Tape #80

Side 2 only

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Nineteenth Meeting, September 9, 1969

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

Members Absent: Rep. Douglas Graham

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

Others Present: Mr. Clarence Zaitz, United Press, Salem
Mr. Doug Seymour, Capital Journal, Salem,

Agenda: Justification, P.D. No. 1; August 1969; section 3 and sections 6 through 16 (Article 4)

Chairman Burns called the meeting to order at 1:15 p.m. in Room 315 of the Capitol Building, Salem, Oregon.

Mr. Spaulding moved to approve the minutes of the last meeting. Mr. Chandler seconded the motion which was carried unanimously.

Justification; P.D. No. 1; August 1969

Section 3. Justification; choice of evils. Chairman Burns recalled that in the last meeting, the subcommittee approved section 3 in substance but requested that Mr. Paillette redraft it for clarity. He asked Mr. Paillette how he had changed it.

Mr. Paillette replied that in accordance with the subcommittee's requests, he had inserted the concept of "reasonable appearance" in relationship to an "injury which is about to occur" by inserting in paragraph (a) of subsection (1) the language "which reasonably appears about to occur" and by breaking the first subsection into two paragraphs for greater clarity.

Chairman Burns asked Mr. Paillette to explain the distinction between public and private injury.

Mr. Paillette explained that there could be a situation where a threatened injury would affect the actor directly as opposed to a situation where some action must be taken to avoid a greater public injury, not necessarily to any specific individual, but to the community at large. Examples would be a major fire or other disaster.

Mr. Chandler moved to approve the amendments to section 3 and the motion carried unanimously.

Section 6. Justification; limitations on use of deadly physical force in defense of a person. Mr. Paillette explained that sections 6 and 7 were both limitations on the broad statement contained in section 5 that states a person is justified in using physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force, and that he may use a degree of force which he reasonably believes to be necessary for that purpose.

Chairman Burns wanted to know why certain crimes were set out in subsection (1) of section 6 rather than just stating crimes of violence.

Mr. Spaulding thought that murder should be included along with kidnapping, forcible rape, forcible sodomy and robbery.

Mr. Paillette said that with the exception of murder, forcible felonies other than those set out in subsection (1) would come under subsection (3) and Mr. Spaulding agreed.

Chairman Burns voiced concern that since there are degrees of crimes in kidnapping and robbery, there is a question of interpretation on whether this is meant to apply to all degrees of those crimes.

Mr. Paillette affirmed that this was his intention. He felt that it would be imposing too great a burden on a person to ask him to determine the degree of a crime at the time it was being committed.

Chairman Burns interpreted this to mean that a person would be justified in using deadly physical force against someone who was committing an unarmed robbery.

Mr.Paillette agreed that was the intention. He added that it still was not as broad as present law.

Chairman Burns noted that none of the present statutes relating to self defense applied to the case of a bystander killing someone in an attempt to prevent an unarmed robbery. Therefore he wondered if this section were not as broad as present law in that respect.

Mr. Paillette explained that from the standpoint of who can use the force, it is broader, but from the standpoint of the situation in which force can be used, it is narrower. He also pointed out that

ORS 163.100 provides "to prevent the commission of a felony upon his property" but this is not as broad as it would appear because it does not mean that a person could kill someone to prevent the commission of a felony upon his personal property.

Chairman Burns noted that there is a restriction against criminally negligent or reckless conduct by the actor later on in the draft with respect to force in making an arrest and wondered why there was none in this section.

Mr. Paillette explained that it was because the issue is different and the possibility of the reckless use of a gun by a bystander was rather remote since bystanders were not usually armed. He pointed out that no special relationship needs to exist between the actor and the other person. He said it was his feeling that with the exception that this section is narrower than existing law in the use of deadly force to prevent the commission of a felony, the only other change in present law is that this does, to a certain extent, modify the "retreat" rule.

Mr. Chandler posed the problem of what might happen if he were visiting a friend and a third person began assaulting his friend. Suppose the assailant was not attempting to commit any of the felonies outlined in subsections (1) and (2) and suppose, he said, that he could, with complete safety, avoid the use of such force by retreating. Was he then obliged to retreat and leave his friend in this situation. He wondered what would happen if he had to shoot the assailant in order to prevent the assault.

