Tape #63

Both sides

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

Third Meeting, February 20, 1969

Minutes

Members Present: Representative Wallace P. Carson, Jr., Chairman
Senator Berkeley Lent
Attorney General Robert Y. Thornton

Absent: Representative Harl H. Haas

Also Present: Senator John D. Burns
Mr. Donald L. Paillette, Project Director

The meeting was convened at 1:30 P.M. by Chairman Carson in Room 401, Capitol Building, Salem.

Assault and Related Offenses, P. D. No. 1 (Article 11)

Mr. Paillette explained that the draft contained three degrees of criminal assault and also some other related crimes such as Menacing and Recklessly Endangering Another Person. He noted that the proposed draft was not as radical a departure from present law as it might appear at first glance as the Oregon Supreme Court now looks upon assault as a separate offense according to the cases. The proposed draft follows the pattern set by other drafts on substantive crimes by providing for the various degrees of the crime. When it comes time to add penalty provisions to all of the crimes, this method will help to distinguish among the different classifications of crimes and provide for a consistent penalty structure. The drafts start off with the lowest form of the crime and in some drafts there are two degrees of a crime; however, in this draft there are three degrees of assault.

Section 1. Assault in the third degree.

Mr. Paillette stated that Assault in the third degree would consist of intentionally, knowingly, or recklessly causing physical injury to another. He thought the terms appearing in the definition needed a little discussion and advised that in the Draft Article on Culpability Requirements the terms "intentionally," "knowingly" and "recklessly" as well as the term "negligently" are defined for general application throughout the Criminal Code.

Other terms that appear in the draft, i.e., "deadly" or "dangerous weapon," the definition of "physical injury" and "serious physical injury" have been defined in the Article on General Definitions and he referred the subcommittee members to copies of that draft which was approved by subcommittee No. 1, after minor amendments. He felt the definitions contained in the General Definitions draft should be kept in mind when the draft on Assault and Related Offenses was being considered. The definitions would apply to other crimes as well; "dangerous" and "deadly weapon" come up in Armed Robbery, for example. Mr. Paillette explained that the idea was to follow the format of the Model Penal Code and the recent codes of other states in putting the General Definitions early in the schematic arrangement of the code and to apply them throughout rather than having to redefine each of them in each succeeding section.

Mr. Paillette repeated that it would be third degree Assault if a person caused physical injury to another or, if the mens rea element were negligent conduct, by means of a deadly or dangerous weapon.

Section 2. Assault in the second degree.

Mr. Paillette pointed out that the word "bodily" appearing in Section 2 sub (a) should be deleted and the word "physical" inserted to correct an error in the draft. The term "physical injury" rather than "bodily injury" is used throughout the draft and the definition in the Definitions Section is for the term "physical injury."

He noted that Assault in the second degree would consist of intentionally or knowingly causing serious physical injury to another; or intentionally or knowingly causing physical injury (as distinguished from serious physical injury) to another by means of a deadly or dangerous weapon; or reckless conduct (as that term is defined) by means of a weapon.

Section 3. Assault in the first degree.

Mr. Paillette pointed out that as far as culpability went, in Assault in the first degree, this would be "intentionally," "knowingly" or "recklessly" and the type of injury would be the "serious physical injury" plus the added element of "under circumstances manifesting extreme indifference to the value of human life."

Mr. Paillette referred to the Commentary and pointed out that the aggravating factors are the culpability or motivation that the defendant had for the assault; the seriousness of the injury actually inflicted; or (these are conjunctive or disjunctive elements) the dangerousness of the means the actor uses, which is a deadly or dangerous weapon. He advised that the charts included in the Commentary of the draft (pages 3, 4, and 5) contained additional comments with respect to the various sections of the draft, showing

the degree of assault, the mens rea required, the type of injury required and the type of weapon required if one is involved.

Mr. Paillette read the following from the New York Draft Penal law:

> "The proposed assault formulation, requiring actual physical injury, places the crime of assault in the main category of offenses (robbery, larceny, perjury, etc.,) which are committed only when the offender succeeds in his criminal objective. And as with other offenses of this nature, an unsuccessful endeavor constitutes an attempt. Attempted assault, then, will be governed by the same rules which apply to attempts to commit other crimes. It will be necessary to discuss attempted assault in terms of the law of attempts, in particular in regard to the elements of proximity and impossibility."

Elsewhere in the New York Code, he said, they define an attempt as follows:

"A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime." In deciding what "tends" to effect the commission of such crime, the New York courts have adopted the "dangerous proximity text." (Acts in furtherance of a criminal project do not reach the stage of an attempt unless they carry the project forward within dangerous proximity to the criminal end to be obtained,)

Mr. Paillette commented that the language in some respects was pretty ethereal and noted that all of the states as they approach the question of "intent" have tried to move "attempt" farther back into the actor's preparation to pick up activity which would not be thought of as having reached the dignity of becoming "attempt." What will happen, he continued, is that the "attempt" will be occurring earlier in the stage of the conduct and also there is going to be less need for crimes such as what is now considered assault. If this approach to assault, as formulated in the MPC and New York, is adopted, what is thought of now as assault would become attempted assault. He added that California is using this same approach to assault.

The MPC, Mr. Paillette stated, discussed this for a long time and first decided that they would go the direction that the New York draft finally took, but on their final draft in 1962 they changed their minds and put back in the traditional concept of assault so they have an attempt or the commission. He referred the members to page 11 of the draft which set out the text of the Model Penal Code. Mr. Paillette felt the decision as to whether or not to change the traditional concept of assault would be the basic policy question with respect to this Article that the Commission would have to make. Whether or not it was felt the sensible approach would

be to go the way New York is going and call it assault only when there is actually some injury inflicted on the victim and cover the incomplete crime as an attempt or whether to adopt the approach the MPC finally adopted. He noted there was quite a difference of opinion among the ALI reporters about this and the original approach was to go the way it was presented in the proposed draft.

Mr. Paillette told the subcommittee members that the Article on Inchoate Crimes was now being drafted by Professor Platt and while Mr. Paillette had not seen the draft, he knew that Professor Platt's approach, as far as "attempts" were concerned, was going to follow, generally, the type of approach that the new codes have been taking.

Mr. Paillette informed the subcommittee that the commentary attempted to summarize what the proposal does, where it came from and how it affects existing law. He referred them to page 8 of the draft which showed that Assault in the third degree was adapted from section 211.1 of the MPC and that Assault in the second degree from section 211.1 of the MPC and section 120.05 of the New York Revised Penal Law and Assault in the first degree from the MPC. He again pointed out the basic and, he felt, very important difference from the MPC in that the proposed draft did not include the "attempt" as an assault.

