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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

Tenth Meeting, October 22, 1969

Minutes

Members Present: Representative Wallace P. Carson, Jr., Chairman
Representative Harl H. Haas
Senator Kenneth A. Jernstedt

Members Absent: Attorney General Johnson

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

Others Present: Professor George M. Platt, University of Oregon School of Law
Miss Kathleen Beaufait, Deputy Legislative Counsel

The meeting was called to order at 9:45 a.m. by Chairman Carson in Room 315, Capitol Building, Salem, Oregon.

Amendments to Sexual Offenses; P.D. No. 2; August 1969.

Section . Sexual misconduct with a minor.

Mr. Paillette explained that the proposed section would be inserted in the Sexual Offenses Draft and would raise the age at which a person is capable of consenting to a sexual act from 16 to 18. The present Oregon fornication law is not covered in the Sexual Offenses Draft and the proposed section would fill this void. The statute, ORS 167.030, reads:

> "Any male person over the age of 18 years who, without committing rape, carnally knows any female person of previous chaste and moral character, who is over the age of 16 years and under the age of 18 years and is not his lawful wife, shall be deemed guilty of fornication."

Chairman Carson stated two things caused him to consider the proposed section and to bring it before the subcommittee for consideration. First, his sense of the public's concern in regard to the proposed Sex Offenses Draft is that it is in the 15 to 18 year old bracket; there is less concern about the activities of the adult. The present Sexual Offenses Draft says, in effect, that a person becomes an adult, sexually, at the age of 16. He cannot vote, marry or drink for another five years or smoke for another two years and this would seem to write into the statutes another inconsistency. Chairman Carson favored moving, both in voting and in contracts, toward an age of majority at 18.

Chairman Carson noted, as had Mr. Paillette, that the present fornication statute covers, vaguely, acts by persons between the ages of 16 and 18. He added that he had not yet found a conviction or a prosecution in Marion County for fornication. The question, then, is whether this age can be covered by adopting a section such as that proposed--Sexual misconduct with a minor. The adoption of such a section would be stating, in effect, that until a person reaches the age of 18, the state is going to control him as far as his sexual activities are concerned by making some activities a crime and some activities not a crime. This area would come under the Juvenile Code. If the Sexual Offenses Draft, P.D. No. 2, is adopted in its present form, sans the statute on fornication, state control will stop at sixteen. Chairman Carson felt this would have obvious effect, both in heterosexual activity and homosexual activity.

Representative Haas noted the language "A person commits the crime of sexual misconduct with a minor if: (1) Being a male...(2) Being a female..." and asked what the age would be of the person commiting the crime.

Mr. Paillette replied that in this instance it referred to a person over 21 because of the section on defenses contained in the Sex Offenses Draft. He felt this defense should apply to the proposed section as it does to other sections in the Draft, making it an affirmative defense if the defendant were less than three years older than the victim. This would make the proposed provision a little more lenient than the present fornication statute.

Representative Haas understood, then, that even with the addition of the proposed section, all consensual sexual conduct between people under 21 and over 16 will not be a crime.

Chairman Carson had not considered this added defense but he thought Representative Haas' statement would probably be true.

Mr. Paillette noted that for third degree rape, the next greater offense, the age limit would be 19 since the age for the female is "less than 16 years of age" in that section.

Mr. Paillette pointed out that the proposed section would take in a male victim, also. This was done with the case of State v. Hodges, which decimated the CTDM statute, in mind. The Court's language would indicate that the rest of the statute might also be unconstitutional. The proposed provision would be complimentary to the extent that it does cover males under the age of 18, who are supposedly covered now under the CTDM statute.

Mr. Paillette stated that he had looked at HB 1897, re the seduction of minors, which was passed during the last legislative session and even without the addition of the proposed section, he felt the sections on sexual abuse contained in the present Sex Offenses Draft would get at the type of conduct proscribed by the bill. He referred to HB 1897, to the language "...or who by threats, commands or persuasion endeavors to induce any such child to commit any crime...", and said he thought this conduct would be covered by the section on solicitation contained in the Article on Inchoate Crimes.

Chairman Carson understood that the proposed section would raise the age of sexual maturity from 16 to 18 and if the three year age defense were extended, two persons aged 16, 17, 18 or within three years of the age of the victim (could not exceed 21), would not be in violation of the section. He noted that if a girl of 15 were seduced by a person of 45 years, under the present provisions of the Sex Offenses Draft the actor would be guilty of statutory rape; if he seduces a girl of 16, there is no crime. With the addition of the proposed section, however, he would be guilty of sexual misconduct with a minor.

Mr. Paillette observed that the section proposed is not as liberal as that set out in the Model Penal Code. He read from section 213.3, Corruption of Minors and Seduction:

> "A male who has sexual intercourse with a female not his wife, or any person who engages in deviate sexual intercourse or causes another to engage in deviate sexual intercourse, is guilty of an offense if:
>
> "(a) the other person is less than [16] years old and the actor is at least [4] years older than the other person; or
>
> "(b) the other person is less than 21 years old and the actor is his guardian or otherwise responsible...;or
>
> "(c) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him; or

"(d) the other person is a female who is induced to participate by a promise of marriage which the actor does not mean to perform."

Representative Haas understood the MPC does not fix the age of consensual sexual conduct at 18; it remains at 16.

Mr. Paillette replied that the MPC uses the age of 16 in section 213.3, Corruption of Minors and Seduction; it uses the age of 10 for Rape.

Representative Haas asked the prevailing situation today in the enlightened states as far as the age of consent is concerned.

Mr. Paillette advised that New York's lowest degree of rape, third degree, sets the victim's age at 17; Michigan uses 16 years for third degree rape; Connecticut 16; Illinois uses 14 for statutory rape; the Iowa Bar Proposal uses 14; Texas has the age of 14. The Oregon Draft is really more conservative in regard to age than most states, with the exception of New York.

Representative Haas was still concerned about the section proposed. He noted that a girl almost 18 could be a college freshman and if she and her 21 year old fiancee engaged in sexual conduct, it would be a crime. She can, however, marry at 16 with her parent's consent or at 18 without their consent. From what he understood from Mr. Paillette's information, the section's provisions go in the opposite direction from that taken by the most recent penal code revisions.

