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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

August 9, 1968

A G E N D A

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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Eighth Meeting, August 9, 1968

Minutes

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

Also Present: Mr. Donald L. Paillette, Project Director
Justice Gordon Sloan, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Judge Roland K. Rodman, Member, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Dave Neeb, Multnomah County Sheriff's Office
Mr. Daniel Remily, Student Research Assistant

The meeting was called to order by Chairman John D. Burns at 9:45 a.m. in Room 309 Capitol Building, Salem. He welcomed Judge Rodman to the meeting and urged him to feel free to participate in the discussion.

Minutes of Meetings

Mr. Chandler moved, seconded by Mr. Spaulding, that the minutes of the meetings of May 17, 1968; May 27, 1968; June 22, 1968; and July 13, 1968, be approved as submitted and the motion carried unanimously.

Report of Commission Meeting of July 19, 1968

In response to the Chairman's request, Mr. Paillette reported that the full Commission had acted on five drafts submitted by Subcommittee No. 1 and had tentatively approved all except the robbery draft which had been rereferred to the subcommittee.

Arson and Reckless Burning; Preliminary Draft No. 2; August 1968

Mr. Paillette explained that he had attempted to incorporate in Preliminary Draft No. 2 on arson all the suggestions made at the subcommittee meeting on July 13 but had not yet revised the commentary which accompanied Preliminary Draft No. 1. This, he said, would be done after the subcommittee reached final agreement on the proposed statute.

Section 1, subsection (3). "Forest land" definition. Mr. Paillette called attention to subsection (3) of section 1 which contained the change in definition of "forest land" approved by the subcommittee at its last meeting. P.D. #1, he said, set forth the

definition contained in ORS 477.001 and the committee had voted to place a period after "clearing." He expressed some concern over deletion of the modifying language after "clearing" contained in the first draft that said "which, during any time of the year, contains enough flammable forest growth, forest refuse, slashing or forest debris to constitute a fire hazard." Without that language, Mr. Paillette said he had some question as to whether it was inconsistent to say "forest land" meant "clearing." He noted that the definition of "forest land" became important in section 4 and observed that there might be a clearing which had never had trees on it but the term was probably intended to mean a forested area which had been logged off. Mr. Spaulding commented that the entire Willamette Valley had at one time been covered with trees and it might be advisable to define "clearing" for this reason.

Justice Sloan suggested placing a period after "cutover land" and deleting "clearing" because "cutover land" would probably include land which would be considered a "clearing" today. He later rescinded his suggestion and pointed out that there was a section in the present code having to do with clearing rights of way which made it apparent that the legislature had in mind a particular kind of forested land when they used the term "clearing."

Chairman Burns asked if there had been any test in the courts of the definition contained in ORS 477.001 and Mr. Paillette replied that he was not aware of any cases on that subject.

The Chairman reviewed the committee's discussion at the previous meeting and pointed out that the feeling of the members was that the deleted language was superfluous because the mere fact that a fire had started in the clearing would necessitate enough flammable growth being present to start a fire. Mr. Paillette remarked that for purposes of prosecution under section 4 it would be necessary to prove that the land in question was "forest land."

Mr. Chandler commented that only in Alaska and Washington was forest land as important to the people of the state as it was in Oregon and said he would favor a broad definition of the term. He suggested that the definition in P.D. #2 be retained without further revision. Mr. Spaulding remarked that in all probability no one would ever be prosecuted for setting fire to a clearing; the district attorney would allege "forest land" in his complaint. The deleted language, he said, limited the definition and was superfluous in his opinion. Chairman Burns said that if the committee was going to proscribe forest fires, a fire started in a clearing adjacent or contiguous to a forest was dangerous and the statute should contain a sanction against that act which was as strong as the sanction against burning slash.

After further discussion, it was the concensus of the committee that the definition of "forest land" be approved as set forth in Preliminary Draft No. 2.

