presumed, he said, that he could be held under subsection (2)(b), but presently that the person would not have a legal duty to prevent the crime.

Mr. Chandler questioned whether she didn't have the intent to help to promote the crime.

Mr. Spaulding called attention to the common law presumption that a wife is under the coercion of her husband and asked if that was still the law?

Mr. Paillette answered that, while it has fallen into disrepute, he thought it was.

Chairman Burns asked the subcommittee if they didn't feel that they had a responsibility to be somewhat conservative and to make their meaning clear. He observed that we are talking about the situation of a police officer who has a statutory duty to prevent the commission of a crime. He felt that if we are talking about something more, we ought to pass a statute making it a legal duty rather than to create some problems here requiring resolution by the Supreme Court. Thus, he favored substituting "statutory duty" for "legal duty."

Mr. Chandler considered what might happen where a company had a blanket bond on all their employes and found that a bookkeeper was embezzling. The terms of the bond require that everyone covered attempt to prevent such conduct from the minute they learn about it and to assist in any prosecution.

Mr. Spaulding asked him if he meant everyone in the company or just the company officials.

Mr. Chandler conceded that a company could not sign a contract that would legally bind all its employes.

Chairman Burns agreed that they would not be legally bound if they were not signatories to the contract.

Mr. Spaulding pointed out that they might be bound if they were on the board and the president signed on behalf of the board but, he cautioned, you could not make it a legal duty for an employe to report a fellow employe. He warned of the danger of totalitarian governments inviting children to turn in their parents and that sort of thing.

Mr. Chandler asked Mr. Spaulding if what he was saying was that if the legislature wants to create a legal duty, let them pass a statute to that effect; otherwise, just confine it to the statutes now in existence or which may later be passed by the legislature.

Mr. Spaulding remarked that this was his intent.

Mr. Chandler agreed with that position. It was less than what he would like, but in view of the possible dangers presented, he would agree to settle somewhere short of perfection.

Representative Graham expressed his opinion that this was far short of perfection. He would like to see this rewritten to the point of striking "legal duty" and saying just "duty" in subsection (2)(c) so that it would read "having a duty to prevent the commission of the crime, fails to make an effort he is legally required to make." In other words, he said, his inclination was to broaden it.

Mr. Paillette suggested that before they make their decision, he would like to read to them the Model Penal Code commentary on this subject. They cite section 2.04(3)(a) which includes this subsection on a legal duty, in stating, "In defining the behavior requisite to establish criminal complicity, the draft is broadest in the case where there is purpose to promote or to facilitate commission of the crime." He pointed out that we are using the same language -- promote or facilitate -- and continued, "It includes not only one who commands, requests, encourages, provokes or aids but also one who agrees or attempts to aid in planning or in execution", commenting that we also have that provision. "It also includes one having a legal duty to prevent a crime who fails to make proper effort so to do. This represents, it is believed, an exhaustive description of the ways in which one may purposely enhance the probability that another will commit a crime. So long as a purpose to further and facilitate is present, there is no risk to innocence; nor does there seem to be occasion to inquire into the precise extent of influence exerted on the ultimate commission of the crime. The inclusion of attempts to aid may go beyond the present law, but attempted complicity ought to be criminal; to distinguish it from effective complicity appears unnecessary when the crime has been committed."

Mr. Chandler asked if Mr. Paillette is saying that in considering subsection (2)(c) with such a fine-tooth comb, we are forgetting the first part of subsection (2) which says, "With the intent to promote or facilitate the commission of the crime."

Mr. Paillette continued reading, "The draft does not confine itself, however, to the case where there is a true purpose to promote or to facilitate commission of the crime. It also reaches those who, with knowledge that such other person was committing or had the purpose of committing the crime, knowingly, substantially facilitated its commission", but that is under their subsection (3)(b) which we didn't adopt, he added. The kind of things they had in mind, he said are: "A lessor rents with knowledge that the premises will be used to establish a bordello." "A vendor sells with knowledge that the subject of the sale will be used in commission of a crime." "A doctor counsels against an abortion but, at the patient's insistence, refers her to a competent abortionist."

Mr. Chandler asked if what we are saying is, in effect, that a person must first have the intent to promote or facilitate the commission of the crime to be involved under subsection (2).

Representative Graham commented that in referring back to the Mrs. Brudos case he would conclude that this subsection would have no effect on her. He asked the other members if that was their interpretation also.

It was agreed that it would not affect Mrs. Brudos.

Representative Graham then commented that that was the reason he would like to broaden it.

Chairman Burns thought that she would be covered under subsection (2)(b) with the word "agrees."

Mr. Chandler added that even though it was passive agreement, she knew what her husband was going to do because he had done this previously.

Chairman Burns asked Mr. Paillette why he felt so strongly that we should have "legal duty" rather than "statutory duty."

Mr. Paillette replied that he felt the subcommittee didn't want to limit it to "statutory duty" because a duty can be imposed in the absence of statutes. For example, these manslaughter by neglect cases, he reminded. There isn't any statutory duty imposed upon a parent to provide for his child with the exception of the "failure to provide support" statute, but there is a natural duty imposed upon a parent to care for a child.

Chairman Burns asked the subcommittee for a vote on section 2. Mr. Chandler moved that section 2 be adopted. The motion carried unanimously.

Section 3. Criminal liability for conduct of another; no defense.