Mr. Paillette suggested that subsection (3) could be modified by inserting "in defense of himself" after "force" in the second line.

Mr. Chandler noted that there would still be a problem with the first part of section 6 because of the limitation to cases of self defense which would prevent one from coming to the defense of another unless it happened to occur in his own home.

Mr. Paillette disagreed and referred to section 5 which allows a person to use physical force in the defense of another.

Mr. Spaulding wondered if section 6 did not restrict that provision in section 5.

Mr. Paillette agreed that it restricts the use of deadly physical force.

Chairman Burns observed that subsection (3) does not specify who is to be the object of the use of unlawful deadly physical force. It implies that it is being used upon the actor because it mentions retreating, he said.

Mr. Paillette agreed that it was intended to cover the situation where there is really an issue of "self" defense.

Chairman Burns thought that it would be desirable to include aggravated assault in subsection (3).

Mr. Paillette thought there should be some limiting language to show that it applied only to true self defense situations.

Chairman Burns stated that if that were the case, perhaps subsection (1) should be broadened to include aggravated assault.

Mr. Spaulding felt that all that was needed was to limit subsection (3) to defense of oneself.

Mr. Chandler thought that in order to eliminate the situation he mentioned where it might be unlawful to help his friend in trouble, subsection (1) would have to be broadened to include aggravated assault. The problem he saw with subsection (3) was that it limits the action to defense of oneself and a person has no justification for fighting to protect a third person. His feeling was that a person is not necessarily justified in killing another to prevent the commission of a felony. However, if someone is using force against a third party and he happens to observe it and is equipped and desirous of doing something to prevent it, he should be entitled to some protection.

Chairman Burns agreed but thought there had to be some kind of restraint. He felt that some provision was needed to require that the actor who is going to use such force must first command the assailant to stop, or must first use reasonable means to stop the assault short of using deadly physical force. He called attention to section 11 in which, he said, this restraint had been stated very well by saying: "Nothing in this paragraph constitutes justification for reckless or criminally negligent conduct by a peace officer." He asked why that restraint should not apply here also.

Mr. Paillette explained that this Article is framed throughout in terms of reasonable belief that physical force or deadly physical force

is necessary. He asked if this did not indicate that the nature of the conduct of the defendant was going to require that he take all reasonable precautions. He asked if the subcommittee thought there should be something included about an affirmative action on the part of the actor before he uses physical force or deadly physical force.

Mr. Spaulding said the trouble with that was that it was nearly impossible to anticipate and define all situations which might arise.

Chairman Burns observed that someone might take advantage of this justification statute to kill someone.

Mr. Paillette agreed that the possibility of abuse of this provision was the difficulty in this area. He questioned whether it would be wise to impose affirmative duties on people in this situation.

Chairman Burns suggested amending subsection (1) by adding "a felony involving force or violence" after "commit" and deleting the rest of the subsection.

Mr. Spaulding moved the amendment suggested by Chairman Burns and the motion carried unanimously.

Mr. Spaulding wondered if the action referred to in subsection (2) was not covered in subsection (1) since the amendment.

Mr. Chandler, Mr. Paillette and Mr. Spaulding all agreed that it was now covered.

Mr. Paillette explained that his reason for the phrasing in subsection (2) was that subsection (1) had set out certain felonies, whereas subsection (2) applied to any kind of force against an occupant of a dwelling.

Mr. Spaulding pointed out that in the case of burglary, the force used for breaking and entering would be constructive force.

Mr. Paillette continued by saying that a person could use reasonable physical force in defense of a person. This section then goes beyond that by stating that if that person were in a dwelling, he would be allowed to use deadly physical force because of the location of the crime.

Chairman Burns wondered if this meant that the provocation can be less if the assailant acts in a person's dwelling. He did not know whether that provision was necessary, he said.

Mr. Paillette asked if a burglary would be construed as being a felony involving force or violence.

Mr. Spaulding was not sure. It could be constructive force and violence in some cases. He thought there would be good argument that this section relates only to actual force and violence. He agreed with Chairman Burns that it should relate to actual force and violence except that in the case of a burglary in a person's home, there is great danger of the burgler using force and violence even though there is no evidence of it except the fact that he is there.

Mr. Pailette referred to the underlying philosophy of the law that a man's home is his castle.