Senator Lent referred to page 7 and read, "Assault with intent to rob, rape or kill will be dealt with as robbery" and asked if it were intended to read "attempted robbery?"

Mr. Paillette said it was not so intended because the definition of robbery defines it as employing force in the commission of theft, so under the draft it would be a rare case where there would be an attempted robbery. An attempted theft, even though no property is taken, if force is employed would come under robbery. The Robbery Draft, he advised, had been tentatively approved.

Mr. Paillette directed the attention of the members to page 9 of the draft stating that it set out the existing statutes and added that the draft, also, would do away with the separate statutory crime of mayhem. It would be covered as a degree of assault depending on the nature of the injury and whether a weapon was used.

Referring to his earlier statement that the Oregon Court really looks upon assault as a separate offense, Mr. Paillette noted that in State v Wilson the Oregon Court said:

"We are of the opinion that criminal assault, even as defined by this court, should be regarded as a distinct crime rather than an uncompleted battery. The mere fact that assault is viewed as preceding a battery should not preclude us from drawing a line on one side of which we require the present ability to inflict corporal injury denominating this as assault and on the other side conduct which falls short of a present ability, yet so advanced toward the assault that it is more than mere preparation and which we denominate an attempt."

Section 4. Menacing.

Chairman Carson asked what placing the hand on the sword and saying, "Were not Assize time, I would slay thee" would come under.

Mr. Paillette replied that under the draft it would be called menacing.

Chairman Carson asked if it could not be brought under Attempted Assault.

Mr. Paillette thought it probably could if it would fit in with the definition of "attempt" as it was finally formulated. He referred to page 14 of the draft and noted that " A person commits the crime of menacing if by word or conduct he intentionally attempts to place another person in fear of imminent serious physical injury."

Section 5. Recklessly endangering another person.

Mr. Paillette directed the attention of the subcommittee members to section 5 of the draft and noted that "A person commits the crime of recklessly endangering another person if he recklessly engages in conduct which creates a substantial risk of serious bodily injury. Here the mens rea would be reckless conduct.

General Definitions, P. D. No. 1

Mr. Paillette asked the members of the subcommittee to look at the Article on Definitions as he felt it might help with the understanding of the terms used if they could see how they were defined. He referred specifically to:

" 'Physical injury' means impairment of physical condition or substantial pain.

" 'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.

" 'Deadly weapon' means any instrument, article or substance specifically designed for and presently cabable of causing serious physical injury."

He noted the last definition was intended to cover guns, switchblades, brass knuckles; something that really has no other purpose but to be a weapon. A "dangerous weapon" would pick up the other types of things that have been defined throughout the years as dangerous weapons and here it would depend upon how the article was used or attempted to be used.

Mr. Paillette thought that nowhere in the proposed code would the definitions be more important than in the Assault draft. He pointed out that the General Definition draft had been tentatively approved by Subcommittee No. 1, but had not yet been considered by the full Commission.

Section 6. Coercion

Mr. Paillette advised that this generally follows the similar type of crime of coercive conduct as set out in the Theft draft. The difference is that under Theft, there is the added element of obtaining property as a result of this. While he felt these related sections (4, 5, and 6) helped fill out the code and the draft, he did not feel they contained the real, basic policy questions that the main three sections (1, 2, and 3) did.

Chairman Carson noted that the method of classifying degrees of a crime was directly opposite that method used in medicine and asked if this was general throughout the code.

Mr. Paillette replied that the approach in drafting had been to use the ascending approach; to have the basic statement of the crime as the lowest degree of the crime and then enhance that by adding certain aggravating factors to it.

Chairman Carson noted that the Model Penal Code had two degrees of Assault, Simple and Aggravated, and wondered if it were necessary to break it into three elements as was proposed in the draft.

Mr. Paillette answered that the drafting approach had been to limit the number of degrees wherever possible. In many cases, he said, where the New York Draft has been followed and where New York has three or perhaps four degrees of a crime, we had gone to just two because we felt it unnecessary to get into so much refinement between the various sections. The approach in assault was formulated on three degrees although he thought without doing too much violence, it could probably be combined into two degrees. He was not certain it would make it any easier to work with in the final analysis.

Senator Burns observed that things are beginning to fall into line, the way in which each crime is set up in degrees and the way in which the same preface is used each time, and it is all related to the definitions. Senator Burns related that when considering the Robbery draft the subcommittee had tried to cut the degrees down to two but found they could not do it; in Arson they did cut the degrees to two. Senator Burns also pointed out the fact that in Assault in the second degree the distinction is drawn between intentionally or recklessly causing a physical injury by means of a deadly or

dangerous weapon and informed the subcommittee members that this was the same formulation used for the same degree of Robbery and Burglary. It is the trend in the states in the revision projects, he said, to adopt this uniformity.

Mr. Thornton raised a point regarding the words "manifesting extreme indifference" in section 3 of the proposed draft. He said he realized that it was MPC language but wondered if the word "extreme" was needed there as he felt it raised another troublesome fact, a question of proof, to the prosecutor sort of like the problem created by "gross negligence" in the negligent homicide statute. He asked the members' opinion of deleting the word "extreme."

Replying to a question by Senator Burns, Mr. Paillette said that the commentary in the draft did not contain a separate discussion about the use of this language.

Senator Burns asked if Mr. Paillette had picked up any annotations on New York or Michigan on cases reported.

Mr. Paillette replied that there were none in New York that were located. Michigan followed the New York draft on this. Since most of the Michigan text for most crimes is almost identical to that of New York, it was not set out in the draft.

Senator Burns felt there was a basic policy decision regarding the separation of Assault and Battery. If the subcommittee adopted the route of the Preliminary Draft this would, in effect, create a new class of crimes called "Attempts." He thought this real basic departure from Oregon law should be discussed.

Senator Burns noted that time and again there was the matter of coming up against the insertion of new language which to some extent or other complicates the code and which seemed to him to leave the way open for judicial interpretation. He felt the job of the Commission was to simplify and render the present code more cogent. He was not particularly enamored by the insertion of new terms but if there was some precedent in some other case or some other state which could be incorporated into legislative history to give the courts, the prosecutors and the defense attorneys some guidelines, then he felt it might be all right.

Senator Burns asked if the use of "extreme indifference to the value of human life" would open up the need for another definition.

Senator Lent agreed that this could be a problem where a judge would be instructing a jury for the first time.

Chairman Carson asked if there was concurrence for striking the word "extreme."

Senator Burns thought this would make it so first degree assault would not be stringent enough to be first degree assault -- it would be just "manifesting indifference to the value of human life."

Senator Lent referred to page 5 of the draft and from the "Comment" column read: "(3) reckless conduct evincing extreme depravity, e.g., shooting into a crowd without any specific homicidal intent." The problem is that a judge should not instruct by the use of examples, Senator Lent said. He certainly thought the intent was to go beyond mere indifference, however.