Section 1, subsection (1). "Building" definition. Mr. Paillette explained that Justice Sloan at the previous meeting had objected to the use of "other structure" in the definition of "building" because it implied that a vehicle, boat or aircraft was a structure. The definition in subsection (1) had accordingly been amended to cure this objection.

Mr. Chandler commented that the amended definition appeared to limit vehicle, boat or aircraft to those specifically adapted to overnight accommodation or for carrying on business therein. Mr. Paillette replied that the definition had not changed in that sense. The intent of the definition was to protect the type of property that would be likely to contain human beings for the purpose of first degree arson prosecution, he said.

Mr. Spaulding said it bothered him to call a boat a building; the definition contained things that were not buildings in ordinary English. Justice Sloan suggested "vehicle, boat, or aircraft" be deleted and replaced by "property." Mr. Paillette replied that when the committee was working on the theft statute, they had agreed that the property definition in that draft would be applicable to sections other than the theft sections and for this reason he had not redefined "property" for the purposes of the arson sections.

Judge Rodman asked if the definition of building in the burglary draft was consistent with the definition in subsection (1) and was told by Mr. Paillette that they had been consistent but were not now because of the revision made in the arson draft with respect to "other structure." Chairman Burns observed they should be made to coincide and Mr. Paillette agreed.

Mr. Paillette said the building definition posed a policy question as to the type of property the committee wanted to protect. Most new codes, he said, were limiting arson to instances where people were likely to be killed or injured -- in other words, to buildings -- and to expand the definition of building to accomplish that purpose. After further discussion, the committee expressed agreement that the highest degree of proscription should be placed upon a person (1) setting fire to forest land and (2) setting fire to anything which endangered the life of another.

Chairman Burns asked Mr. Paillette if it was his position that the proposed definition of building, particularly in so far as a building adapted for overnight accommodation was concerned, did not narrow the present definition of "dwelling house" and was told the definition was broadened to include any kind of structure where people might be lodged.

Judge Rodman pointed out that the phrase "in addition to its ordinary meaning" would make the definition applicable to a building

such as a barn or an outbuilding which had not been used for many years and which would not customarily be occupied.

Chairman Burns commented that if there was no widespread dissatisfaction with the present arson law, perhaps it would be better to retain that statute than to try to draft a new one. Mr. Paillette advised that he had considered that possibility but had decided that it was important to emphasize the protection of forests in Oregon and to protect valuable property in addition to human life. Another objective was to eliminate arson as a crime simply because it was damage to property by means of fire. He contended that if some conduct could be covered adequately by another provision, there was no legitimate purpose served by calling an act arson unless the use of fire had some other result, that result being the endangering or damaging of a building or life of another by fire.

He called attention to the fact that the draft provided that if a person burned property with the motive to collect insurance and as a result thereof caused any of the consequences listed in subsection (2) of section 4 or in section 5, the crime would be arson. Without those consequences, the actor could be prosecuted for fraud or theft by deception.

Mr. Spaulding suggested "adapted for occupancy of persons" rather than "adapted for overnight accommodation of persons" in order to take care of the definition with respect to airplanes, cars, etc. which were not adapted for overnight use.

Chairman Burns asked if the general articles of the code would contain a definition of building and Mr. Paillette said he did not anticipate that they would.

There was some discussion as to whether the definition of building would include a railroad car and Chairman Burns suggested that "railroad car" be inserted after "vehicle." Mr. Chandler commented that a railroad car was a vehicle within the normal meaning of the term and in any event would be either adapted for overnight accommodation or for carrying on business. Mr. Spaulding suggested "for carrying on business or commerce therein" to meet this problem.