Mr. Spaulding said that in view of that concept, he thought it was a good idea to indicate that this subcommittee considers the crime more serious if the burglary is in a dwelling.

Chairman Burns noted that burglary is framed in two degrees. A person commits burglary in the second degree if he enters or remains unlawfully in a building with intent to commit a crime therein. He commits the crime of burglary in the first degree if, in addition to that, and in the process of effecting entry or while in the building or immediate flight therefrom, he is armed with explosives or a deadly weapon or causes or attempts to cause physical injury to any person or uses or threatens the use of a dangerous weapon, of if the building is a dwelling. He concluded that when considering a burglary in a dwelling, it would be of the 1st degree only. He wondered why this justification was not used as a defense in the burglary section as it is here.

Mr. Paillette explained that in this case, the concern is about the self defense concept which would apply throughout the Code although it is limited with respect to deadly force. He did, however, feel that it all belonged in one Article.

Mr. Chandler moved to adopt subsection (2) and the motion carried unanimously.

Mr. Paillette explained that subsection (3) was stated in terms of self defense. He suggested that it be amended by inserting "in defense of himself" after "use of deadly physical force."

Mr. Chandler asked if this would limit the justification defense to self defense thus leaving it out in the case of a third party. If so, he said, this implies that under any circumstances, one who sees someone else about to use unlawful deadly physical force is justified in shooting him, but if he wants to claim it as self defense, he must first look around to see if there is some way to retreat.

Mr. Spaulding pointed out that this was because you would not be helping a third party by retreating, but it might help to retreat if it involved your own safety. He said that he did not agree with the concept of this section but that he thought Mr. Chandler had raised a very valid objection in the interest of this section stating clearly what it was intended to state.

Mr. Paillette thought that Mr. Chandler's point was that if a kidnapping was being committed against a person, that person could not use deadly force to prevent it unless the kidnapper was also using deadly force. He thought that was a good observation.

Mr. Chandler continued by saying that if, however, the actor sees someone else being kidnapped, he could kill the assailant immediately because there is no restraint imposed in that situation.

Chairman Burns stated that that was his objection earlier in urging some restraint to that sort of action.

Mr. Spaulding interpreted this to mean that a person could not use deadly physical force under any circumstances unless it was necessary to accomplish the purpose of protecting oneself or a third party.

Mr. Chandler thought that it meant that a person was justified in using deadly physical force any time anyone else is using it, unless it is being used against him.

Mr. Paillette was of the opinion that the problem arose because subsection (1) authorizes the use of deadly physical force to prevent a felony involving force or violence, but subsection (3) does not authorize deadly physical force to defend oneself against a felony that might not involve deadly physical force even though it still might be a forcible felony.

He informed the subcommittee that he had set out in the commentary what appears to be existing law by citing State v. Gray which states: "The law does not require that he, being in a place where he has a lawful right to be, and not being himself the aggressor, shall retreat

to the wall, but it is his duty to retreat or otherwise avoid further conflict if he can reasonably do so without danger to his life or subjecting himself to great bodily harm, rather than take the life of his aggressor; that is to say, retreat or avoidance of further conflict to prevent the taking of human life is only required where the assault is not accompanied with imminent danger to life or great bodily injury, real or apparent."

Mr. Spaulding recalled a case he tried a few years ago -- State v. Sproul -- in which the judge accepted his proposed instructions: "If it appeared to the defendant that the deceased had the present ability and intention to inflict great bodily harm upon the defendant or to shoot the defendant, and all of this indicated to the defendant acting reasonably and under the appearances that he was in imminent danger and that his life was in peril, he had the right to withstand the anticipated shooting even to the extent of taking the life of the deceased. Under such circumstances, there was no duty upon the defendant to retreat. The defendant has a right to stand his ground for the protection of himself and has the right to take the life of his assailant if it appears necessary to protect his own life."

Chairman Burns questioned whether the term "upon appearances" in Mr. Spaulding's instructions was an accurate statement of existing law. He read from those instructions: "Under such circumstances there was no duty upon the defendant to retreat. The law does not require that a person when so threatened shall stop and determine to what extremes the aggressor will push the attack...that he may act forthwith and at once upon appearances and resist the anticipated attack with such force...." He questioned whether State v. Gray made that implication.