Mr. Paillette supposed that it was somewhat a matter of what Oregon is ready for in this area. He did not personally favor the proposed section on sexual misconduct with a minor and did not feel it added anything in particular to the Sex Offenses Draft. At the same time, he admitted that the question of the age of the victim was certainly the one thing receiving the most criticism so far with respect to the approach on sex offenses. Surprisingly, he continued, many people criticizing this think the age of consent now is 18 rather than 16, which it is under the present statutory rape statute. He pointed out, also, that under present law a prosecutor might not have a statutory rape charge if the girl is over 16 but he might have a contributing charge (at least before State v. Hodges) or possibly could bring charges under the fornication statute. This, admittedly, is an infrequently used statute, the most recent case found in the Oregon Reports being dated in 1925.

Chairman Carson quite candidly admitted that this was the one area people have "zeroed" in on when talking to him about the subject. He felt that elsewhere in the revision the academic, enlightened,

straight-forward, criminal law approach has been taken. He, frankly, was concerned about losing the battle when there are other important areas also needing revision. While conceding his view might be a political judgment rather than an academic one, it seemed to him that if the realistic and responsible public of Oregon could be satisfied by a section such as that proposed, the revision would still be served well. He wondered if perhaps this was a question for the Judiciary Committee in 1971 rather than for the subcommittee.

Chairman Carson asked if it were anticipated the section would be graded a misdemeanor.

Mr. Paillette felt it would be graded a straight misdemeanor rather than a felony or even an indictable misdemeanor.

Representative Haas moved the adoption of the proposed section, Senator Jernstedt seconded the motion and it carried unanimously.

Section ___. Lewd solicitation.

Mr. Wallingford explained that originally it had been planned to have an Article called Public Indecency but when it came time to draft the Article, there were only four sections to be included in the draft. Two of the sections related to conduct similar to disorderly conduct and two related to sex offenses--lewd solicitation and public indecency. It was felt, therefore, that the four sections should be incorporated into other Articles, eliminating the necessity for the Article on Public Indecency.

Mr. Wallingford noted the term "public place" is used in the section on lewd solicitation as well as in the section on public indecency. This term is defined in the Article on Riot, Disorderly Conduct and Related Offenses, P.D. No. 1, and Chairman Carson read the definition found there:

> "'Public place' means a place to which the general public has access, and includes, but is not limited to, hallways, lobbies and other parts of apartment houses and hotels not constituting rooms or apartments designed for actual residence, and highways, streets, schools, places of amusement, parks, playgrounds and premises used in connection with public passenger transportation."

Mr. Wallingford read the proposed lewd solicitation section and advised that the term "deviate sexual intercourse" used is defined in section 1 of the Sexual Offenses Draft.

Representative Haas asked if it was the intent to have the section deal just with Lesbianism and homosexuality. The definition of "deviate sexual intercourse", he noted, covers conduct between persons of the opposite sex also.

Mr. Wallingford replied that acts of deviate sexual intercourse would most ordinarily be found in situations involving homosexuality, but not necessarily.

Mr. Paillette read the definition of "deviate sexual intercourse" set out in section 1, Sexual Offenses, P.D. No. 2:

> "'Deviate sexual intercourse' means sexual conduct between persons not married to each other consisting of contact between the sex organs of one person and the mouth or anus of another."

Mr. Wallingford explained that the provisions of the section are not aimed so much at the act itself as it is to the conduct of public solicitation.

Representative Haas referred to the discussion of People v. Mesa set out in the commentary and noted that the California Court of Appeal had held that no matter how private a homosexual propositioner intends his act to be, when it is communicated in a public place, it is punishable under the law.

Mr. Wallingford agreed that this was what the cited case said but pointed out that in the commentary on the proposed section he had stated that the provisions are "not intended to reach purely private conversations between persons having an established intimacy". It seemed to him that in these cases there would never be a prosecution or a problem, anyway. He did not know whether there would be an actual solicitation between people having an established intimacy--between people who have known each other in the past. Taken literally, he admitted the section could be applied to these cases. It would not be criminal for a person to solicit another in the privacy of his own room in that if the proscription were extended to private areas such as this, any type of solicitation made in a person's living room would be covered.

Representative Haas understood that the conduct being punished by the section's provisions is not the sexual conduct.

Mr. Wallingford agreed noting that the section sets out the fact that the public has a right to be free from this type of solicitation when in a public place.

Representative Haas remarked that there is a big difference between what is objectionable and what is illegal. There are a number of things a person might not like and does not or will not put up with, but this does not necessarily mean it should be made illegal.

Mr. Paillette observed that the Sex Offenses Draft would, in effect, legalize homosexuality between adults in private. It was anticipated that one of the objections to be leveled at this would be the public solicitation problem. Members of the public may not be solicited but they may well be offended by what is taking place between Lesbians or between homosexuals of one sort or another trying to make pickups in public, etc. The provisions of this section are one answer to the problem. This type of conduct could presently be covered under the vagrancy statute. He agreed, however, that whether or not this type of conduct should continue to be covered is a policy question.

Mr. Wallingford did not know how widespread the problem of public solicitation between homosexuals would be--he had not previously thought about the problem. Consensual, adult heterosexual activity is not prohibited now and there is a certain amount of solicitation in public places. Another problem might be created if the legalizing of consensual, adult homosexual activity caused the homosexuals to become much more active in public solicitation.

Chairman Carson admitted that perhaps the action contemplated in this area was arbitrary as it is rather difficult to draw a line between public and private conduct. He could see real danger, however, in allowing open solicitation for this type of activity in public places.

Mr. Wallingford was of the opinion that this type of statute would almost have to be enforced by undercover vice squad work, although there would no doubt be some complaints from citizens who had been solicited or who had seen others solicited.

Senator Jernstedt moved the approval of the section entitled "Lewd solicitation", as drafted, and of its inclusion in the Sexual Offenses Draft. The motion carried unanimously.

Section . Public indecency.

Mr. Wallingford explained that subsections (1) and (2) proscribe the performance of certain sexual activity in a public place--the type of sexual conduct that really amounts to a form of disorderly conduct. Subsection (3) requires an intent to arouse the sexual desire of the actor or another by "an act of exposing his genitals". This conduct is presently covered by ORS 167.145, Indecent exposure.

Professor George Platt now present.

Chairman Carson expressed concern about the language "or in view of" contained in the section. This would cover conduct in a person's home when, perhaps, he failed to draw his drapes.

Representative Haas concluded the provisons of sub (3) would apply only to a male.

Mr. Wallingford replied that this was not the intent.

Representative Carson assumed the provisions in the section would not apply to something like Bullfrog Four or Woodstock because neither would be classed a "public place".

Mr. Wallingford thought they would apply in that these festivals would be classed a "public place" because the general public has access. It would be the same as a theatre.

Senator Jernstedt commented that the adoption of the section would apparently eliminate the appearance of certain types of plays in the state.