Justice Sloan was of the opinion that the definitions section should be deleted from the draft and that the proposed statute should then make reference to "property" as defined in the general articles. Mr. Paillette explained that he was trying to say in the draft that the crime was not arson unless the property involved was a building or forest land or, if it was neither of those, the act either injured or threatened injury to a person or damaged or threatened damage to a building. He advised he did not like the Model Penal Code approach wherein a person was guilty of the highest degree of arson if he intended to damage property by a fire or an explosion, whether or not actual damage occurred, and noted that New York, Michigan and Connecticut had all rejected this approach.

A recess was taken at this point after which the Chairman asked Mr. Paillette to comment on the questions raised by the committee thus far. Mr. Paillette noted that in line with other code revisions, he had attempted to broaden the definition of building and to go to the type of definition that the Model Penal Code, New York and Michigan employed to include other types of structures which might have people in them. However, he had not written into the sections on first degree arson the limitations that were included in the New York and Michigan drafts, namely, that under both of those versions it was only first degree arson if there was intentional damage to a building by fire and further that another person who was not a participant in the crime was in such building at the time of the fire and the defendant knew that fact or should have known it. Those versions, he said, seemed to include too many elements and the subcommittee agreed at its previous meeting this approach would place too great a burden upon the prosecution when prosecuting for first degree arson. By using the same definition employed in the other drafts, he explained, it was broadened too far since the Oregon draft did not require the prosecutor to prove that there was someone actually in the building, and the draft now inadvertently referred to the burning of a building or a barn or something that might not ever contain people. The point raised by Judge Rodman, he said, that "in addition to its ordinary meaning" would include buildings which would not have people in them, was a valid objection and the definition required amendment because the phrase would include non-dwelling type buildings.

Chairman Burns polled the committee and all were in agreement that the phrase "in addition to its ordinary meaning" should be deleted.

Mr. Chandler asked if "carrying on business" would include the teaching of school classes and Mr. Spaulding expressed the view that teaching would probably not be considered a business. Mr. Chandler observed that there were numerous school fires where children were killed but they didn't occur at night and the building was not adapted for overnight accommodation. Mr. Spaulding pointed out that the traditional concept was to include buildings adapted for overnight accommodation and suggested that "occupancy of persons for any purpose" might be substituted in the building definition. When business buildings were included in the definition, he said, the draft was getting away from the overnight concept. Mr. Paillette noted that if someone died in the fire, it would be a felony murder in any event.

Justice Sloan suggested that if "property" included "building," it was unnecessary to define "building." He thought it would be better to express what arson was intended to mean, what it was limited to and what it included as an expression of intent rather than to try to define building. The thing that should be expressed, he said, was the act that was socially reprehensible enough that it should be branded arson.

Judge Rodman said that if Justice Sloan's suggestion were followed, subsection (1) of section 1 would be deleted, subsection (1) of section 5 would be deleted and subsection (2) of section 5 would define property as that customarily occupied by people. Subsection (2) would then read "Any property, whether his own or another's, customarily occupied by persons or which in fact is occupied and such act recklessly causes bodily injury to another person or damage to a building of another."

Mr. Paillette explained that the reason for retaining subsection (2) of section 5 was to cover the crime of arson to collect insurance where the actor intended to burn his own property but as a result injured someone or burned someone else's property. The subcommittee had decided that if he burned his own property and no other property was damaged, the crime should not be arson just because insurance was involved.

Chairman Burns indicated that the committee had not discussed the departure from the present code where "intentionally" was employed rather than "wilfully," "wantonly" or "maliciously." He observed that it was harder to prove the act was done intentionally than to prove it was done wantonly or maliciously. Mr. Paillette replied that the words of intent or purpose had not yet been defined, but drafting had proceeded on the assumption those definitions would generally follow the definitions in the Model Penal Code.