Mr. Paillette agreed, adding that an individual could be indifferent and be just merely reckless.

Chairman Carson asked if Mr. Paillette were then suggesting there be "extreme recklessness."

Mr. Paillette said no. He noted that the culpability language was in the section (intentionally, knowingly or recklessly) but that first degree has to be something more than that and the proposed language was intended to furnish some guide, without further definition, of the really flagrant situation.

Senator Burns wondered if it might not aid the subcommittee in approaching the question raised by Mr. Thornton if they did not start with first degree assault first. He thought there would be questions regarding Sections 1 and 2 and after they had thoroughly digested the problems inherent in those sections, he thought the members would be in a better position to approach first degree assault.

Chairman Carson referred to the policy decision necessary regarding dividing Assault from Assault and Battery, going to Assault as proposed in the draft. He asked if the members wanted to make this decision now.

Mr. Paillette felt this was a good comment because if the subcommittee were to reject the proposed concept of Assault, there would have to be a major restructuring done because injury to the victim is an integral part of the proposed definition of Assault.

Senator Lent indicated he favored the proposed approach because he felt that lawyers and judges were the only people who think of an assault and battery as distinguished from each other.

Mr. Thornton and Chairman Carson indicated they also were in favor of the proposed approach.

Senator Burns also favored the proposal and added that it was the direction everyone seemed to be going and also hand-in-hand with it was the new crime of "Attempt." He thought it would simplify things for juries and for the courts and lawyers.

Mr. Paillette advised that it had been the intent of the reporters when drafting the revision to not leave any holes. In other words, even though a specific crime might have a name change, it was intended to cover certain kinds of conduct. It was felt, he said, that it would not matter too much whether the term "attempted assault" or something else was used as long as there was a proscription to cover the undesirable conduct.

Senator Lent asked why in the first three sections of the draft there appeared a sub (1) when there was no sub (2). He asked if the present Style and Form Manual for Legislation was being followed or if it was being ignored at this point.

Mr. Paillette replied that Senator Lent's point was a good one whether or not the drafting was going by the format of CRS and agreed the sub (1) was unnecessary.

Senator Burns noted that in the past from time to time members had restructured drafts or made technical corrections by official subcommittee action and he thought it might be appropriate to do that here.

Mr. Paillette recalled that in other drafts the sections would begin with the preamble, without any number. He noted that in section 1 of the proposed draft that (a) would become (1) and that (b) would become (2).

Section 1. Assault in the third degree.

Chairman Carson asked the members if there were any concerns about Assault in the third degree.

Senator Burns understood that "intentionally," "knowingly" and "recklessly" would be defined in the General Articles.

Mr. Paillette replied that they were defined in the Article on Culpability.

Senator Burns then said he had no objection to sub (a) but that repeatedly the question of the negligence factor in so far as criminal liability is concerned seems to come up. He asked for an example as to where "negligently

causes physical injury to another by means of a deadly or dangerous weapon" would apply in third degree Assault.

Mr. Paillette replied that there was a statute now covering negligently wounding another. This would be negligent conduct through the use of a dangerous weapon.

Mr. Thornton asked if he meant the "unloaded" gun situation and Mr. Paillette said it would be covered where the actor thought it was unloaded, but it was, in fact, loaded.

Senator Lent thought the language was broad enough so that if he were operating his automobile and failed to maintain a proper lookout and hit someone in a crosswalk, that he would be guilty of Assault in the third degree. Although his automobile would not be a "deadly" weapon, the way in which it was used it would be a "dangerous" one. Under the proposed language he felt he would be guilty of a crime as well as liable in a tort action. He wondered if the language went too far.

Mr. Thornton asked if he felt the operation of a motor vehicle should be excluded.

Senator Lent was not ready to suggest this but was wondering if the intent was to make simple negligence combined with the use of an automobile, which causes injury to someone, a crime.

Chairman Carson asked if it were not true that any tangible article, even a parerweight, negligently, could become a dangerous weapon. A paperweight dropped negligently on someone's foot could become Assault in the third degree.

Senator Burns did not think that automibiles should be excluded. He did not think they should be embraced within the scope of section 1 but thought they certainly should so far as section 2 was concerned because there are occasional cases where people have been prosecuted for running people down with cars.

Senator Lent referred to section 2 sub (c) and noted it used "recklessly causes" and he assumed it would cover the kind of conduct in connection with the use of an automobile that now comes under "guest passenger car" or "negligent homicide."

Mr. Paillette observed that if you now kill somebody with your car when you are driving under the influence you could be charged with negligent homicide; however, if you were driving under the influence now and ran over someone but didn't kill him, there would be no crime. It could be reckless driving but as far as it relates to the victim, there is no crime.

Senator Burns advised that the MPC speaks to this by striking the word "dangerous" so that it would read "negligently causes physical injury to another by means of a deadly weapon" and a car would not come under the definition of a "deadly weapon."

Mr. Paillette noted that under the definition of a "dangerous weapon" New York specifically includes an automobile by saying "including a vehicle as that term is defined elsewhere." Michigan also does this. He noted that in the proposed definition of "dangerous weapon" a vehicle was not specifically included nor was it intended to leave it out. He thought under the proposed definition that a vehicle under certain circumstances could fit within the definition.

Senator Burns thought so too, and felt it important not to try to put too many things in the statute but to leave these things to the determination of the court.

Chairman Carson commented that it seemed to him that the subcommittee had the choice of either going to criminal negligence as they did in the New York Revised Penal Law or of dropping "dangerous weapon" as they did in the MPC.

Mr. Paillette pointed out that the proposed definition of "negligence" is the definition of criminal negligence. He advised that the culpability definitions had been through a subcommittee once and that they were in the redrafting stages now.

Generally speaking, he thought the definition would be pretty close to the New York definition which he read:

"A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

Chairman Carson thought that when you read negligence in the criminal code you almost had to add "gross" to it.

Mr. Paillette agreed that it would have to be a gross deviation from the standard of care of a reasonable prudent man.

Senator Lent was excused to attend a scheduled meeting of the Senate Committee on State and Federal Affairs.

Mr. Paillette explained that the culpability definitions distinguish between "negligence" and recklessness" in that "negligence" is the failure to perceive and "recklessness" has an actor who is aware, but disregards what he is aware of.

Mr. Paillette thought the criticism of sub (b) of section 1, was well taken but he did feel there were circumstances where negligent conduct should be covered. He thought the better approach would be to eliminate the "dangerous weapon" from this and not eliminate negligent conduct. It seemed to him that negligently wounding another person with a gun should be included.