Mr. Wallingford did not think subsections (1) and (2) would apply because even in the most avant-garde plays, the acts are similated. Subsection (3) would apply only if the act was done with the desire to sexually arouse the audience.

Chairman Carson raised the question of whether subsections (1) and (2) should also contain the intent element present in sub (3). He was concerned that public indecency not be condoned but, on the other hand, a great deal of the "offense" can be in the mind of the viewer.

Mr. Paillette stated there presently are a great number of prosecutions under the indecent exposure statute. He recalled that when discussing the Responsibility Draft, the psychiatrists had said the type of person guilty of exposing himself or of being a "peeping Tom" is very difficult, if not impossible, to treat; there is a good deal of recidivism in this area. Contrary to what many people believe, the psychiatrists stated that these people are not generally dangerous individuals and do not graduate to committing more serious offenses. Since ORS 167.145 is such a widely used statute in the state, he continued, it raises the problem of continuing to provide some coverage in an area now covered under present law. He thought the draft proposal would make it more difficult for the state to make out a case because of the intent element necessary in subsection (3).

Representative Haas moved the adoption of the section entitled "Public indecency" and its inclusion in the Sexual Offenses Draft.

Senator Jernstedt understood the provisions of the section applied to either male or female persons and was assured by Chairman Carson and Mr. Paillette that this was the intent.

Representative Haas' motion to adopt the section carried unanimously.

Prostitution & Related Offenses; P.D. No. 1; August 1969.

Mr. Wallingford quickly reviewed the discussion on the Draft when it was considered by the subcommittee on October 9, 1969: No changes were made in section 1, definitions, but the section was not approved as the subcommittee members wanted to come back to it after completing consideration of the entire Article; section 2, Prostitution, was tentatively approved although no formal vote was taken; section 3, Patronizing a prostitute, was partially discussed.

Mr. Wallingford recalled that at the previous subcommittee meeting Attorney General Johnson had been interested in just how many convictions on prostitution emanated from vice squad activity. He thought the following quotation might be helpful in this regard:

> "Because of the nature of prostitution, there is no victim, in the usual sense of the word, who is willing to testify against the prostitute. In addition, the prostitute takes care to operate in such a way that those citizens who might make a report to the police will not observe the conduct which constitutes the prostitution offense. As a consequence, to convict a prostitute, a police officer must pose as a man to be solicited so that he can testify from his own knowledge that a prostitution solicitation has occurrred." (Tiffany, McIntyre & Rotenberg, Detection of Crime 214-215 (1967)).

This would seem to indicate, he said, that just about all prostitution convictions are based upon testimony of police officers.

Section 3. Patronizing a prostitute.

Mr. Wallingford related that statistics in the Kinsey report (Kinsey, et al, Sexual Behavior in the Human Male, 1948) show that 69% of the total male population in the United States has had some experience with prostitution. When contemplating a patronizing statute, then, it must be considered that at least 69% of the male population have committed this offense at least once in their life.

Mr. Wallingford referred to section 3, to the language, "A person commits the crime of patronizing a prostitute if he: (1) Pays or offers to pay a fee to engage in sexual conduct with a prostitute..." and noted that the term "prostitute" is defined in section 1 as "a male or female person who engages in sexual conduct for a fee". If this language were taken literally, he wondered if it would ever

be possible to obtain a conviction on the testimony of a vice squad officer. The state would have to prove that the payment or the offer of a fee was made to a prostitute and the vice squad officer, himself, would not be a prostitute but would only be posing as a prostitute.

Representative Haas asked how many states have this provision in the law.

Mr. Wallingford replied that it is relatively new; Illinois, Connecticut and New York have enacted such statutes; Michigan and California have proposed one.

Chairman Carson asked if there were any statistics available from the states having such a provision as to how they were prosecuting under the statute.

Mr. Wallingford had found no such information and felt it was probably too early to get such statistics as most such legislation is quite new. He noted, as set out in the Draft commentary that while New York and Michigan both have this type of provision, experts in the field of criminal law are very critical of it. (See comments by Morris Ploscowe and B. J. George, Jr., Draft Commentary. pp. 14-15).

Representative Haas moved to delete section 3, Patronizing a prostitute.

Chairman Carson asked Mr. Paillette for his views on the section.

Mr. Paillette related that the provision had generated a good deal of discussion in the ALI when it was being considered. He questioned the distinction that has been made in the past between the prostitute and the patron. He questioned, also, the objection that such a provision would be a problem from the enforcement standpoint in that it could be overcome by the use of a justification type statute exempting police officers--similar to that used now with respect to narcotics. He asked Professor Platt if the solicitation section in Inchoate Crimes would cover the conduct of the male.

Professor Platt thought it would be covered by the solicitation section. He noted that the case law with respect to statutory rape holds that the female who consents to statutory rape may not be prosecuted for conspiracy for her own statutory rape. It is a crime that she has agreed to commit yet she is the protected class that the statute is designed to protect. The proposed section, however, does not have this element; it is not designed to protect the patron and Professor Platt could see no reason why he could not be guilty as a paying customer or as a solicitor.

Chairman Carson suggested the commentary note that the section on solicitation was intended to be so encompassing.

Mr. Wallingford noted that the only problem he could anticipate would possibly be with the penalty provision. Most states, he said, have graded the crime of patronizing as their least serious offense. If solicitation were graded a misdemeanor, it would step up the penalty for the patron, making it a more serious offense than that of prostitution.

Mr. Paillette did not think there would be a problem in this respect in that he did not anticipate that prostitution would be graded as a violation; he felt it would probably be graded a misdemeanor.

Professor Platt noted the MPC states that a person guilty of patronizing is guilty only of a violation. He asked if this is how it is intended section 3 will be graded. The penalty for solicitation, he said, becomes the equivalent of the penalty of the crime solicited, which, in this case, would be a misdemeanor.

Mr. Wallingford advised there is a good deal of disparity between the states which have adopted the provision--California suggests it be a petty misdemeanor; Illinois has a six month penalty; New York classes it a violation; Michigan calls it a Class B misdemeanor; Connecticut calls it a Class A misdemeanor.

Mr. Paillette believed the reasoning behind the adoption of such a section by the MPC and other states was the rejection of a double standard; they believed it hypocritical to prohibit prostitution while not prohibiting the patronizing of prostitutes.

Chairman Carson understood from the discussion that if section 3 were deleted, those who felt patronizing a prostitute should be a crime could be assured it would be a crime under the soliciting section of the Article on Inchoate Crimes.

Professor Platt asked if anyone knew how much police time is devoted to the problem of prostitution.