Speaking to the amendment suggested by Judge Rodman, Mr. Paillette indicated that such an amendment would raise a question as to whether the language would exclude someone who damaged property not ordinarily occupied by another but which did in fact cause bodily injury. If the actor intentionally set fire to something that didn't fit the description in section 5 (2), he could not be tried for first degree arson. Mr. Neeb said it was a question of whether the important element was the intent of the actor or the end result. He expressed the view that it was not as reprehensible to burn a building which the actor believed to be unoccupied, even though someone was injured, as it was to burn it when he knew there was someone in the building. Mr. Paillette replied that if the committee was most concerned with what the defendant should have known rather than what was actually brought about by his conduct, the suggested amendment would probably suffice.

Chairman Burns was of the opinion that requiring that he knew the building was occupied as an element of proof would cause problems. He asked if it could be argued that the actor didn't intentionally burn down a house if he had intentionally burned his own car and recklessly placed the house next door in danger. Mr. Paillette pointed out that in such a situation he would have consciously disregarded a risk that he should have known existed and "recklessly" would cover the act. Justice Sloan agreed that "recklessly" would include knowledge that the danger existed and suggested the deletion of "or damage to a building of another" in section 5 (2).

Mr. Spaulding commented that a person should be guilty of first degree arson, even though no one was injured, if the burning could have injured a person and Chairman Burns expressed agreement. He added, however, that the actor could not be charged with first degree arson in that situation if the draft was premised upon actual injury to a person. Mr. Spaulding suggested the draft say "if the act is designed to place another person in danger." He said a person should not be convicted of first degree arson if the burning happened to place another person in danger for unexpected reasons.

Chairman Burns said he believed burning of the Capitol Building should be arson of the highest degree, not necessarily because people were present but because of the class of the property.

A recess was taken after which Chairman Burns asked Judge Rodman to comment on the amendment he had suggested earlier. Judge Rodman said he would suggest deleting subsection (1) of section 1 and adding in sections 4 and 5 after "building" the phrase "customarily occupied by people" or, as an alternative, subsection (1), section 1, be amended to read "'Building' is a structure, vehicle, boat, or aircraft customarily occupied by people . . . " and the reference to "adapted for overnight accommodation" be deleted.

Section 2. Negligent burning; Section 3. Reckless burning. Chairman Burns suggested the committee discuss sections 2 and 3 of the draft and later return to the definitions section.

Mr. Spaulding urged deletion of "accidentally" from subsection (2) of section 2 because he was of the opinion that the prosecution shouldn't have to prove the act was done accidentally. Mr. Paillette explained that the subcommittee had recommended at its previous meeting that the provisions of ORS 164.070 (3) be incorporated and "intentionally" be deleted in subsection (1) because there was some question as to whether the draft on reckless burning would cover the kind of negligent conduct prohibited under the present statute. Subsection (2), he said, was intended to cover that situation wherein someone accidentally started a fire on land of another.

Mr. Paillette also noted that he had substituted "reasonable" for "possible" because Sullivan v. Mountain States Power Co., 139 Or 282, 9 P.2d 1038 (1932), said:

> "It seems clear that the legislature by the use of the single word 'possible' did not intend to demand that those subject to the act should do things that were neither reasonable nor practicable . . . It is our opinion that the words 'every possible effort' exact everything that is practicable and reasonable, but no more."

Mr. Spaulding objected to section 2 (1) because a person could do everything possible to prevent a fire from escaping and still be

liable if it did escape. He indicated that the insertion of "negligently" before "permitting" in subsection (1) would cure his objection.

After further discussion, Mr. Spaulding moved that "negligently" be deleted from the introductory paragraph of section 2 and inserted as the first word in subsection (1) thereof. Mr. Chandler seconded the motion and it carried unanimously.

In discussing section 2 (2), Justice Sloan asked what would happen if a man intentionally started a fire on land which he believed to be his own but, through inadvertence, didn't know precisely where his property line was and started the fire on land of his neighbor. Mr. Paillette replied that his duty to put the fire out began when he became aware that the fire was not on his own land. He added that there were several cases holding that there was no such duty until the person became aware of the existence of the fire.