Mr. Paillette called attention to the commentary on State v. Gray in which the trial court instructed the jury on self defense in the following language: "But such right of self defense as will justify the taking of life of the assailant can only be exercised to defend his life or defend his person from great bodily harm. But danger of a battery alone will not be sufficient to justify the taking of the life of his assailant." The refusal of the court to give the following requested instruction was one of the errors urged successfully on appeal: "It is not necessary that the assault made by the deceased at the time upon the defendant, if you find that an assault was made, should have been made with a deadly weapon. An assault with the fist alone, if there was an apparent purpose and the ability to inflict death or serious bodily injury by the deceased upon the defendant... is sufficient to justify the killing in self defense, if the defendant

at the time he shot and killed the deceased, had reason to believe and did believe, that he was in imminent danger of death or great bodily harm at the hands of the deceased."

Mr. Spaulding reported that he had used nearly the same language in the Sproul case where he argued that:"Acting reasonably upon appearances that he is in imminent danger of being beaten and maltreated, and probably disfigured or maimed, or his life imperiled, he has a right to withstand the assault, even to the taking of the life of the aggressor."

Mr. Paillette thought Mr. Chandler's original objection to subsection (3) was a legitimate one because he now understood it to mean that a person would not be allowed to defend himself against a felony involving force or violence unless deadly physical force was being used against him. He did not think that was what the subcommittee intended to say. Therefore, he suggested moving the first phrase in subsection (3) to subsection (1) so that it would say:"Using or about to use unlawful deadly physical force or committing or attempting to commit a felony involving force or violence...." Subsection (3) would then begin with:"However, the actor may not use deadly physical force in defense of himself...."

Mr. Spaulding objected to the concept of forcing a man to retreat even though it was somewhat limited by saying a man does not have to retreat from his own house nor does a peace officer have to retreat.

Mr. Chandler observed that anyone else would have to leave a place to avoid trouble even though he might have a perfect right to be where he was.

Mr. Spaulding said that this was his objection. He referred again to the Sproul case. Sproul, he said, had a lawful right to use the road in question to reach his ranch and go about his business. The deceased had placed rocks across the road and told Sproul that if he moved the rocks, he would kill him. Sproul could have retreated and saved all that trouble but, Mr. Spaulding said, it seemed to him that he should not have had to do that. He said the judge instructed the jury as follows: "I instruct you that the defendant had a legal right to go upon the road for the purpose of removing the rock barrier and I instruct you that the defendant had a legal right to go on the road for said purpose even though because of previous threats of the deceased, he anticipated great danger to himself or an armed combat. A

person who has a right to be at or to go to a particular place does not lose that right or have the same in any manner diminished or interfered with by threats of violence made by another and is not required to curtail his freedom of movement by reason of threats made against him."

Chairman Burns pointed out that he thought the policy of the law should be to discourage a person from getting involved in that sort of situation where he had to take the law into his own hands.

Mr. Spaulding suspected that the proponents of the "retreat" theory were thinking of a single instance involving combat between two people. If it could be avoided by retreating on the part of one of them, he should do it. However, he did not think a person should have to change his way of life to avoid combat.

Mr. Paillette agreed that a person should not have to go that far. He did not think this proposal suggested that. He compared this section to the Gray case. In that case it was determined that:"Retreat or avoidance is only required where the assault is not accompanied with imminent danger to life or great bodily injury, real or apparent." In the draft proposal a man is required to retreat if he can do so with complete safety.

Mr. Chandler thought the problem appeared to be the case of a person who posed a continuing threat. The possibility of retreat would be more likely, he thought, in the case of something that developed suddenly. But that would be an entirely different situation from the Sproul case where Sproul was warned that if at any time, he went upon the road and removed the barrier which kept him from reaching his property, he would be killed. In this case, the chance for retreat was gone.

Mr. Paillette noted that the reason Sproul was justified in killing his opponent was not because he was blocking his road, but because Sproul himself was in imminent danger and could not retreat with complete safety. If the man had not been armed, Sproul would not have been justified in killing him. He repeated that this draft does not change that policy. He noted that in his commentary, he qualified this section by saying that retreat is required in the face of unlawful deadly physical force only if the actor knows that he can do so with complete safety. He concluded that this was no different from the Gray case because if a person is in imminent danger, he will not be able to retreat with complete safety.

Chairman Burns queried the subcommittee on whether they would agree that if a person is in imminent danger, he would have no duty to retreat and the subcommittee agreed on that policy.