Mr. Paillette explained that this does not change the existing law. There is no statutory law in this area except as to "accessories after the fact", he added. He pointed out that we now have a statute (ORS 161.250) which says, "Accessory punishable though principal not tried. An accessory may be indicted, tried and punished though the principal is not indicted or tried." But, he reminded, it is limited to "accessory", and would not, under the definition of "accessory" in our present law, include the "principal." In the absence of statute, our case law clearly holds that it is no defense that your co-defendant wasn't prosecuted or convicted.

Chairman Burns wondered why it was necessary to include this if it is axiomatic as suggested by Mr. Paillette. He said he knew of no other draft where we have taken pains to set out a defense and he wondered why we do it here.

Both Mr. Chandler and Mr. Paillette reminded him that we have established defenses in other drafts. Mr. Paillette observed that we have done the same thing in Inchoate Crimes. It seemed to him we also have a statement under our Preliminary Draft on Theft on defenses.

Chairman Burns asked once again why Mr. Paillette felt it was necessary to put this in.

Mr. Paillette replied that he felt that as long as we are talking about criminal liability, we should make it comprehensive. He said it was not absolutely required because he thought the courts would so hold regardless of this provision.

Representative Graham asked if the present law stated that an accessory could be convicted even though the principal was not. When informed that it did, he asked if someone could give him an example of how this might apply.

Mr. Spaulding explained that the principal might not be prosecuted because they couldn't find him.

Chairman Burns added that he might have a good lawyer, or might not have been brought to trial yet.

Mr. Chandler gave an example of where he and Representative Graham might be driving down the road intoxicated, and they have an accident in which people are killed, including Graham. In this case the principal would not be available for prosecution.

Mr. Paillette gave another example of where "A" and "B" commit a bank robbery. "B" makes a deal because this is "B's" first job and "A" is a convicted felon with a long record. Perhaps "B" isn't prosecuted and in turn he testifies against "A".

Representative Graham said he was thinking of a case where the principal is acquitted and they go after the accessory.

Mr. Spaulding observed that you would have a tough time convincing a jury to convict if they knew that the principal was acquitted. At the same time, theoretically, it should be proper that every man's case stands on its own merit. Another example, he remarked, is where the principal might have had a defense of insanity.

Representative Graham moved to adopt section 3 and the motion carried.

Section 4. Exemptions to criminal liability for conduct of another.

Mr. Paillette suggested that before moving on into section 4, the subcommittee should discuss the subject of "causation." Courtney Arthur, who prepared the early drafts on Culpability, he said, followed the Model Penal Code, which has a very long and involved section on "causation" under Culpability. The New York approach eliminated most of the highly technical statutory language on the question of "causation." He thought the reason was the many variations making it very difficult to formulate a comprehensive statute. An example, he said, is the classic situation of the old Squibb case where defendant "A" throws an explosive into a crowd of people and "B" kicks it away and "C" kicks it still further and eventually it gets over to "D", blowing up and killing him. Is "A" guilty of murdering "D" or has there been some intervening cause? If so, what kind of cause -- voluntary, involuntary etc. In his opinion, he said, the issue should be raised so that the subcommittee could at least touch upon it. He could point out some of the options that are open if they are inclined to try to formulate some language on "causation." Here again, he pointed out, we have an area where if we don't say anything, the court is going to apply the common law or the case law.

Mr. Chandler expressed his concern that it would be an extremely difficult statute to write. If there is common law and case law, he reasoned, the judges would be able to handle it.

Chairman Burns said it was his feeling that we ought to be as sparse as possible with the words.

Mr. Paillette read from the MPC section 2.03 "Causal Relationship Between Conduct and Result; Divergence Between Result Designed or Contemplated and Actual Result or Between Probable and Actual Result. (1) Conduct is the cause of a result when: (a) it is an antecedent but for which the result in question would not have occurred; and (b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense."

Mr. Paillette said his first thought was to leave it out. He then decided that perhaps the subcommittee should discuss it and if they decided they wanted him to draft something on it, he would. One of the problems with drafting this type of statute, he stated, is what you may leave out. He reviewed some of the classic cases which fill the case books: The defendant had his wife locked up in a room on the third floor and was beating her severely. In order to escape, she jumped out the window and was killed. The issue was whether his conduct was the cause of her death. A man had another man out in a boat and was going to shoot him. In order to escape from being shot, he jumped out of the boat and was drowned.

Mr. Chandler said that if this is the kind of thing we are talking about it would be very difficult to write an understandable statute.

Mr. Paillette pointed out that Michigan has adopted language similar to the MPC section on "causation." New York did not, but does have a one-paragraph section with respect to the innocent agent type of situation where that person is the instrumentality through which the defendant acted, and for one reason or another, perhaps through immaturity, irresponsibility, or insanity, is not criminally liable. New York has put this under their criminal liability section, he said, which is another option open to us. We could draft a similar section along that line without getting into a long and involved discussion about "causation." Of course, he reminded, that touches on "causation." He added that New York places it under defenses similar to the section 3 of this draft. They say in section 20.05 that "it is no defense that such other person is not guilty of the offense in question owing to criminal irresponsibility or other legal incapacity or exemption, or to unawareness of the criminal nature of the conduct in question or of the defendant's criminal purpose or to other factors precluding the mental state required for the commission of the offense in question."

Chairman Burns said that without going any further, his vote would be not to do it.

Mr. Spaulding confirmed that his vote would be the same.

Mr. Paillette then asked if they thought he should put anything in the commentary about why we did not adopt a causation provision, or did the subcommittee think we should just remain silent?