Chairman Burns pointed out that ORS 164.070 (4) contained a provision which was omitted from this draft:

> "(4) Having knowledge of a fire burning on one's own land, or land of which one is in possession or control, and failing or neglecting to make every possible effort to extinguish the same, regardless of whether or not one is responsible for the starting or existence thereof."

Mr. Paillette responded that the subcommittee had directed him to delete from P.D. #1, "Intentionally starting a fire, or causing an explosion." Chairman Burns asked if, by omitting this provision, the draft reached the situation where someone deliberately set a grass fire but did not imperil a building, person or forest land. Mr. Paillette answered that under the draft there would be some types of fires that might be intentionally set but might not come within arson and would be covered under criminal mischief. The intentional damaging of property of another by fire could be criminal mischief, he said.

Mr. Spaulding suggested section 2 read:

> "A person commits the crime of negligent burning if he damages property of another by negligently starting a fire and failing to make every reasonable effort to put it out or control the fire."

Mr. Paillette pointed out that Mr. Spaulding's proposal would limit the actor's duties to put out or control the fire only to the situation where he started the fire. He explained that he had used "permitting" in the draft to cover situations where the actor might or might not have started the fire.

Chairman Burns said he had no objection to section 2 (1) as amended but recommended that subsection (2) conform to ORS 164.070 (3) by inserting "on one's own land" after "starting a fire." Mr. Paillette explained that he had omitted "on one's own land" because he thought it was covered under subsection (1) and to include the phrase in subsection (2) would be redundant. Chairman Burns expressed agreement and said he had no objection to subsection (2). He suggested inserting the equivalent of ORS 164.070 (1) in the draft because that provision would cover intentional burning. Mr. Paillette replied that when the phrase "unlawfully setting on fire" was used, many questions were raised as to why the act was unlawful.

After further discussion, Mr. Spaulding moved, seconded by Mr. Chandler, that subsection (2) be amended to read:

> "(2) Starting a fire on one's own land or the land of another and failing to make every reasonable effort to extinguish or control the fire."

He explained the motion was the result of the discussion that a man might intentionally burn his own stubblefield and that would be all right, but if he let it escape to cause damage to property of another and didn't use every reasonable effort to control it, he would then be guilty of negligent burning. Mr. Paillette asked if he would not be guilty under subsection (1) in the same circumstance.

Mr. Chandler asked if the draft would apply if a man burned stubble on his own land and in so doing burned up a car belonging to a pheasant hunter which was sitting in the middle of his field. Mr. Paillette pointed out that ORS 164.070 covered fires on land and was not related to that question; there was nothing contained in that statute which was applicable to negligently burning someone's personal property. He noted that the concern of the committee at its last meeting was that the situation in which there was an accidental starting of a fire was not covered under reckless burning. ORS 164.070 had been incorporated into P.D. #2 which specifically limited the act to accidentally starting a fire. He contended that setting fire on one's own land would be covered under subsection (1) and would take care of the situation where it might have been accidental or it might have been intentional.

Chairman Burns suggested that section 2 be entitled "Fire on land" or "Burning on land" and read:

> "A person commits a crime under this section if he damages property of another by:
>
> "(1) Negligently permitting a fire to escape from land under his custody or control; or

"(2) Starting a fire on one's own land or the land of another and failing to make every reasonable effort to extinguish or control the fire; or

"(3) Recklessly burning." He recommended the reference to "explosion" found in section 3 of the draft be deleted.

Chairman Burns asked Justice Sloan if he thought there was a constitutional problem involved in saying that intentional damage of property by fire could be covered by the criminal mischief statutes. Justice Sloan expressed the view that a constitutional problem might exist in this respect. He suggested a statement be placed in the criminal mischief statute to indicate that it included the type of conduct not covered by the arson statute. Chairman Burns said that when a type of arson was intended to be covered in another section of the code, such as criminal mischief, the Commission was admitting the existence of a hole in the code to be construed by the courts and objected to this possibility. Mr. Chandler agreed.