Mr. Spaulding felt that it would be a jury question to determine whether or not the danger was apparent to a reasonable person and whether he would be taking chances with his safety if he retreated. He thought the commentary would show that it was the intention of the subcommittee to restate the present law and Mr. Paillette agreed that it would.

Mr. Chandler moved to amend subsections (1) and (3) as Mr. Paillette had suggested.

Mr. Spaulding wondered if perhaps this was saying something the subcommittee did not mean to say. He asked if the meaning was that because a person is in his house, the danger is greater and therefore, he has a right to kill someone unnecessarily.

Mr. Chandler thought the concept stated was that since a person's home is his castle, if he thinks there is danger of violence under those circumstances and while in his home, he has a right to stand his ground.

It was agreed, however, that in the situation just described, the man in his home could not have been the aggressor. A person could not start an argument in his own home and then be justified in killing someone as a result.

The subcommitte approved Mr. Chandler's motion to amend subsections (1) and (3). They then unanimously agreed to approve subsection (3).

Section 7. Justification; limitations on the use of physical force in defense of a person. Mr. Paillette explained that this section was consistent with present law.

Chairman Burns wanted to know why the terms "physical injury" and "death" were used and yet "serious physical injury" was left out.

Mr. Paillette replied that by the use of this language, he felt any kind of injury between physical injury and death would be included. He added that a person could not provoke another and then use the defense of justification. He referred to his commentary: "When a man is armed, and seeks another for an affray, the law will not permit him to provoke and urge on the difficulty to a point where there is an

appearance of an attempt to use weapons, and then justify the aggressor in taking life simply on the ground of apparent danger. In such case he is the aggressor, and the cause of the danger which menaces him, and he must abide by the condition of things which his own lawless conduct has produced."

Chairman Burns asked if subsection (3) was designed to cover the dueling statutes.

Mr. Paillette replied that it would take care of the dueling situation as well as the situation where two people simply agree to have a fight. The rationale behind this statute is that this kind of situation can be avoided.

Mr. Spaulding moved to approve section 7 and the motion carried with Mr. Chandler and Chairman Burns voting "aye" and Mr. Spaulding not voting.

Chairman Burns questioned Mr. Paillette on whether this Article would effectively repeal the justifiable homicide statute and if Mr. Paillette were convinced that he had covered all situations of this type.

Mr. Paillette replied that both justifiable and excusable homicide statutes as well as the self defense statutes were covered. He felt that he had included all situations.

Section 8. Justification; use of physical force in defense of premises. Chairman Burns referred to his previous question regarding kidnapping and burglary and their related offenses along with the various degrees of these crimes. He wanted to make the record quite clear that with respect to Justification, the subcommittee has considered those crimes only in the first and second degrees. He felt that this section should relate only to arson in the first and second degrees and not to related offenses.

Mr. Chandler asked if it would be clarified by saying just "arson" rather than "arson in any degree" in paragraph (b) of subsection (2). He then moved to make that change and the subcommittee generally approved the amendment.

Chairman Burns asked what the subcommittee thought of the concept of "defense of premises" in this section.

Mr. Spaulding noted this was presently the law.

Mr. Paillette pointed out that present law authorizes the use of force but not deadly force. He called attention to his commentary which stated "The proposed section, in allowing a greater degree of physical force to be used by a person in defense of a dwelling or in defense of an occupant in a dwelling than would be justifiable in defense of a person generally or in defense of property generally, is consistent with the traditional concept of a man's habitation as his 'castle' that has long been favored by the law. However, the section recognizes the social interest in human life and does not authorize the use of deadly force to prevent a mere trespass."

Mr. Spaulding suggested adding the word "lawful" in subsection (1) so that it would read "a person in lawful possession or control of premises." He pointed out that a trespasser could possibly be in actual possession or control. He put his suggestion in the form of a motion and it was carried unanimously. With no further discussion, Mr. Spaulding then moved to approve section 8 as amended and that motion also carried unanimously.