Mr. Paillette observed that the problem centered in Portland and most of the prosecutions are not under state statutes but are brought under city ordinances.

Professor Platt said he had always been a little uncomfortable when he thought about the impact the crime of prostitution has on the police--not on society in general. It has several bad effects in that it takes energy for a sumptuary crime where everyone is a happy, consenting partner; in order to prove prostitution charges,

officers are often put into situations which cannot be other than condemned by the public. Psychiatrists have held that the activities engaged in by vice squads in repression of homosexual activity, prostitution and drugs draw to the vice squad of a police department the kind of people who have these repressed desires. This, too, is bad for obvious reasons.

Mr. Paillette stated that one has to consider what the alternatives are. If there are no statutes prohibiting prostitution, should there be statutes controlling it. He related that Hawaii had tried the control approach without too much success. The arguments made in support of "control" were that this would reduce sex offenses and some other more violent crimes and control of the houses would reduce venereal disease; however, none of these things came to pass, in fact, the venereal disease rate went up.

Mr. Wallingford added that Hawaii had had the advantage of being an isolated state; Oregon would have a different problem if it were to, in effect, legalize prostitution in that it is contiguous to 48 states where prostitution would still be illegal.

Professor Platt wondered which would be better for the police departments--no law banning prositution or a law banning prostitution--in respect to which system would provide less opportunity for graft or corruption.

Chairman Carson observed that this would probably be true of a number of crimes against society, such as bookmaking, as opposed to violent crimes and admitted that perhaps it might be a valid argument.

The motion made by Representative Haas to delete section 3 carried unanimously. Chairman Carson noted the provision would be considered again when the section on solicitation is considered in the Inchoate Crimes Article.

The subcommittee meeting recessed at 11 a.m., reconvening at 11:25 a.m. Chairman Carson not present.

Section 2. Prostitution.

Mr. Paillette advised that he knew of no state that had repealed the prostitution statutes on its books--not even Connecticut which has probably gone as far as any of the states in the area of liberalizing sexual offenses. Connecticut retained a section on prostitution and also has sections on patronizing, permitting and promoting prostitution, as well as a section allowing the court to order an examination for venereal disease. (See Proposed Connecticut Penal Code, ss. 84-92).

Mr. Wallingford noted that New York went farther than any other state by its penalty provision, by making the prostitution offense a violation which is punishable by a maximum of 15 days.

Representative Haas felt that an approach like this would have to be looked at as a matter of pure politics--there would be little chance of getting the Commission to recommend the repeal of the prostitution laws.

Mr. Wallingford agreed, adding that he would not even consider supporting the repeal of prostitution statutes; it would create too many other problems. Professor Platt also questioned that repeal of such statutes would do any good.

Representative Haas understood the provisions of section 2 would not include the patronizing male.

Mr. Wallingford agreed that it would not in that his conduct would not be in return for a fee.

Section 4. Promoting prostitution.

Mr. Wallingford advised that this section does not refer to either the prostitute or the patron but to those profiting from prostitution. The terms "place of prostitution" and "prostitution enterprise" are defined in section 1 of the Draft. "Place of prostitution" is directed at the situs situation whereas "prostitution enterprise" is directed at the "call girl" type of prostitution activity. All of the subsections, he continued, are restatements of the existing law in Oregon on prostitution.

Representative Haas thought he recalled the "public nuisance" statute being applied in Portland to abate prostitution activity.

Mr. Wallingford advised that subsection (1) of the section would presently be covered by ORS 167.106, keeping a bawdyhouse; sub (2) by ORS 167.125, procuring a female to engage in prostitution, and 167.240, prohibiting inducing a minor to visit a house of prostitution; sub (3) by ORS 167.120, living with, receiving earnings of, or soliciting for a prostitute; and sub (4) by ORS 167.130, transporting a female for prostitution purposes, and 167.125, procuring a female to engage in prostitution.

Representative Haas asked if it were intended that the adoption of section 4, as drafted, would replace ORS 465.110 which provides the civil procedure for abatement of nuisances.

Mr. Wallingford replied that it was not intended that ORS 465.110 be repealed.

Senator Jernstedt referred to the language "or to remain in a place of prostitution..." contained in subsection (2) and asked what it was intended to cover.

Mr. Wallingford explained that it would cover situations where a person sets up a house of prostitution and induces women to remain there, not by coercion, but by promises of a good income and possibly police protection.

Senator Jernstedt referred to the present penal statutes set out on page 25 of the commentary and asked the last time, say, in the last 10 years, anyone was convicted under one of the statutes cited.

Mr. Wallingford noted there was quite a disparity in the punishment provisions of these statutes. As far as cases which have gone up on appeal are concerned, there are none--not only in the last 10 years but in the last 100 years.

Representative Haas commented that this is another instance where prosecution is usually under city ordinance. The punishment is usually a fine which is paid by someone so that the prostitute is back on the streets again within 48 hours.

Mr. Paillette anticipated that when the offenses are graded for penalties, the crime of promoting prostitution would be graded a little more severely than the offense of prostitution itself. He hoped the mandatory minimum would not be retained.

Mr. Wallingford observed that he did not know whether this type of conduct is a problem in Portland or whether the police make no real aggressive effort in this area to obtain convictions, but there are not really many arrests made for this type of conduct. There are more arrests made for the crime of prostitution. Some studies have shown, he continued, that organized crime in the United States is not very much interested in prostitution because it apparently is just not profitable enough and because there is a problem of organization and discipline in dealing with the type of person who engages in prostitution.

Section 5. Permitting prostitution.

Mr. Wallingford explained that the provisions of this section are directed at the landlord as the lessor of premises used for prostitution activities. Oregon presently has a statute, ORS 167.105, which prohibits:"Any person who keeps or sets up, or permits to be kept or set up, a house of ill-fame, brothel or bawdyhouse...."

Professor Platt compared the proposed section to section 251.2 of the MPC. He noted the MPC uses the language "knowingly promotes" instead of "knowingly permits" and thought this raised a problem like that dealt with in the Inchoate Crimes Article where the retailer who is in the normal business of selling sugar sells sugar to people he knows are making illegal whisky. It is necessary to be very careful when drafting a criminal statute not to impose criminal sanctions on what is legitimate commercial activity. This may, he said, be impinging on that because all that the section requires is that the landlord "knows" there are prostitutes in his building. Professor Platt thought the section should require the "promoting" idea.

Mr. Wallingford stated that he had not included this type of conduct under that prohibited in the "promoting" section because he thought section 5 would be graded as conduct of less serious proportions. Usually in these cases the lessor or lessee is not directly profiting from the activity.