Mr. Spaulding said he saw no point in requiring proof that a fire had actually damaged property of another under the negligent burning section. He was of the opinion that the section was more concerned with the public wrong and grave danger of permitting a fire to escape from land in the actor's custody or control than with protecting a particular property. Mr. Paillette responded that such a course would create an inconsistency in that the balance of the draft, when discussing intentional arson, required damage. He asked if the committee wanted to say that for intentional arson there had to be damage, but for negligent fire, it would be a crime without damage. Mr. Spaulding said that seemed consistent to him because there was an evil in letting fire get away without exerting every reasonable effort to keep it under control.

Chairman Burns asked if the committee was agreed that the draft should contain a section on negligent burning and all agreed that this was desirable. Chairman Burns then asked if the committee also was agreed that a section on reckless burning should be included. Mr. Spaulding thought it was unnecessary and Mr. Chandler commented that he was not sure there was a great enough difference between the two to require both sections. Mr. Paillette observed that there was a higher degree of culpability under recklessness than under negligence.

Mr. Paillette noted that Michigan limited arson to buildings in which somebody was likely to be injured or to particularly valuable property and this appeared to be the direction in which most of the revisions were going. Justice Sloan commented that this theory ignored the fact that arson was perhaps the most hazardous kind of misconduct a person could engage in and Mr. Paillette replied that where the danger to persons did not exist, the fact standing alone that fire was used to accomplish the deed should not make the act the crime of arson.

Representative Elder commented that if Mr. Paillette's argument was valid, arson in the first and second degree was all that needed to be retained in the arson draft and negligent and reckless burning should be included with the criminal mischief provisions. Mr. Spaulding agreed that just because someone violated the law with fire, it should not be called arson.

Chairman Burns suggested that the chapter be called "Arson" and divided as follows:

Section 1. Definitions
Section 2. Arson in the third degree (including negligent, reckless and accidental burning)
Section 3. Arson in the second degree
Section 4. Arson in the first degree

Mr. Paillette pointed out that to adopt that course would be severe on the defendant who accidentally started a fire and thereafter would be tagged as an arsonist. This was the reason, he said, why he had called the one type of conduct "reckless burning" where there was no intent to damage property. Mr. Spaulding suggested the chapter be labeled "Fires on land" or "Crimes by fire" rather than "Arson."

Section 1, subsection (1). "Building" definition. Chairman Burns asked if the committee had agreed to limit the definition of building to something customarily occupied by people.

Mr. Paillette called attention to an amendment given to him by Judge Rodman prior to his leaving the meeting which would revise the first sentence of section 1 (1) to read:

> "'Building' means any structure, vehicle, boat, or aircraft adapted for occupancy by people."

Mr. Paillette asked if the committee agreed that the overnight concept should be removed from the draft. Mr. Spaulding answered affirmatively and explained that the overnight accommodation feature was included because of the concept that a dwelling house was a place where someone was likely to be asleep and that concept had been broadened by the draft. Mr. Paillette added that the reason the overnight concept was bad was not so much that people were asleep as because they lived there. The committee agreed that the criterion for first degree arson should be occupancy of the building rather than adaptation for overnight lodging and the number one consideration should be the danger to a human life.

Mr. Paillette suggested the committee retain the concept that a building be defined to include things other than dwellings where there might be people. He proposed:

"'Building' means any structure, vehicle or place customarily occupied by persons lodging or carrying on business therein, whether or not a person is actually present."

Mr. Spaulding urged that the proposed statute be written so everyone could understand it and when the statute said that a building was a vehicle, it made no sense. He suggested that the committee employ the phrase "protected property" instead of using "building" completely out of context with what the word meant. He suggested:

"'Protected property' means any structure, place or thing customarily occupied by people or adapted for the carrying on of business therein."