Section 9. Justification; use of physical force in defense of property. Mr. Paillette reported that this section also was consistent with present law and the commentary notes its relationship to the case of State v. Weber. He noted that Perkins on Criminal Law in 1957 stated that Oregon's justifiable homicide statute was an example of one of the states which authorized the killing of another in defense of personal property. Mr. Paillette said the language of the statute seems broad because of our present definition of "property" which includes personal property, but the Oregon Court would probably disagree with Perkins. However, he said, as far as criminal law is concerned, the Weber case shows the viewpoint of the Supreme Court that the use of a dangerous weapon is, as a matter of law, excessive force when used solely in the defense of property.

Chairman Burns noted that this section on defense of property relates to both real and personal property and that a person is justified in using such physical force as he reasonably believes to be necessary to protect that property from theft or criminal mischief. He wondered if there were additional categories of crimes against property to which this standard should apply.

Mr. Paillette could think of no other crimes that would be covered in the Code which would include this type of crime against property.

Mr. Chandler moved to approve section 9. The motion carried unanimously.

Section 10. Justification; use of physical force in making an arrest or in preventing an escape. Section 11. Justification; use of deadly physical force in making an arrest or in preventing an escape. Section 12. Justification; use of physical force in making an arrest or preventing an escape; basis for reasonable belief. Section 13. Justification; use of physical force by private person assisting an arrest. Section 14. Justification; use of physical force by private person acting on his own account to make an arrest. Mr. Paillette read the summary covering all these sections. He reported that they were generally in accord with existing law.

Chairman Burns remarked that section 12 imposed a standard requiring a police officer to know the legal rules but section 14 required no such standard for a private person. He wondered why that was so.

Mr. Paillette explained that it was because the police officer was in a position where he was expected to know the law and therefore should be held to a higher standard.

Chairman Burns referred to the word "only" which was used in section 11 but not in section 10. He asked Mr. Paillette if it should not be included in section 10 after the word "person."

Mr. Paillette agreed that it would add emphasis to include it. The subcommittee agreed to amend section 10 to include the word "only" as Chairman Burns suggested.

Chairman Burns also suggested that paragraph (b) of section 11 (1) be changed to conform with section 6 by including the language "involving force or violence" and deleting"the use or threatened use of deadly physical force." He moved the amendment and with no objection from the subcommittee, the change was made.

In discussion of section 12, Chairman Burns pointed to the commentary citing Rich v. Cooper which stated that when making an arrest, a police officer is presumed to be acting in good faith in determining the amount of force to be used. He asked if there was any conflict between that presumption and that stated in section 12.

Mr. Paillette answered that he did not see any conflict. He did not think he had indicated that a peace officer must establish that he had acted in good faith and belief. His action must have been reasonable, however, as it must be under present law.

The subcommittee next considered section 13. Chairman Burns pointed out that this section relates only to an escape from custody; not from official detention.

Mr. Chandler wondered about a possible situation where he, as a bystander, might be directed by a peace officer to help subdue a person who was trying to escape from custody. How much of a duty would he have to stop the escapee.

Mr. Paillette reported that under present law, there was a duty to help the peace officer and a person could be prosecuted for refusing.

Mr. Chandler asked what would happen if he had tried to stop the escapee yet failed to do so.

Mr. Paillette replied that it would be for the jury to determine whether or not he had made a reasonable effort.

Chairman Burns wondered if the language "is justified in using physical force when and to the extent that he reasonably believes that force to be necessary to carry out the peace officer's direction" implies that the peace officer must show the citizen bystander each step of the way.

It was determined that if directed by a peace officer to "stop that man" the citizen could take whatever step was necessary without additional specific instructions from the peace officer. By the same standard, if the officer said "shoot him", the private citizen must shoot; he does not have to know whether the officer is authorized to do that or not. If it later turns out that the officer was not authorized to shoot, e.g., if the man had only committed a misdemeanor, that is not the fault of the private person.

Chairman Burns commented that paragraph (b) of subsection (2) indicates that a person is justified in using deadly physical force only when he is directed or authorized by the peace officer to do so and does not know, if that happens to be the case, that the peace officer himself is not authorized to use deadly physical force under the circumstances.

Mr. Chandler's interpretation of the section was that if the private person knew the peace officer was not authorized to use deadly physical force, he is not obligated.

Mr. Paillette called attention to a statute making it a crime to refuse the peace officer's direction. Therefore, if a person was told by the peace officer to shoot someone, which he did, he would have to assume it was all right because the policeman told him to do it.

Mr. Chandler conceded that a citizen must have faith in the correctness of the policeman's direction.