Mr. Spaulding felt the more you said about that kind of theoretical subject, the more you are apt to be misinterpreted.

Chairman Burns agreed. He said he thought he would just omit it. If the question arises, the Supreme Court will have an historical precedent with which to approach it and they won't be encumbered by anything that we may have said here.

Mr. Paillette then moved into section 4 by explaining that it provides that a person is not liable if he is actually a victim of the crime or if the crime is so defined that his conduct is incidental to the crime itself. Under subsection (1) which states "He is the victim of that crime", you have the situation where a victim of a blackmail plot, or the victim in a statutory rape case is not criminally liable for the substantive offense itself, he pointed out. Subsection (2), he continued, says "The crime is so defined that his conduct is necessarily incidental thereto" and the MPC suggests the following examples: Should a man accepting a prostitute's solicitation be guilty of prostitution? Should a woman upon whom an illegal miscarriage is produced be guilty of abortion? We have a decision on the latter point, he continued, in the Barnett case, which says clearly "no."

This becomes important in the context of the testimony of an accomplice, he added. If the individual testifying is an accomplice, you can't get a conviction unless that testimony is corroborated by other evidence. He cited Oregon case authority on this: State v. Knighten (prosecutrix is not an accomplice to statutory rape); State V. Mallory (prosecutrix is not an accomplice to fornication). Some of the language in the Barnett case was right on point and well stated, he thought. He read what the Court said: "It is our opinion that it was not the intention of the legislature by the passage of this statute (ORS 161.220) to make the consent and solicitation of the mother culpable when such actions had not been previously so considered."

Mr. Chandler said he thought that the problem with this type of conduct is that there are places where people are willing to say this constitutes culpability. For instance, the man who gives in to the blackmailer, or the woman who marries a bigamist not knowing what he is. Unless you exempt her, she becomes guilty of bigamy.

Chairman Burns corrected him by saying that the question of intent would have to be considered. If she lacked knowledge, the intent element would be missing.

Mr. Paillette informed the subcommittee that some states have a separate statutory crime to cover the mother in cases of abortion. He also pointed out that the section is drafted to leave an option for the legislature, by saying, "Except as otherwise provided by the statute defining the crime, a person is not criminally liable for conduct of another constituting a crime." For example, he said, if the situation arose where the legislature wanted to impose liability on the type of individual who would normally be thought of as a victim, it would be an exception to this provision.

Chairman Burns recalled that the Legislature had passed a prostitution bill this session in the Senate. (Senator Roberts had voted against it because she felt the man was as guilty as the woman.) But the technical, legal point raised by Mr. Paillette on corroboration of an accomplice's testimony brings this point to mind, he said. Every prostitution arrest is made by a vice officer who pays the woman the money, goes to the room and secures sufficient evidence to make the arrest. He felt that a specific section is needed in that statute excepting the undercover officer; otherwise he could be construed as an accomplice and would not be able to testify.

Mr. Paillette replied that he did not think so, since under section 4, his conduct would be incidental to the crime of prostitution or the crime of solicitation. He read from the MPC commentary, which is the justification for subsection (1), "It seems clear that the victim of a crime should not be held as an accomplice in its perpetration, though his conduct in a sense assists in the commission of the crime. The businessman who yields to the extortion of a racketeer, the parent who pays ransom to the kidnapper, may be unwise or even may be thought immoral; [but] to view them as involved in the commission of the crime confounds the policy embodied in the prohibition; it is laid down, wholly or in part, for their protection. So too, to hold the female an accomplice in a statutory rape upon her person would be inconsistent with the legislative purpose to protect her against her own weakness in consenting, the very theory of the crime."

Chairman Burns asked about the part of subsection (2) which said "is necessarily incidental."

Mr. Spaulding said he did not understand subsection (2).

Mr. Paillette referred them to the MPC commentary which in his opinion, justified subsection (2), "Exclusion of the victim does not wholly meet the problems that arise. Should a woman be deemed an accomplice in the act of prostitution, the purchaser an accomplice in the unlawful sale, the unmarried party to a bigamous marriage an accomplice of the bigamist, the bribe-giver an accomplice of the taker?..." and he continued with what he thought was good language, "To seek a systematic legislative resolution of these issues seems a hopeless effort...No one can draft a prohibition of adultery without awareness that two parties to the conduct necessarily will be involved. It is proposed, therefore, that in such cases the general section on complicity be made inapplicable, leaving to the definition of the crime itself the selective judgment that must be made. If legislators know that buyers will not be viewed as accomplices in sales unless the statute indicates that this behavior is included in the prohibition, they will focus on the problem as they frame the definition of the crime. And since the exception is confined to behavior 'inevitably incident to' the commission of the crime, the problem, we repeat, inescapably presents itself in defining the crime."

It was moved that section 4 be adopted and the motion carried unanimously.

Section 5. Criminal liability for conduct of another; renunciation as defense.

Mr. Paillette explained that this is where we give the defendant an out by renunciation as a defense. He read the following: "Subsection (1) In any prosecution for a crime in which criminal liability is based upon the conduct of another person pursuant to section 2 of this Article, it is a defense that, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose, the actor terminates his complicity prior to the commission of the crime and; (a) Wholly deprives his complicity of its effectiveness in the commission of the crime; or (b) Gives timely warning to law enforcement authorities or otherwise makes proper effort to prevent the commission of the crime. Subsection (2) The defense of renunciation is an affirmative defense which shall be proved by the defendant by a preponderance of the evidence."

He advised the subcommittee that as in the Inchoate Crimes draft, we have made this an affirmative defense. He noted that when George Platt drafted the renunciation defense to solicitation, conspiracy and attempt, he felt that the burden should be on the defendant and Mr. Paillette said he agreed with this approach wholeheartedly. If we are going to allow this defense, he remarked, if we feel that it is good policy to encourage participants in a crime to pull out and to renunciate, we should not leave the burden on the state to prove that no renunciation took place. In other words, he said, the defendant should be required to prove his renunciation. He indicated that he had submitted this conditionally because the basic policy decision is the same as that the Commission will have to consider with respect to Attempts. It seemed to him that if we are going to allow it in one area, we should allow it in the other, and if not, reject it altogether. He could not visualize allowing renunciation in the area of attempt without allowing it in the completed crime or vice versa. Although, he said, one could argue that with respect to an attempt, you have not gone to the completed crime; it is in the planning or preparatory stages and if we are going to allow a person to pull out, he is going to have to pull out there or not at all.

Mr. Spaulding asked if it would not be hard to prove in the case of an attempt, whether or not a person renunciated before they completed the attempt.

Mr. Paillette answered that renunciation as a defense to the charge of attempt provides that it has to be under circumstances manifesting a voluntary and complete renunciation of his criminal purpose and that he avoids the commission of the crime attempted by abandoning his criminal effort and, if mere abandonment is insufficient to accomplish such avoidance, doing everything necessary to prevent the commission of the attempted crime.

Chairman Burns asked Mr. Paillette why the language wasn't the same. The renunciation defense under "attempts" he noted was different language than we have here.

Mr. Paillette agreed that it was and that it also was different language than that used by the MPC. The reason, he said, was that they felt this would be more stringent. You still have to have the complete and voluntary renunciation and a termination and then you have to further show that you not only terminated, but that you deprived your participation of its effectiveness, whereas under the "attempt" renunciation draft it just says doing everything necessary. Here we say he has to give timely warning to law enforcement authorities and take specific, affirmative steps.

Chairman Burns thought this was unnecessary and said he would vote to take it out unless the others could convince him otherwise. There are so many relative terms, he added, that he felt this kind of thing would lead the court into a hair-pulling session on interpretation.

Mr. Chandler said the thing he liked about it was subsection (b)"gives timely warning".

Mr. Spaulding asked for a definition of "timely warning."

Representative Graham said he would think it would mean sufficient warning to get it stopped.

Chairman Burns didn't think that it would necessarily have to be in time to get it stopped. It might be in time to apprehend the guilty parties before their getaway, he added. He wondered, though, what "otherwise makes proper effort to prevent the commission of the crime" meant.

Mr. Paillette responded by citing MPC which says the action that is going to be needed is going to vary from one case to the next and they did not want to make the rule too specific.

Representative Graham approved of leaving some discretion to the court.

Mr. Paillette further cited the MPC which says "there will be cases where the only way that an accomplice can deprive his conduct of its effectiveness is to make independent efforts to prevent the crime. When that is so, the law should nonetheless accord the possibility of gaining an immunity provided there is timely warning to the law enforcement authorities or there otherwise is proper effort to prevent commission of the crime. The sort of effort that should be demanded turns so largely on the circumstances that it does not seem advisable to attempt formulation of a more specific rule."

Mr. Spaulding observed that "timely warning to law enforcement officers" would vary in some cases and when that was impossible, you would have to go by "or otherwise makes reasonable effort."

Mr. Chandler asked Mr. Paillette about the status of the Attempts Article in subcommittee No. 3.

Mr. Paillette replied that they had been through most of it one time. It had been approved conditionally up through section 10, he thought, but the subcommittee hadn't decided on it to the point of sending it to the Commission.

Mr. Chandler said he was thinking that if they had approved their section 3, they had approved the principle of the provision insofar as it includes the idea that the defense has to be proved by the defendant instead of just negatived by the state.

Mr. Spaulding asked Mr. Paillette if he had quoted a definition of an affirmative defense to mean that the state has to disprove it.

Mr. Paillette replied that under the Model Penal Code's approach to an affirmative defense, the burden remains on the state to disprove it.

Chairman Burns asked if that were the case, wouldn't the defendant have to plead it?

Mr. Spaulding supposed it would be comparable to self defense, where the defendant has to raise it.

Mr. Chandler didn't think the defendant would have to plead it either, but in order to get it to the jury, he thought he would have to raise the issue; otherwise there would be no evidence.

Mr. Paillette mentioned that the way Michigan handles the issue is by saying the burden of injecting the issue is on the defendant, but this does not shift the burden of proof. This means that the burden is still on the state,which in effect means they have to disprove it.

Which, Mr. Chandler said, would be a tough thing to disprove.

Mr. Paillette didn't think we would want to go so far as to say, not only are we going to allow renunciation, but we are going to leave it to the state to disprove it. He suggested that the subcommittee might want to conditionally approve it or disapprove it, or they might want to take another look at it, depending on what happened on the Attempt draft.

Mr. Chandler thought that if subcommittee No. 3 has gone into this to the point where they are ready to accept it in connection with conduct that isn't really quite a crime yet, then it behooves this subcommittee to apply it to conduct we say is an actual crime.

Chairman Burns voiced concern that Subcommittee No. 3 might perhaps be waiting for us to act on it.