Senator Burns thought this would probably be the instance where negligent wounding would be most used.

Senator Burns stated that the solution he favored was the deletion of the words "or dangerous." With this amendment he felt that section 1 would be acceptable.

Mr. Thornton agreed with this statement.

Section 2. Assault in the second degree.

Senator Burns noted that a person commits the crime of Assault in the second degree if he: intentionally or knowingly causes serious physical injury to another; or intentionally or knowingly causes physical injury to another [he noted it did not have to be serious physical injury], with the additional element of using a deadly or dangerous weapon. It was appropriate in his judgment to leave "or dangerous" in because of the case of intentionally running someone down. Also included in the definition, he continued, was recklessly causing serious physical injury to another by means of a deadly or dangerous weapon and he thought this also was appropriate. He was concerned about the constitutional question between subsection (b) of section 2 and section 3 insofar as assault with intent to kill is concerned. He could not see a sufficient standard prevalent in the statute to distinguish between the two.

Senator Burns cited the example of someone holding up a grocery store or of getting into an argument with someone and of shooting another person, but not killing him. The actor would be intentionally and knowingly causing physical injury by means of a dangerous weapon and also intentionally and knowingly causing serious physical injury to the person under circumstances manifesting extreme indifference to his life. He asked how the judge would rule on the demurrer there.

Chairman Carson thought the question would be on "serious" there but wondered if that would be a sufficient "limb to hang on."

Mr. Paillette agreed that there was a different definition for "physical injury" as opposed to "serious physical injury." He thought that Senator Burns' hypothetical case would almost without argument fall under Assault in the first degree, assuming there was a serious physical injury. He assumed that Senator Burns was concerned that there might possibly be a Pirkey problem here.

Senator Burns asked Mr. Thornton if he thought there would be a problem here or if he thought the word "serious" would add an additional element which would take the court off the limb.

Mr. Thornton thought it did, that it would be all right.

Mr. Paillette felt it furnished a guide for a grand jury or for a district attorney or for a judge if he has to determine not only the nature of the injury plus whether or not the circumstances would manifest extreme indifference to life.

Senator Burns asked Mr. Paillette if he would hypothecate subsection (b) as a pistol whipping, perhaps.

Mr. Paillette thought it could be a pistol whipping.

Chairman Carson thought pistol whipping could also be Assault in the first degree, depending upon how serious the danger and how badly hurt the victim is. He felt a pistol whipping would certainly manifest extreme indifference to human life.

Senator Burns thought the definitions between "physical injury" and "serious physical injury" sufficiently define it so that he found nothing wrong with section 2.

Mr. Thornton noted that in other instances he had discouraged the use of qualifying adjectives such as "serious" but he felt it was necessary to have the word "serious" in sub (c) to have a basis of distinction from sub (b). He said that he would vote in favor of section 2.

Section 3. Assault in the first degree.

Chairman Carson noted this covered "intentionally, knowingly or recklessly causes serious physical injury to another," which is the same as Assault in the second degree, plus the "serious injury" and the additional element or standard of under circumstances manifesting either extreme or just indifference to the value of human life.

Chairman Carson recalled that Senator Lent had indicated a concern about the word "extreme" but that he had not been prepared to remove the word. Chairman Carson said that he was inclined to agree with Mr. Thornton about these adjectives.

Senator Burns noted that the degree of assault being discussed was the highest degree and that it becomes a matter of interpretation unless it is qualified and there is a wide range as far as the differences are concerned. He was concerned about leaving the word "extreme" in the definition and asked Mr. Paillette what his research indicated with regard to this and how he would justify either leaving the language in or taking it out. He also asked how Mr. Paillette could justify having "recklessly" causing serious physical injury as Assault in the first degree when section 2, subsection (c), Assault in the second degree, carries the wording "recklessly causes serious physical injury to another by means of a deadly or dangerous weapon." He questioned placing "recklessness" within the ambit of first degree Assault.

Chairman Carson thought that if "reckless" were dropped out of the definition, it would be dropped right down to second degree Assault.

Senator Burns observed that Assault in the first degree would probably be a crime that would be punishable by life or by perhaps twenty-five years. Assault with intent to kill presently is punishable by life imprisonment (he noted that it carried a higher penalty than second degree murder). Presently, he said, negligent homicide carries only three years in the penitentiary. He estimated that penalty for the proposed Assault in the second degree would be somewhere in the category of one to ten.

Mr. Paillette explained that in defining Assault in the first degree, the Model Penal Code approach had been studied and that it basically seemed to be a sensible approach in that it took in the kind of situation in which there was a depraved mind at work, perhaps someone who was not actually intending to hurt anybody but nonetheless succeeds in hurting someone. He thought their feeling was that this kind of conduct should be rapped quite stiffly and he thought this made sense. Miss Lavorato and he did not feel, however, that they should go quite as far as New York did with respect to their Assault in the first degree. Mr. Paillette commented that in combining these two approaches it was possible that some violence might have been done, particularly to the individual who is just reckless as opposed to someone who intentionally does these things. He surmised that Senator Burns' objection was that if someone recklessly did what someone else intentionally did, he was going to be punished just as severely.

Senator Burns agreed. He pointed out that most of the crimes that carry a proscription for recklessness do not carry that proscription into the highest degree of the crime. He noted in rereading the Text of the Model Penal Code that in Aggravated Assault it did include "recklessly" and was not sure he could agree with them because he felt there was a line of demarcation between a "knowing or intentional" act and a "reckless" act.

Mr. Paillette advised that New York said there was Assault in the first degree when there was an attempt to cause a serious physical injury and it is caused by a dangerous or deadly weapon or if there is an intent to commit mayhem or "under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct ...." He noted that reckless conduct is modified only with the language about "depraved indifference to human life" and he thought this might be where they had run afoul in the draft. It seemed to him that if serious physical injury were caused intentionally, a strong argument could be made for calling it Assault in the first degree without the other element of a "depraved" or "extreme" indifference to human life. He thought perhaps Senator Burns' objection could be met by not applying the extreme indifference to human life test to intentional conduct but applying it only to the reckless conduct.

Chairman Carson thought that then the only difference between section 2 (b) and section 3 would be how strong the victim was and how vulnerable he was to serious injury.

Mr. Paillette suggested leaving section 2 as drafted except for sub (c). In sub (c) after "weapon" add "or under circumstances manifesting extreme indifference to the value of human life" and making section 2 Assault in the first degree, eliminating the proposed section 3. Section 1 would then become Assault in the second degree. He asked Senator Burns if this would meet his objections.

Senator Burns did not feel it would because there would be no line of demarcation drawn between assault with intent to kill and assault with a dangerous weapon and he felt there definitely was a difference.