Mr. Paillette read the language used in section 251.2 of the MPC section on "Promoting Prostitution" and said he did not think the conduct proscribed was limited just to "promoting" prostitution.

Representative Haas wondered it it was not actually the intent of this type of statute to get at the situation where it cannot actually be proved that a person is "promoting" an activity but it can be proved that he leased or subleased his premises for the activity.

Mr. Wallingford said the proposed section is a type of nuisance statute--to get at someone who, with knowledge, allows an activity to continue unabated.

Mr. Paillette recalled that the section is derived, with minor changes, from the proposed California Revised Penal Code, section 1804 (4), which is a subsection of a section called "Abetting Prostitution". One of the ways of abetting prostitution is to "knowingly permits prostitution in any premises under his possession or control or fails to make reasonable effort to halt or abate such use." He noted that under the provisions of the proposed section the landlord would have to "knowingly permit prostitution" before he could be convicted.

Representative Haas understood that all the section would really do would be to put the burden on the landlord not to allow his property to be used for an illegal purpose when he knows this is being done.

Professor Platt wondered if this would not also apply to the storekeeper selling materials completely legal to sell but which he knows are going to be used for completely illegal purposes. Would this not bring in the element of a conspiracy between the storekeeper and the person robbing a bank or between the landlord and the prostitute. He felt that the requirement that the landlord simply "know" of the illegal use of property was going too far.

Mr. Wallingford noted that in the case of the storekeeper the control of the property sold leaves when he sells the item. In the case of a landlord, however, he still exercises some control over his property, if he so chooses, even after he leases it. Under the abatement procedure in ORS chapter 464 there is a statute enabling him to cancel any lease.

Professor Platt was still concerned about the possibility of the landlord being prosecutable under the conspiracy provisions as well as under section 5. Is the innocent landlord, the one who knows prostitution is going on in his premises but who is not personally profiting by the activity, the person the criminal law really desires to reach.

Mr. Paillette doubted that this was the type of person the section's provisions would usually get at--if the landlord knows the activity is being conducted and "knowingly permits" it to continue, he usually is getting a share of the profits through higher rent, etc.

Professor Platt observed that the landlord really being discussed is the one owning a run-down hotel.

Mr. Wallingford agreed that almost every case going up on appeal relates that after the solicitation is made the prostitute and patron check into a hotel. In this type of hotel prostitution is a good part of the trade and it is known to be going on. Where the hotel does not charge an unreasonable rate, they perhaps could not be charged with "promoting" prostitution but they could be charged with "permitting prostitution".

Representative Haas referred to the language "knowingly permits prostitution in any premises under his...control" and asked if this would extend the section's provisions down to the manager of the hotel. He noted that as a result of legislation passed during the last session, the projectionist who runs the obscene film is no longer prosecuted unless he has some authority in the selection of the film or shares in the profits of the enterprise. He wondered if the same type of problem would exist under the provisions of section 5.

Professor Platt noted that the person it is desired to reach is the person sharing in the profits of prostitution. It is not desirable to cast so large a net that it catches those who might be innocent landlords.

Representative Haas again called attention to the fact that there is a civil abatement statute which can be utilized.

Mr. Paillette pointed out that the section, as drafted, is actually narrower than ORS 167.105 because it requires that the actor have "possession or control" of the premises while ORS 167.105 reads, "Any person who keeps or sets up, or permits to be kept or set up...." A person could be guilty thereunder without having possession or control of the premises.

Professor Platt asked if there would be objection to using the language, "...if he knowingly permits with the purpose to promote...." He felt this would bring the section in line with the Inchoate Crimes section on conspiracy and did not think it would do harm to section 5. The words "with purpose to promote" would make more specific the mens rea of the particular owner.

Mr. Paillette thought if section 5 were to be amended in this manner, subsection (3) of section 4 would cover the same type of situation since it reads: "Receives or agrees to receive money... pursuant to an agreement or understanding that such money or other property is derived from a prostitution activity...." This language, he said, would clearly show an intent to promote the activity.

Representative Haas asked how the proposed section 5 varied from subsection (1) of section 4 which reads: "Owns, controls, manages, supervises or otherwise maintains...."

Mr. Wallingford admitted there was not a great deal of difference. Section 5, he said, was intended to get at the lessor-lessee situation and it was not felt that section 4 (1) would reach that.

Mr. Paillette suggested amending section 4, promoting prostitution, by inserting "with the intent to promote prostitution" after the word "if" so that it would read: "A person commits the crime of promoting prostitution if with the intent to promote prostitution he knowingly:". Section 5 could then be deleted.

Representative Haas moved section 4 be amended as suggested by Mr. Paillette.

Mr. Wallingford favored the amendment in that it would solve a problem he felt might have come up under subsection (4) of section 4 in regard to the taxi driver whose fare instructs him

to drive to an address that the taxi driver knows is a house of prostitution. In complying with the request, would the taxi driver's conduct come within the provisions of subsection (4) which proscribes conduct to "...aid or facilitate an act or enterprise of prostitution." Mr. Wallingford did not think it should and he thought the proposed amendment would make it clear that the driver's conduct would not come within the provisions of the section.

Professor Platt favored the suggested amendment since it would be consistent all the way through with keeping criminal sanctions out of legitimate commercial activity.

Representative Haas also moved the deletion of section 5. (The two motions were held in abeyance until after lunch recess when Chairman Carson would again be present to vote.)

Representative Haas again expressed concern about the problem of the "mere employee" of a hotel who rents out rooms per instructions and who may or may not be the manager but who might get caught up under the provisions of section 4 (1).

Professor Platt felt that with the clarification of the mens rea inserted by the proposed amendment to section 4 there would no longer be a problem.

Mr. Paillette noted that another very effective means of controlling the hotel-motel situation is through the license issued by the city allowing the business to operate.

The subcommittee recessed for lunch at 12:05; Chairman Carson reconvened the meeting at 1:10 p.m.

Section 6. Compelling prostitution.

Mr. Wallingford explained that the conduct set out in subsections (1), (2) and (3) are, in effect, all aggravated forms of promoting prostitution. The object is to grade these as a more severe form of the crime.

Representative Haas noted the section used the term "aids" and wondered if there would be any problem in determining the meaning of the term.

Professor Platt asked if the crime of "compelling prostitution" would not be the crime of rape. He wondered if there was some overlapping in the area.

Mr. Wallingford said that the intent of subsection (1) is not directed so much at a specific sex act as it is a course of conduct. The "force or intimidation" is used to compel another to engage in a prostitution activity. For example, a woman may be forced to remain in a prostitution activity by threat of physical harm or, if she is a drug addict, by threat of cutting off her supply of drugs.