Mr. Spaulding supported this view and added that the fact that the officer is wearing a uniform is also a consideration.

Mr. Paillette admitted that it would be unfair to order a man to respond to this type of demand by a peace officer and then prosecute him for manslaughter.

Chairman Burns complained about the private detectives he has encountered in Portland who, in many instances, should not be allowed to carry deadly weapons. His concern was whether peace officers meant only duly commissioned public officers.

Mr. Spaulding found that ORS 133.170 defines peace officer as a sheriff, constable, marshall, policeman of a town or member of the Oregon State Police. It was then concluded that this would include all sheriff's deputies as well as any auxiliary policemen such as those hired by businesses.

Mr. Chandler's feeling was that the concept of this section was correct. It was his opinion that when a private person responded to a request from an officer of any kind, that person should not be held responsible. If the citizen reasonably believed that the officer was authorized to direct him, he should be immune from any charge, even though he may have been mistaken in his belief in the officer's authority.

Chairman Burns asked Mr. Paillette why he had not combined sections 13 and 14.

Mr. Paillette replied that it would have made each section too long. He felt there was a legitimate reason for separation since one section covers a private person acting on his own and the other refers to a person assisting a peace officer in an arrest.

Mr. Chandler moved to approve sections 10 and 11 as amended and sections 12 through 14 as drafted. The motion carried unanimously.

Section 15. Justification; use of physical force in resisting arrest prohibited. Mr. Paillette explained that the states were divided in their concept of the "no sock" principle. This section is taken from

the 1968 version of the New York Revised Penal Law. It states that an individual will not be allowed to fight the officer on the spot; that he will have redress later if it turns out to be unlawful. He commented that this appears to be a departure from present law. In State v. Myers, he said, the court held that: "Where an arrest is made by a known officer without authority and nothing is to be reasonably apprehended beyond temporary detention in jail, resistance cannot be carried to the extent of killing the officer." The implication of the holding is that lesser force would be permissible in resisting such an arrest.

He also referred to Perkins on Criminal Law which indicates that: "The modern trend is in the direction of some such statutory provision as this: 'If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest.'"

Mr. Spaulding was satisfied that the concept made sense. He moved to adopt section 15. The motion passed without opposition.

Section 16. Justification; use of physical force by guard in detention facility to prevent an escape. Chairman Burns asked if this section placed a restriction on present law. He remarked that under present law, a guard in the tower who observes a prisoner trying to escape is justified in shooting him. He assumed that in this section, that guard would be justified in using "physical force" but not "deadly physical force."

Mr. Paillette explained this does not actually restrict the use of "deadly physical force." Because of the language "he is justified in using physical force when and to the extent that he reasonably believes it necessary", this would include "deadly physical force", he said.

Mr. Spaulding called attention to the fact that the subcommittee had been using the term "deadly physical force."

Mr. Paillette replied that "deadly physical force" was used only in those cases in which the kind of force was limited. He suggested it could be clarified by saying "is justified in using physical force including deadly physical force." He said he had certainly not meant to limit this action because there would be instances which would necessitate a guard using deadly force.

The subcommittee generally agreed to amend section 16 by inserting "including deadly physical force" following "physical force." They then approved section 16 as amended.

Section 17. Duress. Mr. Paillette explained that this section provides a defense if a person was coerced into committing a crime by the threatened imminent use of unlawful physical force upon him; that it is not a defense if he places himself in that situation intentionally or recklessly; and abolishes the common law presumption that a wife is acting under the coercion of her husband.

Mr. Chandler asked if this defense was limited to a person of reasonable firmness.

Mr. Paillette agreed that it was. He conceded that it was a rather peculiar standard in some respects but pointed out that this was MPC language and was also what the other states have used, mainly, he thought, because it was so hard to produce a more adequate test.

Mr. Chandler supposed that a person without reasonable firmness could not be held responsible for his actions at any rate.

Mr. Paillette noted that in State v. Patterson the question was whether the fear of prosecution for a former offense was a sufficient compulsion upon the defendant, when threatened with it, to exonerate him from criminal liability. The court in that case held that: "The compulsion which will excuse a criminal act...must be present, imminent and impending and of such a nature as to induce a well grounded apprehension of death or serious bodily harm if the act is not done. A threat of future injury is not enough. Such compulsion must have arisen without the negligence or fault of the person who insists upon it as a defense." The "reasonable firmness" test, he explained, would be the standard imposed to make this defense unavailable to a person who, for instance, said he had been threatened that unless he helped another person rob a bank, he would be beaten, and immediately gives in to this threat.