Chairman Carson questioned that there was -- in the prosecutor's mind. He wondered if intent to kill was not often proved by the weapon used and the viciousness with which it is used.

Senator Burns advised that one of the real practicalities as far as this is concerned, in the mind of the judge trying the case and in the mind of the defense attorney, is that assault with a dangerous weapon is a lesser included offense and the suggestion of cutting the degrees of assault to two would eliminate the distinction; would eliminate the plea bargaining.

Mr. Paillette agreed that there would not be as many options open to the prosecutor.

Mr. Thornton was of the opinion that the "reckless" injury should be taken out of first degree; he thought it should stay in second degree. He thought the wording "extreme indifference" undoubtedly came out of cases in defining recklessness. He asked if the language following "recklessly" was not all a part of the definition of "recklessness."

Mr. Paillette did not think it read too clearly but he thought Mr. Thornton was right and that it was intended just to apply to "recklessly."

Senator Burns stated that if the language was meant to apply just to recklessly, there was a Pirkey problem between "intentionally" or "knowingly" causing serious physical injury insofaras section 3 and section 2 were concerned.

Mr. Thornton again suggested the deletion of the word "extreme" in section 3 of the proposed draft.

Chairman Carson was inclined to go along with Mr. Thornton's suggestion. He recognized the problem regarding "indifference" but did not know how anyone would go about instructing about "extreme" indifference.

Mr. Thornton suggested leaving section 3 as is, retaining "recklessly" in first degree and just deleting the word "extreme."

Senator Burns objected to having "reckless" in the same category as Assault in the first degree. He felt if Mr. Thornton's suggestion were adopted, it would compound his objection to having "reckless" in section 3 because he thought the suggestion would lower the degree of recklessness.

Mr. Thornton thought that the language "under circumstances manifesting extreme indifference to the value of human life" was intended by the draftsman to differentiate the recklessness in section 3, the first degree, as against the recklessness in section 2 (c).

Mr. Paillette agreed that this was the intent.

Mr. Thornton stated that he could support section 3 of the proposed draft if the word "extreme" were deleted.

Mr. Paillette advised the members as to the position taken by New York regarding this. New York talks about "recklessness" as "under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury..." (New York Revised Penal Law S. 120.10 (3)).

Mr. Paillette read from the New York commentary:

> "Subdivision 3, defining the highest crime of reckless assault, is especially significant when considered in conjunction with another provision defining the same conduct as murder when death results. The murder provision, virtually the same as a first degree murder provision of the former Penal Law, applies to conduct of extreme depravity, such as shooting into a crowd wantonly but without any specific homicidal intent. Although this constitutes murder under both the former and Revised Penal Laws in the event of fatality, it did not constitute assault under the former Penal Law if the result was serious but nonfatal physical injury. This obvious gap is filled by the revised provision in issue, which renders the 'wounder' guilty of assault in the first degree. Upon this subject, it is pertinent to note that, even thought his bullet fortuitously hits no one, the culprit is still guilty of another and lesser, though felonious, crime."

Mr. Paillette noted that New York felt the actor was just lucky if he did not kill someone and was their rationale for putting it in Assault in the first degree.

Senator Lent was now present.

Senator Burns noted that it would not be Assault in the first degree if you shot at somebody and missed him.

Mr. Paillette agreed but noted that he was talking about an instance where someone was wounded rather than killed. If the victim were killed, the actor would be prosecuted for murder but under the former New York penal law if the victim was not killed, the actor was not prosecuted for anything. This was what the New York revisionists were trying to get at.

Senator Burns commented that he felt very strongly about placing "reckless" in the same catefory as Assault in the first degree although he understood completely the rationale lying behind the qualifying language in the section. He asked Mr. Paillette to draw a distinction between the crime of "recklessly causes serious physical injury" in section 2(c) and the crime of first degree Assault that Mr. Paillette just spelled out in the New York commentary.

Mr. Paillette replied that the more he thought about it and reflected on the State vs. Pirkey, the less certain he was that he could draw a satisfactory distinction. He thought Senator Burns had a good point; that there might be a problem as to whether the section provided a sufficient guideline or whether it could be argued that it gave the prosecutor a chance to arbitrarily charge the defendant under second degree or first degree.

Chairman Carson was of the opinion that as the draft was written, the language "manifesting extreme indifference to the value of human life" applied equally to "intentionally" and "knowingly" as well as to "recklessly."

Senator Lent agreed that it must apply equally in section 3 otherwise he wondered what the difference would be between it and second degree Assault.

Senator Burns indicated this was his second question. He felt that in the New York text just read by Mr. Paillette that the language "...evincing a depraved indifference to human life... " applied only to "recklessness" and Mr. Paillette agreed.

Senator Burns informed Senator Lent that it had been suggested that the degrees in the Assault draft be reduced from three to two. He also stated he opposed this because it did away with the distinction between Assault with Intent to Kill and Assault with a Deadly or Dangerous Weapon and does away with plea bargaining and lesser included crimes.

Mr. Paillette stated that what the drafters were trying to do (and he was not so sure they had succeeded) was to relate the seriousness of the offense either with the kind of implement that was used in the crime or with the kind of injury that was inflicted, one or the other and as far as the culpability

element was concerned, to talk in terms of "intentionally." He thought this might be the basis of the real problem because when you talk about "intentionally" you could have different kinds of intent when you commit an assault. You could have an intent to inflict bodily injury or you could, on the other hand, have an intent to inflict serious bodily injury and he thought that perhaps the subcommittee could distinguish better if they looked to the type of intent involved. He suggested that perhaps the intent element in the draft needed further refinement.

Senator Lent pointed out that the proposed draft had three things in second degree: sub (a) dealt with result, with serious physical injury; in sub (b) there may be very slight injury but it is the use of a deadly or dangerous weapon that brings it up to second degree; in sub (c) reckless conduct gets into it if it causes serious physical injury, which brings in both the result and the deadly or dangerous weapon. Section 3, he continued, goes to the circumstances, whether or not it creates a serious risk to life. Here you get into the case where life is actually threatened and he thought this was what was trying to be accomplished between second and first degree. First degree would be where life can very easily be snuffed out rather than either injury plus a weapon or serious injury without a weapon. First degree, he thought, went further; it got the climate into it; the result is not so important if the circumstances spell out a high degree of risk to life rather than high degree of risk of injury.

Senaotr Burns said that he was not arguing that the section should not be in the draft and he gathered that Senator Lent seemed to denote some rationale for the existence of it, also. Senator Burns again stated that he had had an objection to making the person who is "reckless" guilty of first degree Assault but noted that Senator Lent seemed to think it appropriate.

Senator Lent said that what he was getting at was this: Section 3 read "intentionally, knowingly or recklessly" causes, first of all, "serious physical injury" and he noted that "serious physical injury" appeared also in Section 2 but without the use of any weapon. In Section 3 it is not tied to a dangerous or deadly weapon, either, but it is tied to the circumstances in which the "serious physical injury" occurs. It would be a case, probably, where life was in danger of being snuffed out and it seemed to him that a valid distinction was being made.

Senator Lent again brought up the problem arising when a judge attempts to instruct a jury as to the meaning of "extreme indifference."

Mr. Paillette was not sure it could be defined.

Senator Burns asked if "depravity" could be inserted.

Mr. Thomson noted that was the New York approach. They say "under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another."

Mr. Paillette observed that the New York language included "grave risk." He thought this definition was worse because of the added question of what is a "grave risk of death" along with "depraved indifference."

Mr. Thornton indicated he was coming around to the idea of having but two degrees of Assault.

Senator Lent said he had not supposed this because he thought there was an idea in the draft of importance to the proposed thing, if it could be stated to the subcommittee's satisfaction. He reviewed by stating that Assault in the third degree was causing physical injury if done intentionally, knowingly, or recklessly; or negligence if a deadly weapon is used. Assault in the second degree was causing serious physical injury if done without a weapon; or any injury if a deadly or dangerous weapon is used; and reckless enters into it when there is a serious physical injury and a deadly or dangerous weapon is used. Assault in the first degree gets to the point where deadly or dangerous weapons are not involved and you have any one of three kinds of conduct, intentionally, knowingly or recklessly, but you look then to the surrounding circumstances as to whether there was a considerable degree of risk of the loss of some human life. He thought this was a third step and thought the problem was stating it to everyone's satisfaction rather than the concept.

Chairman Carson was hopeful that "depraved" had a definition other than that in Webster's New World Dictionary because he did not think it would fit: "Morally bad, corrupt or perverted." He said he realized "depraved indifference" was a standard phrase and that New York used it.

Senator Burns asked how "extreme" was defined.

Chairman Carson read: "At the end or outermost point, farthest away, most remote, utmost, last, final, going to great lengths, in the greatest degree, very great or greatest, excessive, immoderate."

Mr. Thornton suggested that if there must be a qualifying adjective that the word "total" be considered.

Senator Burns left the meeting.

Senator Lent observed that nothing was accomplished, really, by playing with words but from a practical standpoint it must be something that a judge could instruct on. He noted that "gross" or "great" could be used and thought that by using "gross" instead of "extreme" the subcommittee would know that they could borrow from the civil field as they knew the courts had dealt with "gross negligence" for a long time.

Mr. Paillette noted that there had been a good deal of trouble in the past regarding defining or not defining such terms as "substantial." "Gross deviation" was another term used and it was decided not to try to define the term.

Mr. Thornton noted that the Model Penal Code used just the "Simple assault" and the "Aggravated assault" approach and asked Mr. Paillette why he did not favor this approach.

Mr. Paillette said it was mainly a question of structuring the draft. He thought the proposed draft accomplished the same thing as that accomplished by the MPC only with a little different format. He noted that the MPC structure was not as simple as it looked because of the way in which they put in their penalty provisions. Aggravated Assault is really two separate crimes under the MPC because under section 211.2 (a) it is a second degree felony and if it comes under section 211.2 (b) it is a third degree felony. In effect, then, there are three degrees but the MPC says it in a little different way.

Mr. Paillette suggested one other way of structuring the draft that might make a little more sense would be to take the "serious physical injury...by means of a deadly or dangerous weapon" out of second degree Assault and move it down into the first degree category.

Senator Lent could not agree because he still felt there was an idea in section 3 different from that in section 2.

Chairman Carson thought that if Mr. Paillette's suggestion of pulling out subsection (b) of section 2, were followed, there would not then be any conflict. In Section 3, Assault in the first degree, the phrase "intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon," would stand on its own and then would read "or recklessly causes serious physical injury to another under circumstances manifesting extreme indifference to the value of human life." The two concepts would then be separated; one would be the intentional, physical injury to another, serious or otherwise, by a deadly or dangerous weapon and the second would be the reckless indifference.

Mr. Paillette added that Assault in the second degree, then, would cover an intentional, serious physical injury whether or not there was a weapon and reckless, serious injury by a deadly or dangerous weapon. Intentional, physical injury by means of a weapon would be covered under Assault in the first degree.

Senator Lent could not support this. He thought that in section 3, if there was to be any difference at all, it was in the idea of the circumstances. He felt it took both the intentional and reckless act and put them in terms of the circumstances under which they occur; this, he thought, was what distinguished section 3 from section 2.

Chairman Carson thought this was beyond where other states have gone. It seemed to him that normally "extreme indifference" relates to recklessness; that if you shot into a crowd, that the actor would certainly qualify without the language "extreme indifference." It seemed to him that if you intentionally do something like that, you could almost assume "indifference."

Mr. Thornton suggested that in the interest of simplicity and streamlining, the subcommittee consider having Simple Assault and Aggravated Assault and let the penalty refect the difference in degree.

Senator Lent noted this would mean knocking out section 3 and simply making the penalty range big enough under section 2 to take care of some of the situations where the sentencing authority, the judge, took into consideration the circumstances under which the crime was committed.

Chairman Carson asked if this was not one of the things the revisionists were trying to get away from--the one to twenty-five, where one defendant gets one year and another in another county does the same thing but receives twenty-five years.

Mr. Thornton noted you could get away from this by using the Federal approach and having 100 percent indeterminate sentence.

Mr. Paillette explained that the Commission practice had been to leave out all of the penalty provisions in the drafts and to attempt to grade them so they all fit in together and so there would not be inconsistencies in the penalty structure. That is the reason, he said, that they had gone to the "degree" approach. To facilitate this, he observed that he would certainly hesitate following the MPC approach to Assault because it would stick out "like a sore thumb" in connection with all of the other drafts. Everything else that has been drafted so far has been drafted in terms of degrees.

Mr. Thornton thought it would be possible to call it two degrees--first and second degree.

Mr. Paillette pointed out that the MPC actually had four degrees. Simple Assault could be a misdemeanor or a petty misdemeanor; Aggravated Assault could be either a felony in the second degree or a felony in the third degree. The drafters of the proposed Assault Draft felt that Assault in the third degree would probably be graded as a misdemeanor, that Assault in the second degree would be a middle category of felony and that Assault in the first degree would probably fit into the upper range of felonies. The same idea was followed in the Robbery Draft, with first degree Robbery falling into the upper category of the grading structure.

Replying to Senator Lent, Mr. Paillette agreed that all final decisions were made by the full Commission, no matter what a subcommittee might decide. The full Commission relies strongly, however, on what the subcommittee has done.