Chairman Carson understood the point raised by Professor Platt but pointed out that the patron of the prostitute is not knowingly committing the act of rape.

Professor Platt stated that rape is a general intent crime that can be committed recklessly. A person who has intercourse with a female who does not have the capacity for consent can be guilty of rape even though he does not know she had no capacity to give consent. He wondered if adoption of section 6 would create a Pirkey situation by allowing the prosecution to choose between the crime of compelling prostitution and the crime of rape.

Mr. Paillette contended that in order for the person who has compelled the female to engage in prostitution to be guilty of rape it would be necessary to have a principal to the crime and it would have to be the patron. The patron would have to be an accomplice of the promoter.

Professor Platt observed that in this situation the prostitute has not really consented to the intercourse. He still felt it would be rape--it would just be a question of who is compelling the act to be done.

Representative Haas cited a case where the husband who forced his wife through threats to have intercourse with another was subsequently convicted of rape.

Mr. Paillette recalled that in the case cited the person performing the act with the wife knowingly participated. In the situation covered by section 6 the patron would not be "knowingly participating" in the compelling.

Representative Haas referred to the use of the term "intimidation" in subsection (1) and asked if this was intended to cover the situation previously mentioned where an addict is forced to remain in prostitution by threat of the withdrawal of her drug supply.

Mr. Wallingford thought that if these facts could be proven, they would be sufficient to prosecute the promoter under sub (1). He assumed that just about any prosecution made under subsection (1)

would have to be on the direct testimony of the prostitute and he thought there would certainly have to be other evidence as well.

Chairman Carson asked if the term "prostitution" meant one act of intercourse or if it meant a whole career.

Mr. Wallingford replied that prior to the Perry case it was necessary to show a continuing series of indiscriminate acts in order to convict someone of prostitution. Now the showing of one act of prostitution is sufficient and this is how the term is used in the Draft. If a pimp used force or intimidation to compel a woman to engage in one act of prostitution he could be prosecuted under the provisions of section 6.

Chairman Carson asked what the word "aids" covered as it is used in subsections (2) and (3).

Mr. Wallingford replied that it would cover the placing of a female in a house of prostitution or transporting her intrastate.

Representative Haas asked if the word "aid" would include the fee paid by a patron.

Mr. Wallingford agreed that this was a point and thought the problem here was that the word "prostitution" has not been defined on the assumption that it is not necessary.

Representative Haas referred to the section called "Sexual misconduct with a minor" added to the Sexual Offenses Draft and noted that an individual of 22 paying to have sexual intercourse with a female of 17 could be charged under the section on "Compelling prostitution" as well as under the section on "Sexual misconduct with a minor".

Mr. Paillette observed that the section on compelling prostitution contains the added element of a fee but even without the added element in one section, there would be no Pirkey situation. This would occur when the penalty provision for one section was both a felony and a misdemeanor.

Mr. Wallingford envisioned section 6 as being a felony offense. He advised that all of the areas covered in the section are presently felonies: ORS 167.135, procuring a female under 18 for prostitution, has a ten year maximum; ORS 167.115, placing wife in house of prostitution, has a ten year maximum; ORS 167.125, coercing a female to engage in prostitution, has a five year maximum.

Chairman Carson asked the reason for singling out the offense involving a "wife, child or stepchild" in subsection (3).

Mr. Wallingford replied that it is existing statute and throughout the United States it has consistently been considered a more serious offense in the area of prostitution. He admitted, however, that whatever penalty is attached to the section would apply to all three subsections.

Chairman Carson could understand how such crimes perpetrated against relatives could be considered more reprehensible; however, his point was that the draft did not make it more serious in that the penalty is not to be more severe for sub (3) than that for sub (1) or (2).

Representative Haas disagreed pointing out that the section provides that no one can be forced to engage in prostitution, no one under the age of 18 can be aided or caused to engage in prostitution and no wife, child or stepchild, regardless of age, may be aided or caused to engage in prostitution.

Mr. Paillette referred, again, to the question that had been raised regarding a possible Pirkey question. He advised that when writing a memorandum re the Pirkey case he had cited State v. Gordineer where a Pirkey question was raised by the defendant who stood convicted of contributing to the delinquency of a minor (ORS 167.210) for giving alcoholic liquor to a child. It was his contention that inasmuch as another statute (ORS 471.410) made it a misdemeanor to give alcoholic liquor to a minor, the district attorney was given the power to elect between the two separate statutes. The defendant argued that this violated Pirkey and denied him equal protection under the laws. The Court affirmed the conviction, saying that in the case of giving intoxicating liquor to a minor, the act of giving, alone, regardless of its consequences, constitutes a crime under ORS 471.410. But, when it appears that the act was accompanied by circumstances which show that it would tend to cause or did cause the child to become a delinquent child, a different crime is made out. The Pirkey case was distinguished from Gordineer by this language:

> "Clearly, then the case at bar is different from State v. Pirkey. There the unconstitutional statute made illegal the doing of a certain act under a particular set of circumstances. It then permitted the offense to be treated as a misdemeanor or as a felony in the complete and unqualified discretion of the magistrate or grand jury. Here, however, it is a difference in the kind of circumstances under which an act is done that distinguishes the crime and accounts for their classification." State v. Gordineer, 229 Or 105, 366 P2d 161 (1961).

Mr. Paillette observed that Pirkey was really on pretty narrow ground in that it involved a single statute giving the district attorney or grand jury discretion to charge either a felony or misdemeanor. There has not been one case raised since Pirkey that has been affirmed or reversed on the basis of Pirkey. Pirkey has never said, he continued, that a single act cannot violate more than one statute.

Representative Haas asked if the provisions contained in subsection (2) of section 6 were not covered by subsection (2) of section 4.

Chairman Carson thought subsection (3) of section 6 could be covered by section 4 (2), also.

Mr. Wallingford agreed but added that the object of section 6 is to single out particular classes of people and make the conduct involving them a more serious offense. He anticipated section 4 being classed a Class C felony and section 6 being graded a Class B felony.

Chairman Carson pointed out that the wording "induces or causes" is used in section 4 while section 6 uses the wording "causes or aids". He asked if this difference was intentional and, if so, why.

Representative Haas again expressed concern about the use and meaning of the term "aid".

Professor Platt suggested it might help to insert the phrase "with another" after the word "prostitution" in subsection (2).