Chairman Burns wondered why Mr. Paillette did not just leave this question up to the case law since it seemed to him that the definition in Patterson stated it better than the subcommittee could by statute.

Mr. Chandler was of the opinion that a statute is always preferable to case law.

Chairman Burns questioned the subcommittee on their opinion of the "reasonable firmness"test.

Mr. Chandler responded that he would assume that a person without reasonable firmness would use another defense.

Mr. Spaulding asked if it were only a disputable presumption that a wife acts under the coercion of her husband.

Mr. Paillette advised that he could find no Oregon cases on this subject, and since there is nothing to the contrary, he would assume that the common law presumption would abide if the defense were raised. It is, however, an antiquated rule and he felt that if there is actual force or other duress applied to a wife, she could avail herself of the other defense which would put her in the same situation as anyone else.

Chairman Burns objected to the defense under subsection (1) because he felt that this was injecting responsibility into Justification. There is one standard of responsibility throughout the Code and yet this section is framed in terms of "reasonable firmness." No matter what you call it, he said, you are talking in terms of diminished responsibility. It seemed to him that if a person were not one of reasonable firmness, perhaps the defense should be raised by the defendant under Responsibility.

Mr. Spaulding wondered if it would be better to say "a reasonable person in his situation would have been unable to resist" and delete the word "firmness."

Mr. Paillette was not sure that would solve the problem. He said a reasonably prudent person could still be very susceptible to threats of force upon his person.

Chairman Burns suggested taking language from Patterson for this statute, stating:"The commission of acts which would otherwise constitute an offense, other than murder, is not criminal if the actor engaged in the described conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person and such force was of such nature to induce a well grounded apprehension of death or bodily injury."

Mr. Chandler favored saying "such force as he was unable to resist."

Mr. Paillette did not know if he would go that far.

Mr. Spaulding was not sure of the meaning of the word "unable" in this context. He wondered if it meant physically, mentally or morally unable. If the threat involved his wife or child and a man was coerced into committing some affirmative act, it would mean that he was mentally or morally unable to resist because anyone could physically resist performing an affirmative act.

Mr. Chandler observed that the "reasonable firmness" test will create the problem of requiring an individual set of jury instructions for each case.

Mr. Paillette agreed that this would be so. However, he pointed out, the ALI felt that they wanted to impose some standard on this defense so that it would not be abused by those who might urge that they committed a crime because they were threatened when actually they were threatened in such a way that they should have been able to resist.

Mr. Spaulding's impression was that this standard was impossible to define. Since it would ultimately be left to the jury to decide, he thought there was some merit in Chairman Burns' suggestion for abiding by case law in this area and for letting the courts instruct the juries on duress.

Mr. Chandler repeated that he felt as a matter of general policy, it was much better, where possible, to write the law into a relatively short and precise statute rather than require the courts to rely on past decisions.

Mr. Spaulding expressed concern that this section would invite defendants to raise the issue and that it gave some semblance of authority by putting something in the form of a statute that might not be raised otherwise.

Mr. Chandler moved to eliminate section 17 and renumber section 18, section 17. The motion carried unanimously. This motion was later rescinded. (See section 18)

Section 18. Entrapment. Mr. Paillette compared this section with section 17 by stating that it would be a codification of existing doctrine.

Mr. Chandler moved to delete section 18 also.

Chairman Burns' response was that he thought this was a good statute and that he did not have the same objection that he had to section 17.

Mr. Chandler said his motion was made in an effort to be consistent.

Mr. Paillette agreed that the subcommittee should be consistent but urged that they also make every effort to be as comprehensive as possible.

Mr. Chandler withdrew his motion.

Chairman Burns asked if the subcommittee would like to take both sections 17 and 18 under advisement and discuss them later. The subcommittee indicated approval of that plan.

Mr. Paillette offered to redraft section 17 in an attempt to present something less objectionable from the standpoint of the standard imposed in this draft.

The meeting adjourned at 5 p.m.

Respectfully submitted,

Connie Wood, Secretary
Criminal Law Revision Commission