Mr. Paillette reassured him on this issue. He said that they were not waiting for this subcommittee to do something because at the time they considered this provision, the draft on Parties had not been done yet. But, he added, he didn't want to speak for Subcommittee No. 3 and say they have approved it, because they have not. There is more work to be done on it, he reported, and it may not be approved for some time.

Chairman Burns thought that we should make up our own mind and then argue the basic policy question in full Commission.

Mr. Chandler moved that this subcommittee conditionally approve this section, depending on the Commission to decide if it wants to go this route. If it does, he then felt definitely it should be kept in both sections. It would be a mistake to take it out of this section and to leave it in the other. He reserved for himself the right to argue against it later.

Mr. Spaulding was reluctant to approve it, he said, because the more elements you get in a criminal case where you define the burden of proof, the more chance you have of getting them all mixed up. With insanity and everything else, he said, the state has the burden of proof. If you adopt this defense, it is liable to be attempted by defendants all the time as a last straw, and the court is going to have to instruct the jury on the difference of preponderance of evidence as applied to one issue and back and forth. It is a difficult thing to handle, he warned, and he didn't think there were many instances where an accused defendant would have a legitimate defense on this ground where he wouldn't otherwise have a legitimate defense. He concluded that there was not much need for it and that it would clutter up the orderly procedure of the trial of the criminal case.

Mr. Chandler said that he had not tried a criminal case, nor was he likely to do so, but he thought that subsection (2) of section 5 would keep the thing from being raised "willy nilly" in a criminal case because the defendant has to raise the issue and he has to be prepared to present the evidence.

Chairman Burns stated that all the defendant needed to do was to call himself as a witness. His own testimony could be his evidence.

Mr. Spaulding agreed. He gets to use his own testimony to support it even though it may never have happened, he remarked.

Chairman Burns said a defendant could cover himself in a situation like this by writing a letter to the police, putting it in the mail, and then going ahead with the crime. He then repeated the motion made by Mr. Chandler to conditionally approve section 5 but the motion failed to get a majority vote. Chairman Burns then said that in the absence of a majority vote, the section dies.

Section 6. Criminal liability of corporations.

Mr. Paillette reminded the subcommittee that quite some time ago they had discussed corporate liability under the general definitions. A person was defined as meaning a human being, or where appropriate a public or private corporation. There was some discussion at that time that if we included corporations in the definition, there were going to be instances where the definition of the crime just doesn't fit when applied to corporations. Even though we have a definition now that includes corporations, the court has said that there are some cases where it does not stand to reason that the legislature intended to apply this to corporations. One of the best known cases, he recalled, was the Roseburg, Oregon case of State v. Pacific Powder Co., where a corporation had been indicted for manslaughter as a result of a truck explosion in which several people were killed. The court held that their interpretation of the legislative intent was the criminal sanctions would not apply to corporations for that kind of conduct. This draft, he continued, does not change that, but it does attempt to articulate corporate liability to a greater extent that we now have in our criminal statutes. New York, Illinois and Michigan, he said, all have based their approaches on the MPC and this draft continues the MPC approach.

The definitions under subsection (1) define "agent" and "high managerial agent." Under subsection (2)(a) we say that the corporation is guilty of an offense if it is engaged in by an agent of the corporation acting within the scope of his employment. This is limited to a misdemeanor or a violation not imposing any felony or criminal liability on a corporation, unless it is under a statute that clearly indicates a legislative intent to impose such criminal liability.

By enacting such a provision, Mr. Paillette continued, we are not making a corporation liable for murder, armed robbery or any felony. Under subsection (2)(b) we say a corporation is guilty of an offense if the conduct constituting the offense consists of an omission to discharge a specific duty that is imposed by law; or subsection (2)(c) the conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or knowingly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation.

Chairman Burns recalled that in their earlier discussion on this subject, there had been some type of double or treble damage provision attached to corporate crimes.

Mr. Chandler pointed out that such a provision was the only means of effectively punishing a corporation. He supposed, he said, that we will get to that issue under penalties. Do we, he wondered, also get to the issue of who faces the rap under penalties.

Chairman Burns stated that he had two bills this last session in his committee (Commerce and Utilities) which would affect corporations. One was a bill of Senator Willner's and Representative Hansell's which would have made it a misdemeanor for any railroad train to block a grade crossing for more than 10 minutes in a city or more than five minutes outside a city. We investigated, he said, and found that a number of municipalities in Oregon have city ordinances to that effect. Baker has one which provides that blocking a grade crossing for more than 10 minutes is punishable by six months in jail and a $500 fine. He wondered where we are going to define who goes to jail.

Mr. Paillette answered that since you cannot put the whole corporation in jail, you must decide who is going to be punished.

Mr. Chandler thought that you would put the active agent in jail, unless the high managerial agent had told him to do it.

Mr. Spaulding said that we have that situation now. The person who commits the crime, whether agent or not, is the one punished.

Mr. Paillette stated that we now have a statute that defines "person" to include corporations and that our criminal statutes are framed in terms of "persons." He referred again to the Pacific Powder case where the state contended that the corporation should be criminally liable for manslaughter because they were a "person." The Supreme Court looked at the definitions where it says "except as the context may require otherwise." They said that in construing the manslaughter statute, we look at the penalties that are imposed. They traced the history of manslaughter as part of homicide, which includes murder, and realizing that the penalty for homicide is imprisonment, they held that it was not the intent of the legislature to impose criminal liability where you could not impose the penalty, since the penalty section is part of the crime.

Mr. Paillette thought they reached the right result under our present statutes, but felt that it would be of great value to the courts in future cases if under our code, we set some guidelines so that under this section, unless the legislature has specifically said otherwise, there is no intention to make a corporation guilty of a felony. He added that this does not overrule or attempt to change the rule laid down in that Pacific Powder case.

Mr. Chandler felt that you would never indict a corporation for manslaughter.

Mr. Spaulding said he didn't know why you wouldn't want to. Under certain circumstances, you indict an individual for causing a death even though he didn't intend to, and he didn't know why a corporation shouldn't be punished also, if you can figure out a way to prosecute.

Mr. Chandler cited the Greyhound Bus case where a bus skidded on ice near Medford some time ago and flipped over, killing 31 people. It became apparent, on close examination, he said,that according to their timetable, they had to violate the rules of the PUC and the laws of the State of Oregon to make the schedule set out in their timetables.

Mr. Spaulding pointed out that the drivers have been trained to answer that question with "we aren't expected to keep up with the timetables."

Mr. Chandler answered that in this case, however, they were keeping up with timetables and were violating the basic rule in order to do so. Of course, the families of the people who were killed had a right to sue and they all did, but he felt that the state has a right and a responsibility to let Greyhound know that the state is not going to stand for any more conduct like that

Mr. Spaulding mentioned that a corporation can be guilty of even more serious conduct than involuntary manslaughter. It would seem to him that if the legislature wanted to say so, you could take care of it by massive fines.

Mr. Paillette pointed out that he didn't want to overstate the limitations of this provision because it doesn't provide that under ordinary circumstances, they could not be convicted of a felony or be found guilty; they just would not be guilty of a felony under the "respondeat superior" approach. They could be guilty of a felony if it were something that they had knowingly engaged in.

Mr. Chandler said he realized that this did not in itself create any new crime. He did feel that it gives the legislature room to move, in a general way, toward making companies responsible for the acts of their people.

Representative Graham said he thought that it pinpointed individuals within a corporation for criminal liability and he approved. He moved for its adoption as well as that of section 7, Criminal liability of an individual for corporate conduct.

Mr. Spaulding reminded the subcommittee that they had not yet considered section 7. However, he said, it reflected the law anyway.

Mr. Paillette and Chairman Burns both agreed that it did.

Mr. Spaulding returned to section 6 and said he did not see why you would want to necessarily eliminate felonies.

Mr. Paillette explained that he was not eliminating felonies except from the standpoint of liability for the acts of an agent acting within the scope of his employment, unless the statute clearly imposes liability on the corporation for such conduct under subsection (1)(a). Under subsection (b) you could have a felony, and under subsection (c) it clearly could be a felony if

engaged in, authorized, solicited, requested, commanded or knowingly tolerated by the board of directors or high managerial agent. Under those circumstances, a corporation could be guilty of a felony. It just limits it as to misdemeanors for "respondeat superior."

Mr. Spaulding said he understood clearly now and that he was in favor of it.

Chairman Burns repeated the motion made by Representative Graham to adopt sections 6 and 7. The motion was carried.

(Mr. Graham had to leave the meeting at this point.)

Business and Commercial Frauds.

Section 1. Business and Commercial Frauds; definitions.

Mr. Wallingford explained that section 1 lays out four definitions that are used in the 15 sections of this Article. Subsection (1) defines "business records" as meaning any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activities. There is an existing Oregon statute, 41.680, that defines the term "business" which is similar to our definition of "business records", he said.

Mr. Chandler asked if "business records" would include a check.

Mr. Wallingford replied that it would not since a check wouldn't be kept for the purpose of reflecting its condition or activities. "Enterprise", he continued, in subsection (2) covers just about any type of business or professional activity. Our present statute defines the term "business" as "including every kind of business, profession, occupation, calling or operating of institutions, whether carried on for profit or not".

Chairman Burns asked if "financial institution" came from the definition in the present Oregon code?

Mr. Wallingford replied that it was new language.

Mr. Spaulding wondered why "enterprise" should include social activity, since social activity could mean almost anything.

Mr. Wallingford replied that when using social activity, they are referring to such things as fraternal lodges.

Chairman Burns asked if this type of social activity would become relevant unless that social activity was engaged in as a commercial endeavor.

Mr. Wallingford said that it would if you are using the term commercial endeavor in the sense of profit.

Mr. Chandler asked why "political" was left out of subsection (2) when it was used in the New York revision. In fact, they said "political or governmental", he pointed out.

Mr. Wallingford commented that as far as "governmental" is concerned, we have a separate statute covering this area of public records.

Chairman Burns thought political should be in there, because a person could be falsifying campaign records.

Mr. Paillette asked if political records are now covered under the Corrupt Practices Act?

Mr. Chandler said only those that are required to be reported.

Mr. Wallingford mentioned that the word "enterprise" is not used specifically in any of the statutes. It is only used in the sense of defining business records.

Mr. Spaulding suggested the subcommittee move on into section 2 and then come back to this section later.

Section 2. Falsifying business records.

Mr. Wallingford read from this section, "A person commits the crime of falsifying business records if, with intent to defraud, he: (1) Makes or causes a false entry in the business records of an enterprise; or (2) Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or (3) Fails to make a true entry in the business records of an enterprise in violation of a known duty imposed upon him by law or by the nature of his position; or (4) Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise."

Mr. Chandler remarked that it was pretty inclusive.