Mr. Paillette advised that the term "aids and abets" has been defined a number of times by Oregon case law. He quoted from page 5 of the commentary on Parties to Crime, P. D. No. 1:

> "The terms 'aids' and 'abets' have been utilized in paragraph (b) without definition insamuch as they have been interpreted in a number of Oregon cases. State v. Rosser defined an 'aider and abettor' as 'one who advises, counsels, procures or encourages another to commit a crime, though not personally present at the time and place of the commission of the offense.' State v. Start defined 'abet' as meaning 'to countenance, assist, give aid' and to include 'knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime.'"

Chairman Carson failed to see the distinction between the phrases "induces or causes" and "causes or aids". If there is no difference, he felt sections 4 and 6 should be made consistent in respect to terminology used.

Mr. Paillette quoted from Webster's New Collegiate Dictionary (1961): "Induce. To lead on; prevail on; to move by persuasion or influence. To bring on or about; effect; cause."

Representative Haas moved to amend subsections (2) and (3) of section 6. Subsection (2) to be amended by deleting the language "Causes or aids" and inserting "Induces or causes" and by inserting the words "with another" after the word "prostitution". Subsection (3) to be amended by deleting the language "Causes or aids" and inserting "Induces or causes".

Mr. Wallingford questioned that the addition of the words "with another" in subsection (2) solved anything. He did not think they would exclude a patron who simply pays a fee to a prostitute, although he thought this was the intent of the amendment.

Mr. Paillette noted that section 6 (2) makes it a more serious crime if the person engaging in prostitution turns out to be under the age of 18. With respect to the offense of statutory rape, however, a defense of reasonable mistake of age is allowed. He thought the problem might be solved if a substitute could be found for the use of the noun "prostitution"; if the section could be drafted in such a way that it is clear that the conduct being discussed is not the single act of intercourse, paid for or not, but rather a prostitution enterprise.

Chairman Carson thought this would give rise to a proof problem--it would be necessary to prove the promoter committed the crime of compelling prostitution more than once. He asked if the penalty for compelling prostitution would be any more severe than that for statutory rape.

Representative Haas felt the penalty should be more severe than that for statutory rape because he felt compelling another by force and intimidation to engage in prostitution bordered on an imprisonment situation involving drugs, physical beatings, etc. He thought the point raised by Mr. Paillette in regard to subsection (2) of section 6 was a good one, however.

Mr. Paillette said his point was not whether the conduct proscribed by section 6 was to be punished more severely but that because of the way the Sex Offenses Article has been structured, a defense of reasonable mistake of age is allowed where it involves a victim over 12. He did not think it would be necessary under the provisions of sub (2) of section 6 for the state to prove the defendant knew the female was under 18, only that the female was, in fact, under 18.

Representative Haas felt sections 4, 5 and 6 were intended to reach the third party, entrepreneur type of individual who is procuring his work force. He asked the derivation of section 6.

Mr. Wallingford replied that the basic structure of the section is derived from California but, in effect, the section restates existing law in Oregon. He read from ORS 167.135:

> "Procuring or transporting female under 18 for prostitution purposes. Any person who knowingly persuades, induces, entices, or coerces any female person under the age of 18 years, with the purpose or intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution...."

ORS 167.115, he said, covers placing the wife in a house of prostitution and carries a ten year sentence and a $10,000 fine.

Representative Haas moved to amend his earlier motion by deleting the words "with another" which were to have followed the word "prostitution" in subsection (2) of section 6.

Chairman Carson understood it was intended to exclude the patron from the provisions of subsection (2) and felt the commentary should so show. Representative Haas agreed.

Representative Haas' amended motion to amend subsections (2) and (3) of section 6 carried unanimously. The subsections will read: "(2) Induces or causes a person under the age of 18 to engage in prostitution; or (3) Induces or causes his wife, child or stepchild to engage in prostitution."

Chairman Carson stressed the fact that the commentary should show that it was the intent of the subcommittee to exclude the patron from the provisions of subsection (2) of section 6--that it was intended the provisions get at the promoter.

Section 7. Promoting and compelling prostitution.

Mr. Wallingford explained that section 7 deals with corroboration with respect to prosecution under sections 4 and 6. The provisions would broaden present law some in that it would probably apply to more conduct than does ORS 167.140 which reads:

> "Upon a trial for inveigling, enticing or taking away an unmarried female for the purpose of prostitution, the defendant cannot be convicted upon the testimony of the female injured unless she is corroborated by other evidence tending to connect the defendant with the commission of the crime."

Section 8. Evidence.

Mr. Wallingford advised that section 8 is a restatement of the present law in Oregon on the issue of evidence. In any prosecution under subsection (3) of section 6, inducing or causing a wife, child or stepchild to engage in prosecution, a wife is a competent witness against her husband.

Subcommittee vote on each section of Prostitution Draft:

Section 1. Prostitution offenses; definitions.

Professor Platt drew attention to the section and Article reference in subsection (1) and asked if it would not be better to simply incorporate the definitions by cross reference. This would eliminate the possibility of a conflict later if the Article number referred to were changed and the reference to it in the Prostitution Article overlooked.

Mr. Paillette admitted that for the Commission's purposes the section reference could be deleted. He advised that the Article reference is for convenience now so that the members will know where to look.

Representative Haas moved the adoption of section 1 as drafted and the motion carried unanimously.

Section 2. Prostitution.

Mr. Paillette called attention to the language "offers or agrees" used in the section and asked Professor Platt if there would be any overlap or conflict with Inchoate Crimes from the standpoint of an attempt--attempted prostitution, for example.

Professor Platt thought it rather unnecessary to use the term "offers or agrees"--these are really the crimes of solicitation and conspiracy.

Mr. Wallingford explained that this was the reason both terms were used. If the offer originates with the prostitute, the word "offer" would apply but if it originates with the patron and the prostitute agrees, it was felt that it might be another situation.

Chairman Carson noted, also, that the deletion of the words "offers or agrees" would create a problem for the vice squad since the officer would have to charge the person with soliciting under Inchoate Crimes or would have to commit the act in order to charge a person with prostitution. He felt it should be pointed out to the Commission, however, that there is some redundancy and overlap but that it was felt necessary in this area.

Senator Jernstedt moved the approval of section 2 as drafted and the motion passed unanimously.

Section 3. Patronizing a prostitute.

Section 3 was deleted by action taken earlier in the meeting. (See page 12 of these minutes.)

Section 4. Promoting prostitution.

Representative Haas moved the adoption of section 4 as amended and the motion carried unanimously. (Amendments set out on page 17 of these minutes.)

Mr. Wallingford drew attention to the phrase "with the intent" contained in subsection (4) of section 4 and wondered if the amended language just approved made this phrase redundant.

Representative Haas moved to amend subsection (4) of section 4 by deleting the words "with the intent". The motion carried unanimously.