Senator Lent moved that the subcommittee at least adopt the concept of having three degrees of Assault. The motion carried unanimously.

Senator Lent then commented that he thought the one thing really bothering the members now was the use of the word "extreme."

Chairman Carson added that Senator Burns was concerned about the inclusion of "recklessly" in section 3. (Senator Burns not present)

Mr. Thornton moved the adoption of section 1 with the words "or dangerous" deleted and with the numbering changed to conform with the drafting manual. The motion carried unanimously.

Senator Lent moved the adoption of section 2 as drafted but with the language "bodily injury" changed to read "physical injury" and with the outline changed, also. The motion carried unanimously.

Senator Lent moved the adoption of section 3 as drafted, with the elimination of the subsection "(1)" symbol and Mr. Thornton noted this would allow the word "extreme" to go in. He asked the opinion of the members regarding the substitution of the word "gross" for the word "extreme. Senator Lent thought there was logic in the suggestion because at least the courts would have had some experience working with the word "gross." Mr. Thornton said he could support Senator Lent's motion if he would amend it to substitute "gross" for the word "extreme."

Senator Lent moved they accept Section 3 as written, after deletion of "(1)" and after substituting the word "gross" for the word "extreme." The motion carried unanimously.

Mr. Paillette understood, for the purposes of any other staff work on the draft, that the subcommittee wanted to leave it as it was drafted; that it was satisfactory to the members.

Senator Lent said there were the policy concepts that (1) the subcommittee would go this way--that Assault meant some injury; (2) that the subcommittee favored three degrees; (3) that the subcommittee was ready to submit it to full Commission as to language. Mr. Paillette asked if the subcommittee was satisfied that section 3 said what the subcommittee intended. Senator Lent thought that it did; he thought the concept there was the additional factor of the circumstances.

Chairman Carson asked if it were not agreed that the phrase "under/in the circumstances manifesting gross indifference to the value of human life" applies equally to "intentionally," "knowingly" and "recklessly." The other members agreed to this statement.

Section 4. Menacing.

Mr. Paillette commented that this really covered the "threat." He noted there were examples set out in the commentary.

Mr. Thornton asked why the new word "menacing" was used instead of "threatening." Mr. Paillette replied that the language was taken from New York.

Chairman Carson noted that New York did make a distinction in menacing, covering not only physical acts but also threatening words.

Mr. Paillette noted that the MPC combined menacing with their Assault; whereas, the proposed draft puts it in as a separate section.

Mr. Thornton thought a good argument was that Oregon would be tied to a major populous state and would have the advantages of judicial construction in that state.

Senator Lent thought that it might be better to use the new word "menacing" so as not to carry along the trappings of "threatening," which might be tied in with the old distinction between Assault and Battery.

Mr. Thornton remarked that "menacing" was more than "threatening."

Senator Lent read from the dictionary: "Menace--projecting, threatening, a threat or threatening, anything threatening harm or evil, to threaten; synonyms, see threaten."

Mr. Paillette noted that another problem, in just deciding what language to use, is that "threat" appears elsewhere in the code. It is used in Theft by Extortion. He noted that you could threaten someone by means other than fear of physical injury. The drafters were trying to have the word convey the thought of a threat to do physical injury to the victim.

Chairman Carson posed a situation where he told an individual that he would rough up the individual's child and asked if he would then be guilty of "menacing."

Mr. Paillette replied that he would not.

Chairman Carson observed, then, that he had certainly "threatened" the victim but apparently had not "menaced" him. He noted the language in the draft "... place another person in fear of imminent serious physical injury" and presumed it referred to the person to whom the menacing word is made. If that is true, then he felt there is a difference between a "threat" and a "menace."

Senator Lent felt, even though the dictionary used the words as synonyms for each other, that there is a little more sinister connotation to "menace" than there is to "threat."

Mr. Thornton proposed the acceptance of Section 4 as written. The motion carried unanimously.

Senator Lent pointed out that section 4 "menacing" is talking about an "attempt" and wondered if they were getting into the problem discussed earlier about the difference between "crimes" and "attempts." Here a crime is actually defined as an "attempt."

Mr. Paillette asked if he meant that "menacing" could be Attempted Assault?

Senator Lent asked how you could get at someone for an attempt at Menacing? Menacing is itself an attempt.

Chairman Carson did not think you could have an attempt at Menacing.

Senator Lent asked if the members were confident that there would be no problem regarding the earlier expressed thought about the difference between a "crime" and then making a separate distinction for an "attempt."

The other members did not feel this would be a problem.

Mr. Paillette noted the intent of the actor covered by section 4 would not be an attempt to hurt or injure someone but is an intent to place them in fear.

Section 5. Recklessly endangering another person.

Senator Lent referred to the language "recklessly engages in conduct which creates a substantial risk...." and felt this was different from the language in section 4, "by word or conduct he intentionally attempts to place...."

Mr. Paillette answered that this went back to the definitions of the Culpability elements and that the definitions are framed in terms of defining "recklessly" and "negligently" and "knowingly" and "intentionally." He noted that "recklessly" modified the verb and not the noun.

Senator Lent noted that the Wisconsin text read "reckless conduct" but that the New York Revised Penal Code read "recklessly engages in conduct."

Mr. Paillette advised that the New York definitions were geared to "recklessly" and "negligently" and "intentionally."

Mr. Thornton noted that New York had two degrees of Reckless Endangerment.

Mr. Paillette commented that New York had a tendency to break everything down into numerous degrees, recalling that they had four degrees of Criminal Mischief.

Senator Lent called attention to the use of "bodily" instead of "physical" injury in Section 5. Mr. Paillette took note of this.

Senator Burns was now present.

Senator Lent noted that what was being said in Section 5 was: "A person commits the crime of recklessly endangering another person if his reckless conduct creates a substantial risk of serious physical injury to another person."

Mr. Paillette agreed.

Senator Lent thought there was a subtle difference between talking about "recklessly engaging in conduct" and "engaging in reckless conduct" but he did not know that it was an important one. If there were a decision made because some court felt there was a difference, then perhaps another look should be taken.

Senator Burns did not know that there was a difference between the two wordings.

Senator Lent referred to an earlier statement by Mr. Thornton regarding the fact that by sticking to the New York statutes where we can, and the fact that that state is so populous, there will be decisions for our courts to use as guidance and said this might be another instance where this would be true.

Mr. Thornton wondered if the subcommittee should not give some consideration to the two degree approach adopted by New York.

Senator Lent noted that the New York text involved the use of the language "depraved indifference" and "grave risk" discussed earlier.