Mr. Spaulding agreed that it certainly was when "enterprise" includes social activity.

Mr. Wallingford reminded that all the subsections include an attempt to defraud. Ordinarily we are talking about something in the nature of an intent, which can be reached by this statute before the crime intended is committed.

Mr. Chandler said the thing that bothered him was the language in subsection (3) "in violation of a known duty imposed upon him by law or by the nature of his position."

Mr. Spaulding asked if the intent here was to make the prosecutor prove that the defendant knew about the duty.

Mr. Wallingford replied that that is how "known" is being used here. Or, he said, you could drop the term "known" and have only "in violation of a duty."

Mr. Spaulding thought he would prefer that.

Chairman Burns said that use of the word "known" assumes that because a person gets a job of a bookkeeper, for instance, he knows how to do it and if he makes an omission, he could be criminally prosecuted. Isn't that assuming too much, he asked?

Mr. Wallingford repeated that this would apply if he failed to make an entry with an intent to defraud.

Chairman Burns commented that intent was something that was always difficult to prove.

Mr. Paillette pointed out that the commentary was especially helpful and read, "It should be noted that it is not the intention of the proposed section to preserve the integrity of business records. Instead, the prohibition is directed at conduct preliminary to the commission of a fraud, in that it requires 'intent to defraud' ", and he continued, the MPC even mentions a "church, union or club" so they apparently didn't feel there was any reason to distinguish those records from those of anyone else, if there was a fraudulent intent involved.

Mr. Wallingford pointed out that this section was really intended to discourage people from taking the first step. Of course, he admitted, in the most common experiences, you are already dealing with the completed crime.

Chairman Burns assumed then, that this section was to stop one from falsifying the records.

Mr. Spaulding added,"and to be able to prosecute him when he has made his first move."

Chairman Burns wondered how you were going to prove he had intent to defraud.

Mr. Chandler said the problem as he saw it was that we are keeping corporate records in new and unusual ways e.g., computers are being used and the basic record is a piece of punched paper. Is that a business record under our present understanding, he asked, even though it takes a computer to understand it?

Mr. Spaulding said if it has meaning, he thought it would be a record.

Chairman Burns understood that the provision makes it clear that the intent can be to defraud the customer, a partner, the IRS, the State Tax Commission or just anyone. He said that he could see no problem with section 2 down to subsection (3), but was troubled by the "known duty imposed on him by the nature of his position."

Mr. Wallingford asked him if he was troubled by the term "the nature of his position" as being vague?

Chairman Burns replied that it was not that; it was the fact that he might be liable to a prosecution for a criminal offense because it was assumed that he knew better because of the nature of his position.

Mr. Wallingford pointed out that it would have to be proved that he had knowledge, hence the importance of the word "known."

Mr. Paillette asked Mr. Wallingford if his definition of the word "property" in section 1, subsection (4) was the same as we had used in our Theft draft?

Chairman Burns read the Theft definition of "property" and it was agreed it was not the same. He then moved that it be conformed to the Theft definition. The motion carried. It was, however, left up to Mr. Paillette to straighten it out after he pointed out that we could perhaps even eliminate this definition in this section and refer to our earlier one. We have said "as used in" and left that designation blank, the idea being that we could use it in other sections as required.

Mr. Chandler moved that the subcommittee approve section 2. The motion was carried.

Section 3. Commercial bribery, and Section 4. Receiving a commercial bribe.

Mr. Wallingford explained that sections 3 and 4 are related and that this is new law to Oregon. Section 3 says, "A person commits the crime of commercial bribery if he offers, confers or agrees to confer any pecuniary benefit upon an employe, agent or fiduciary upon an agreement or understanding that the latter violate a duty of fidelity owed to his employer, principal or beneficiary." This language, he noted, follows the language in the Bribery Article. Section 4 is receiving a commercial bribe and is approximately the same language.

Chairman Burns wondered why Mr. Wallingford said in section 3, "offers, confers or agrees to confer" rather than "offer or agrees to offer" and "confer or agrees to confer."

Mr. Wallingford said that the three terms were broken down in this way: He offered a bribe, he gave a bribe or he agreed to give a bribe.

Chairman Burns asked what subcommittee had the Bribery draft?

Mr. Wallingford answered that Subcommittee No. 2 had it and had just gone over the first draft Tuesday.

Chairman Burns then asked Mr. Paillette why Subcommittee No. 2 would not have Commercial Bribery rather than this subcommittee.

Mr. Paillette reasoned that this section fit into Business and Commercial crimes. This subcommittee had all the crimes against property so it seemed to him that they also had more expertise in the area of fraudulent conduct because of the property crimes. He felt that, although Mr. Wallingford had been working with Subcommitte No. 2, for the purposes of this Article, and since we talked about Business and Commercial Crimes after we completed our crimes against property, it followed naturally with our other draft on crimes against property.

There followed a great deal of discussion about various examples of what might be considered commercial bribery; such as the television stations where one pays an auto dealer for doing the commercials himself, but in some cases pays a salesman who pockets the money himself; the double billing practice; the service station that will write out the billing for excess gas to be billed on a credit card and give the customer the difference in cash; the service station which provides free gasoline to the traveling agent of the local Teamsters Union, in return for which all Teamster Union drivers get their gas and service done there; the trucking company drivers who pull into a service station to fill up with 200 gallons of fuel and then take the rebate in cash rather than put it on their credit card; service stations in small towns that cater to insurance adjusters by selling them beer, but marking it as gas on the credit card bill so that the insurance company pays for the beer.