Representative Haas then moved the readoption of section 4 as amended and this motion also passed unanimously.

Section 5. Permitting prostitution.

The subcommittee acted upon the motion to delete section 5 made earlier in the meeting by Representative Haas. The motion passed unanimously.

Section 6. Compelling prostitution.

Representative Haas moved the adoption of section 6 as amended and the motion carried without objection. (Amendments set out on page 24 of these minutes).

Section 7. Promoting and compelling prostitution; corroboration.

Senator Jernstedt moved the adoption of the section as written and the motion carried unanimously.

Section 8. Evidence.

Representative Haas moved the adoption of section 8 as drafted and the motion carried unanimously.

Mr. Wallingford noted that the definition of a "public place" will have to be incorporated in the Prostitution Article. This was felt to be a mechanical amendment which would not have to be voted on.

Criminal Homicide; Perliminary Draft No. 1; August 1969.

Chairman Carson asked Professor Platt to provide the subcommittee members with an overview of the Draft's provisions.

Professor Platt discussed the policy changes involved in the Article generally:

The first substantial change is the elimination of degrees of murder in Oregon. This follows the pattern of the MPC. Historically, the reason for having degrees of murder was to allow a place for treating the homicide less seriously. Traditionally any kind of murder carried the punishment of death with it and to get away from this harsh method, the old Pennsylvania degree system was initiated in this country and has since been employed in most states. Oregon no longer has capital punishment and for this reason it is no longer necessary to have degrees of murder. Also, he noted, the way in which the degrees of the crime are differentiated is very artificial, especially in light of case law, not only in Oregon but throughout the country, in determining what is premeditation. From reading the cases, Professor Platt determined that any instant in time is enough for premeditation. Distinguishing premeditation, then, from the "reckless act doctrine" is almost impossible and there is no longer too great a legal distinction between premeditation and the "depraved-heart, reckless act" doctrine of second degree murder.

The second principal change in murder is the way felony-murder is treated. Currently there are two degrees of felony-murder. Death resulting from rape, robbery, arson and kidnapping is defined as first degree felony-murder in Oregon. There is no premeditation, obviously, in respect to the killing. Second degree felony-murder is death resulting from any other felony. Case law in the country, he said, is beginning to turn away from the felony-murder doctrine in the sense that at one time applying the doctrine had gone to extremes in that it was applied to situations where the death was more accidental as a result of, say, a robbery, than it was the outgrowth of a dangerous activity. The Draft, he related, does not turn away from the felony-murder but adopts the New York approach which he felt to be a little less liberal than the MPC approach. New York provides that if a death occurs during the commission of certain listed felonies, it is murder, but there are certain narrow defenses created for the defendant. If the defendant can conform to the necessary proof (the burden is on him by a preponderance) he can escape the felony-murder charge in that it would, perhaps, be reduced to manslaughter. Rather than looking at the absolute liability theory of any death resulting in the commission of a certain felony, attention is focused on the activity of the actor in the light of whether it was knowing, intentional, reckless or negligent. If it is one or the other of these, the corresponding level of homicide applies.

Professor Platt advised that suicide is treated in the murder section but there is no substantial change from existing law in Oregon.

Substantial changes are made in the Oregon law on manslaughter because it changes the basic test of what is now voluntary manslaughter. The old test of killing "upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible" reduces murder to manslaughter in Oregon and was the traditional common law concept. The proposed draft replaces this test with new language which is much broader and more subjective but which still retains safeguards of the objectivity necessary if a new theory of manslaughter is to be adopted and have any practical effect. Criminal homicide becomes manslaughter when the act is committed "under the influence of extreme mental or emotional disturbance". This phrase is taken from the MPC and takes the place of the "heat of passion" standard. Under the new test words could be shown to be sufficient provocation while under the old law mere words are not usually considered sufficient provocation for the commission of the crime. The new test would also enable an actor to bring in evidence showing that an unexpected reaction to a therapeutic drug produced an emotional reaction resulting in his killing someone, thus, perhaps, reducing the charge of homicide to manslaughter. The test retains objectivity in that the explanation or excuse must be reasonable viewed "from the standpoint of a person in the actor's situation under the circumstances as he believes them to be". The test does not impose the defendant's moral views.

The second major change in the manslaughter provisions abrogates the approach to the misdemeanor-manslaughter rule, the old unlawful act doctrine, which has come into disrepute because it is applied so arbitrarily to potentially produce absolute liability for any act that is a misdemeanor at the outset. An example of this would be the striking of one blow in an argument which results in death. For examples of similar conduct resulting in manslaughter convictions see Draft Commentary, pp. 20-21. It is the negligence and recklessness of the act which should be viewed from the homicide standpoint rather than the result of the simple battery. Under the draft provisions, to find manslaughter arising out of a misdemeanor act, the act itself must be so reckless as to support manslaughter or so negligent in the criminal sense as to support a conviction for negligent homicide. Professor Platt related that he had not been able to find enough cases to be able to come to the conclusion that Oregon applies its misdemeanor-manslaughter law in an arbitrary fashion; however, the opportunity is there for abuse in the application of the homicide statutes. The question, he advised, no longer is whether the act committed is unlawful, the question is is the act reddess or negligent with substantial homicidal risk involved.

The last major provision in the proposed Draft is for criminally negligent homicide. He recalled that criminal negligence is now defined to mean a substantial risk that one should be aware of, but is not necessarily aware of, which may cause homicide. Within the provision on criminally negligent homicide would probably fall the cases of misdemeanor-manslaughter where the act committed is merely negligent in the first instance. Negligent homicide includes the automobile homicide section that now exists and Professor Platt did not think the Draft made any change whatsoever with respect to the test for the homicide. Oregon, he said, like every other state has had great difficulty in defining what negligence is with respect to manslaughter. He thought the MPC version as adopted earlier by the Commission eliminates a lot of the problems. The definition of criminal negligence adopted by the Commission reflects the present case law in Oregon with respect to gross negligence in automobile homicide cases. Professor Platt advised that the MPC grades this offense as the lowest grade felony whereas under present Oregon law it is graded an indictable misdemeanor for automobiles. This, then, would raise a policy question to be dealt with by the Commission.

Future Subcommittee Meeting Date

It was suggested that Thursday, November 6, be considered as a date for a half-day subcommittee meeting and that Thursday, November 13, or Friday, November 14, be considered as dates for an all-day subcommittee meeting.

The meeting was adjourned at 2:50 p.m.

Respectfully submitted,

Maxine Bartruff, Clerk
Criminal Law Revision Commission