Mr. Paillette admitted that from the plea bargaining standpoint the New York approach had some merit. Michigan, he advised, comes right out and says that one of their basic objectives is to facilitate plea bargaining. He thought the subcommittee could go another degree if it desired. His feeling was, that where there is a situation where there has not really been any injury, that serious questions could arise as to whether it would come under one degree or another. The drafters did not feel that this would probably be a big area.

Senator Burns thought that if the members decided to break this section down into two degrees that they would be indirectly approaching a question that another subcommittee will be working on and that he thought they would wrestle with in full Commission, and that is Classification of Crimes. He thought there had been some thinking about distinguishing misdemeanors between Class A, B, and C and he thought Endangering in section 5 was a misdemeanor type of offense.

Mr. Paillette thought section 5 would be a misdemeanor type of offense. He advised that New York had a very sophisticated and unnecessarily complicated penalty structure.

Senator Burns thought that when the members discussed putting two degrees into section 5 they were really talking about two degrees of misdemeanors and he felt this should be avoided wherever possible.

Mr. Paillette informed the members that the subcommittee working on Classification of Crimes had approved of Misdemeanors and Petty Misdemeanors.

This, he said, is really the only difference they had made in classifying the crimes from the present law.

Senator Lent noted that in New York the lesser crime was one where the actor only threatened serious physical injury and the greater crime was where the actor threatened to extinguish a life and they again bring the circumstances idea through which is what distinguishes the draft's second and third degree Assault.

Mr. Paillette reminded the members that they must, also, keep in mind the definition of "serious physical injury" and that it is implicit in the definition that it "creates a substantial risk of death." With this in mind, he thought it might be somewhat redundant to have another degree in section 5.

Senator Lent moved the acceptance of section 5 as drafted, with the provision that the word "bodily" be changed to "physical."

Senator Burns noted the presence of the language "substantial risk" in section 5 and asked Mr. Paillette if this was to be defined in the General Definitions section, or if it was necessary.

Senator Lent noted that it had been discussed a little while Senator Burns was absent from the meeting and that it seemed to be the consensus of opinion that some things would not be defined--that they would be left to the discretion of the courts.

Mr. Paillette advised that the term had been discussed by other subcommittees in relation to various drafts and that he thought the general feeling had been that a point is reached where you cannot define any further.

Senator Lent felt that the courts are used to dealing with terms such as "substantial evidence", etc.

Mr. Thornton pointed out that the language "substantial risk" was also used by New York.

Senator Lent's motion to adopt section 5 carried unanimously.

Section 6. Coercion.

Mr. Paillette admitted that he was not overly enthusiastic about having this section in the draft, but he felt that the decision as to including the section or deleting it from the Assault Draft should be a subcommittee decision. Mr. Paillette thought the crime was pretty well covered in instances where

it would be most likely to occur and that is where there is some property element involved--an attempt to get property as a result of this action. The language in section 6, he said, is almost identical to the language contained in the Theft by Extortion Draft.

Mr. Thornton thought it should be carefully studied because he felt coercion was something a little different from extortion. Extortion, he said, will not reach certain types of racketeering and shakedown conduct and he was not sure whether the Theft statute would or not.

Mr. Paillette referred to the present statute, ORS 163.480: "any person...who threatens any injury to the person or property of another...or threatens to accuse another of any crime with intent thereby to extort any pecuniary advantage or property from him, or with intent to compel him to do any act against his will, shall be punished...". He noted that the crime is committed when the threat is made and there is no requirement that property be obtained. The proposed draft follows the present law but separates the offenses of theft by extortion and coercion. If property was involved, he said, it would fall under Theft and if no property was obtained as a result of the Theft it could be attempt.

Mr. Thornton recalled coming up against situations and finding that the extortion statute was insufficient and of offering a bill on this. He had some notes regarding this that he would like to check out.

Chairman Carson referred to the language in section 6 (8), to the effect that coercion is demanding conduct or telling someone to refrain from conduct to use or abuse his position as a public servant by performing some act within or related to his official duties...and he wondered about its application say, to committee chairmen in conducting a hearing or meeting. He noted the wording was in the proposed draft, Illinois and a few other places.

Mr. Paillette noted that the language in the draft came from the MPC as well as from New York. §135.60.

Chairman Carson was of the opinion that the draft was such a hybrid that it lost the safeguards in both instances. He noted the MPC defined criminal coercion "with purpose unlawfully to restrict another..." and then put in the subsection relating to taking or withholding action as a public official.

Senator Lent pointed out that Illinois starts out the first part of its section by saying "...a threat to perform without lawful authority any of the following acts:" and noted this did not appear in the proposed draft.

Mr. Paillette agreed that the language in the draft was much closer to that of New York.

Senator Burns noted that Mr. Paillette was a little uneasy with respect to section 6 and asked how he would alternatively cover the void that would be left if section 6 were deleted.

Mr. Paillette asked if he meant the void in respect to the present extortion statutes?

Senator Burns said,"yes" as he thought the present extortion statute almost covers some of the same things covered by section 6. He noted that it did not have the element of property in it.

Mr. Paillette thought the present Extortion statute was covered under the Theft statute the way it is drafted because under present law there has to be an intent to extort a pecuniary advantage or property from the victim but there does not have to be any actual obtaining of property to be extortion. Under the Theft draft if the actor obtains property it is Theft by Extortion; if he does not obtain property but just makes the threat with the intent (the same intent that is necessary under ORS 163.480), it would be Attempted Theft by Extortion. With respect to present law, he did not feel there would be a void, but with respect to the question raised by Mr. Thornton, that he felt the present Extortion statute has proven to be inadequate, perhaps there is a void that should be remedied.

Mr. Thornton stated that he was not ready to vote on the question and he had a time problem which would prevent him from staying at the meeting much longer. He would like to check some notes he had on the problem and study the draft more before he voted.

Mr. Paillette said that in respect to the Assault Article that he thought the coercion crime could go any number of other places in the overall draft.

Senator Burns noted that it could almost be a footnote to the Extortion section. He noted that if the subcommittee members had not looked at Extortion, that he thought they should look at Coercion in conjunction with Extortion. He thought perhaps it would be in order to postpone consideration of section 6, and at the next meeting bring in the approved Extortion draft and place it side by side with section 6 and discuss which way to go.

Mr. Paillette informed the members that New York placed coercion in their Kidnaping Article.

Chairman Carson announced that if there was no objection, the course suggested by Senator Burns would be followed and urged all members to read or reread the approved Extortion Draft. There were no objections voiced.

Mr. Paillette announced that he would like to have a subcommittee meeting every two or three weeks during session. He will get together with Chairman Carson and work out the date for the next meeting for the subcommittee.

The meeting was adjourned at 4:20 P.M.

Respectfully submitted,

Maxine Bartruff, Clerk