Mr. Chandler stated that this sort of thing -- kickbacks and rebates -- is the most common form of commercial theft that goes on in our country. The defaulting bookkeeper with $100,000 is a rare bird, he said, while this other type of conduct is rampant.

Mr. Spaulding asked if the subcommittee thought they should try to legislate in that area?

Mr. Chandler said the problem, when discovered, was in most cases, handled in the company. They simply warn their employes not to do it again or they will be fired.

Mr. Wallingford agreed that this was true in the insurance business where even in cases of embezzlement, they rarely will prosecute.

Mr. Chandler mentioned another case where the chief clerk for some stock brokerage firm in New York got away with some two and one-half million dollars worth of stocks and they refused to prosecute because they were afraid of upsetting the market.

Chairman Burns asked if the problem was not further complicated by the fact that many organizations say they can only pay a person X number of dollars, but will give an expense account taht the employe can take advantage of.

Mr. Spaulding stated that it is something that is gnawing at our economy and our morals and in fact, our whole society and, that while it would be good if we could legislate on it, it is deeply ingrained in our way of life.

Mr. Chandler wondered whether it was right to place the State of Oregon firmly on the side that this activity is crooked, whether it exists or not.

Chairman Burns reminded the members of complaints about high taxes stating that these practices add to those taxes and actually discriminate against people who are honest. People who are motivated to engage in this conduct are really causing the state to impose higher taxes, he said, and added that it seemed to him that we have a responsibility to do everything we can to discourage that type of activity.

Mr. Spaulding mentioned that one insurance company they work for prohibits them or anyone else that they do business with from taking them to lunch. He said he appreciated it very much because there is just too much of that sort of thing -- trying to get the law business of insurance companies by buying them booze, letting them win in a poker game etc.

Mr. Wallingford mentioned that one fairly common thing today that this section would cover is buying the disclosure of trade secrets. Another problem, he said, was in buying executives by offering them higher paying jobs, when they really want to buy secret knowledge gained in their former jobs. However, he doubted whether the draft would reach that sort of action.

Mr. Paillette mentioned that in discussing Bribery earlier in the week, Subcommittee No. 2 had similar language to "agreement or understanding" and they had difficulty with the term. They changed it to "with the intent". The reason they felt it was awkward was because the phrase "upon an agreement or understanding"might be construed to relate back to offer. If you are looking at the evil intent of the person offering the bribe, it is just as bad if he offers the bribe in the absence of an agreement; you can't have an agreement unless you have a meeting of the minds between the offerer and the receiver of the bribe. The point is, if he has offered the bribe, whether or not there was an agreement, he has committed the offense. We are really looking at the element of intent. So they changed it to read that a person would not need an agreement or understanding if he had the intent to unlawfully influence a public servant. In this draft, you would have an intent to have the agent or employe violate a duty to his employer.

Chairman Burns noted that that was more in line with the classic definition of bribery. He moved that sections 3 and 4 be amended by deleting the phrase "upon an agreement or understanding" and inserting "with the intent" so that section 3 would read, "A person commits the crime of commercial bribery if he offers, confers or agrees to confer any pecuniary benefit upon an employe, agent or fiduciary with the intent that the latter violate a duty of fidelity owed to his employer, principal or beneficiary". Section 4 would say,"A person commits the crime of receiving a commercial bribe if while an employe, agent or fiduciary he solicits, accepts or agrees to accept any pecuniary benefit with the intent that he violate a duty of fidelity owed to his employer, principal or beneficiary." The motion carried.

Mr. Chandler then moved approval of sections 3 and 4 as amended. That motion also carried.

Section 5. Sports Bribery; definitions.

Mr. Wallingford pointed out that section 5 contained three definitions that relate to sections 6, 7 and 8 which involve bribery in sports.

Mr. Chandler noted that the language was almost exactly like that of Michigan and New York where they really have these problems.

Mr. Wallingford read the definitions: "Sports contest" means any professional or amateur sport or athletic game or contest viewed by the public. "Sports participant" means any person who directly or indirectly participates in sports contests as a player, contestant, team member, coach, manager, trainer or any other person directly associated with a player, contestant or team member. "Sports official" means any person who acts in sports contests as an umpire, referee, judge or sports contest official.

Mr. Chandler asked him what was meant in subsection (2) by "directly associated with a player".

Mr. Wallingford replied it could mean an agent, which most players now retain. It would have to be someone advising the contestant in some official capacity, he felt.

Mr. Paillette pointed out that we now have statutes on this subject. They were passed about 10 years ago when the basketball scandals broke and nearly all states suddenly decided that they should have some regulations in this area.

Chairman Burns asked why Mr. Wallingford deleted "expects to act" such as they had in the New York text.

Mr. Wallingford deleted it, he replied, because he didn't think it was necessary. He said that it seemed to him that the way we have defined "sports participant", the only advantage of "expects to participate" would be to a person who had never before participated in a sports activity.

Chairman Burns asked if there were any reported New York cases.

Mr. Wallingford replied that there was a Maryland and an Iowa case both involving basketball players.

Chairman Burns thought that the subcommittee should go through sections 6, 7 and 8 before making a final decision on section 5.

After some discussion about best possible meeting times and dates, the next meeting was scheduled for July 7 at 1:30 p.m.

The meeting was then adjourned.

Respectfully submitted

Connie Wood
Criminal Law Revision Commission