Justice Sloan asked why it was necessary to limit the definition to the carrying on of business and Mr. Spaulding acknowledged that the suggested definition would suffice if a period were placed after "people."

Mr. Chandler proposed to go a step further and encompass the definition of forest land and public buildings. The definition would then read:

"'Protected property' means any structure, place or thing customarily occupied by people or used by people, including 'forest land' as defined by ORS 477.001 and 'public buildings' as defined by ORS 479.010."

Chairman Burns said that first degree arson would then be the intentional burning of any protected property; the intentional burning of any property if it caused bodily injury or damaged protected property; or the imperiling of life or limb. Second degree arson should be the intentional burning of a building not customarily occupied by people and would include barns, railroad cattle cars, etc.

Mr. Spaulding suggested that to solve the problem of labeling "reckless burning" as "arson," there should be a separate chapter entitled "Reckless and negligent burning." Mr. Paillette remarked that Legislative Counsel would in all probability codify the two subjects under one chapter, and Mr. Spaulding said that in that event the heading should be "Crimes by fire" or something similar.

Chairman Burns asked that the clerk excerpt this latter portion of the committee's deliberations and distribute a copy to each member of the committee who would in turn return individual critiques to Mr. Paillette. Based upon the comments he received, he could then prepare another draft.

Robbery; Preliminary Draft No. 3; August 1968

Mr. Paillette explained that the Commission had rereferred the robbery draft to the subcommittee with the request that two things be done:

(1) Make clear what was meant by a deadly or dangerous weapon as an aggravated element of robbery; whether or not the draft referred to loaded guns; what was meant by deadly weapon and what was meant by dangerous weapon.

(2) Indicate the kind of robbery it would be if a robber pretended or represented he was armed when in fact he was not armed.

He pointed out that the draft was aimed at the danger or threat to the victim and was not intended to make it robbery in the first degree to hold up someone with a fake gun. Some of the Commission members felt the draft should be concerned with the actual threat to the individual while others thought the fright caused to the victim was of paramount importance. In redrafting the proposal, he said, he had attempted to find a middle ground by including three degrees of robbery rather than two.

Section 2. Robbery in the second degree. Robbery in the second degree contained the principle change and would take care of the toy gun situation by saying it was a more serious crime if the robber said he had a gun when he actually didn't have one. Mr. Spaulding commented that this would encourage would-be robbers not to actually arm themselves. Mr. Paillette read paragraphs 2 and 3 of his comment on page 2 of P.D. #3 which pointed out that the primary aim of section 2 was prophylactic because it subjected the robber who used, for example, a toy gun, to a more severe penalty than a robber who used no weapon.

Section 3. Robbery in the first degree. Mr. Paillette next called attention to subsection (2) of robbery in the first degree which changed the language of the previous draft, "uses or threatens the immediate use of a dangerous weapon," to "uses or attempts to use a dangerous weapon." He read from page 2 of the commentary to the draft which explained why the change had been made.

In reply to a question by Mr. Chandler, Chairman Burns explained that under Oregon case law there was a presumption that every gun was loaded and it became incumbent upon the defendant to prove that the gun was unloaded. Mr. Paillette stated that under P.D. #3 if the robber made any representation that he had a gun, even though he kept it in his pocket, he could be tried for robbery in the second degree. If he carried a loaded revolver, he was running the risk of a first degree robbery charge, whether or not he used the gun.

With respect to the terminology, "deadly weapon" and "dangerous weapon," Mr. Paillette pointed out that he could not determine in Oregon case law that there was any distinction between the two terms. He referred to page 3 of his commentary to the draft which set out the New York definitions of the terms and explained that the definitions section of the Oregon code would probably contain something similar to New York's definitions.

Mr. Chandler moved that Preliminary Draft No. 3 on robbery be approved. The motion was seconded by Representative Elder and carried unanimously.

The meeting was adjourned at 3:00 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission